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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Promoting Compliance with Competition Law held by the Competition Committee in June 2011.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la promotion des règles de conformité avec le droit de la concurrence qui s'est tenue en juin 2011 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable, the delegates' written submissions and the Secretariat's issues paper, several key points emerge:

- (1) *To promote compliance with competition law most effectively, competition authorities need to understand the numerous factors that influence compliance and non-compliance.*

Drivers of compliance include: financial penalties, director disqualification orders, criminal sanctions, fear of damage to corporate or individual reputation, morality and a strong culture of compliance. Drivers of non-compliance include: an ambiguous commitment – or no commitment – to compliance by management, uncertainty about legal requirements, employee naiveté and/or simple error, rogue employees, arrogance, and competing interests from other compliance areas.

Understanding these factors well allows competition authorities to manage their resources more effectively by better designing and targeting their compliance efforts. For example, if companies are not sufficiently aware of competition law, competition authorities can focus on increasing awareness through training and advocacy. If companies are aware of the law but simply think they are above it and will not be caught when violating it, then investigatory efforts can be increased so that detection rates rise. If companies believe that the benefits of violating the law are worth the risk of being caught, then the benefit/risk ratio needs to be lowered by making the legal consequences more severe.

- (2) *Fines are a common method for deterring competition law violations. The amount of fines imposed for antitrust infringements – particularly cartel violations – has significantly increased over the last decade. However, cartels continue to be detected at essentially the same pace and some commentators argue that higher monetary sanctions are therefore needed to achieve deterrence. Others question the ability of any level of fines to achieve effective deterrence.*

It is generally accepted that high fines are a crucial element of deterrence. The amount of fines imposed for antitrust infringements, and for hard core cartel violations in particular, has significantly increased over the last decade. However, the number of cartel cases has also increased and recidivism in certain sectors such as construction suggests that current sanction levels are still insufficient. Some officials and commentators therefore believe that even higher fines are needed.

The Committee's discussion indicated that clear conclusions about the efficacy of higher fines in deterring anticompetitive behaviour cannot be drawn from simply tracking the level of fines and the number of cartels uncovered because we can never know the number of undetected cartels. Speakers from the business community added that while current fines are not excessive *per se*, once they reach a level that is high enough for management to take compliance seriously, making them even higher will not increase deterrence. Ever-higher fines also raise questions about companies' ability to pay and the proportionality of the punishment relative to the harm caused by the violation.

From a practical perspective, high corporate fines alone may not always provide optimal deterrence because they are not borne by all responsible for the infringement, including natural persons. Some

jurisdictions favour a combined approach, using fines alongside a battery of other tools, including director disqualification, reputational damage via publicity, and criminal sanctions.

- (3) *Criminal penalties are perceived in some jurisdictions as the most effective deterrent to cartel formation and continuation. Others believe that criminal sanctions are unwarranted in their competition law enforcement systems.*

A number of jurisdictions have criminalised cartel violations over the past several years. Cartel violations are now punishable by prison terms in 17 of the 34 OECD member countries, though actual criminal sentences have not been imposed in all of them. The threat of imprisonment has been described as having an unparalleled power to deter cartels and to realign individuals' incentives in a way that fines cannot. Unlike with fines, corporations cannot really indemnify employees facing custodial sentences. Criminal sanctions therefore help to shrink the deterrence deficit left by sub-optimal corporate fines. It is the individual responsible for the infringement who is targeted, rather than the shareholders of a corporation. Some global cartels have chosen not to operate in highly profitable markets due to the risk of criminal sanctions in those jurisdictions. This suggests that competition regimes featuring imprisonment as a potential sanction can be highly effective at achieving deterrence.

However – apart from the United States, where criminal penalties have been imposed on cartelists with increasing frequency and severity – the rather limited number of individuals charged with criminal offences to date suggests that many enforcers and courts are not entirely persuaded by the arguments for imprisonment. In jurisdictions that have not adopted criminalisation the prevailing view is that substantial fines, and the damage to a company's credibility following an infringement decision, are sufficient to ensure a high degree of deterrence. Some empirical work has also questioned the extent to which imprisonment is a suitable deterrent, citing dispositional, organisational, situational and cultural factors as neglected but important influences on individual behaviour. Equally, whereas sanctions against individuals in principle are a strong deterrent, the effect on deterrence depends on whether the chances of detection and prosecution will be enhanced when sanctions against individuals are added to the toolbox.

- (4) *Competition authorities are using innovative methods to promote compliance.*

While methods such as fines, imprisonment, director disqualification and leniency programmes have all been in use for some time, competition authorities have also been incorporating other approaches in recent years. These include efforts to persuade “ethical” investment funds not to invest in companies found to have been involved in cartels, to reach out and educate businesses about competition law while gaining a better understanding of their attitudes toward compliance, and in some cases to encourage firms to implement compliance programmes. Other approaches include making special allowances when a new competition law goes into effect, such as giving companies free transitional advisory opinions on whether their existing business arrangements violate the new provisions. Finally, at least one agency has developed an interactive educational tool that is freely available on its web site.

- (5) *Companies must comply with many statutes, including competition laws. Ideally, a firm's competition compliance efforts will be part of a wider compliance programme. However, steps should be taken to ensure that competition is at or near the top of the compliance agenda.*

The compliance agenda is growing in terms of both the number of applicable legal fields (competition, bribery, tax, corruption, health and safety, etc) and the extent of the requirements. A company cannot dedicate all its compliance resources to competition, and companies may not have separate systems in place for each statutory area. The keys for successful compliance programmes in general are efficiency, leadership, training, education, information and due diligence. While each area of law has distinctive elements, the components of an effective compliance and ethics programme are similar.

Competition should consequently form part of a wider programme encompassing all aspects of compliance and ethics.

However, companies may be more inclined to commit resources to those areas of law that are associated with the strongest moral condemnation. In other words, the choice to promote compliance with a law is influenced by the degree to which society accepts the idea that the behaviour prohibited by that law should be illegal. For this reason, competition compliance may sometimes slip down the list of priorities behind other areas such as bribery and fraud. Some commentators have emphasised that for companies to take competition compliance more seriously, the immoral aspect of competition violations should be communicated more strongly. Competition authorities should therefore consider more actively engaging with the media and increasing advocacy efforts to promote the idea that competition law infringements are not only illegal, but immoral.

(6) *Competition compliance programmes have the greatest potential with respect to preventing and uncovering hardcore cartels.*

Competition compliance programmes are more likely to prevent some types of misconduct than others. Programmes are not especially well-suited to conduct that is known to require complex legal and economic analysis as well as in-depth inquiries into facts and market effects, such as abuse of dominance and monopolisation. On the other hand, programmes can be very helpful in preventing and exposing hard core cartel conduct, which is illegal per se and which lay people can more easily understand. Hard core cartels, however, also represent a monitoring challenge because they are deliberate and conspiratorial violations in which deception and secrecy are used to hide the illegal activity.

(7) *Some competition authorities have been willing to issue guidance on designing effective compliance programmes while others have been more reticent. There is widespread agreement, though, that 'one size fits all' approaches to competition compliance programmes are not very helpful.*

Delegates and private sector representatives agreed that 'one size fits all' approaches to designing compliance programmes are not advisable because each sector and firm is so different. However, clarifying the overall objectives and principal features of good competition programmes can be helpful. There is general agreement that these objectives can be summarised as "the 5 C's": (i) Commitment, (ii) Culture, (iii) Compliance know-how and organisation, (iv) Controls and (v) Constant monitoring and improvement. Genuine compliance programmes are taken seriously at every level of the corporation, and they involve regular training, audits, screening and updates.

A number of competition authorities have been actively involved in carrying out studies and/or issuing guidance on compliance programmes. Others have concluded that it is each company's responsibility to establish a compliance programme that best fits their business. Increasing the compliance dialogue between competition authorities and the business community cannot hurt, though. Competition agencies may better understand business decisions, goals, and constraints, while firms may increase their understanding of competition law obligations and gain insights on how to meet them.

(8) *Genuine commitment by management is necessary for compliance programmes to be successful. Only top managers can set and disseminate a corporate culture of compliance. This is particularly important for SMEs that have restricted budgets, but that have a smaller workforce with whom top management can communicate directly.*

Competition compliance programmes will not succeed without the commitment of firms' top management. A genuine and credible competition compliance programme also requires the ongoing

commitment of time and resources to ensure that ethical standards and cultural values are instilled within the organisation. Furthermore, employees need sufficient incentives to comply, which will be influenced by management's attitude toward compliance.

SMEs are financially restricted from putting costly compliance programmes in place. However, managers in smaller companies can capitalise on their size by addressing most or all employees personally and encouraging a compliance culture in a more hands-on manner. Directors of large companies with subsidiaries and many more employees generally do not have that luxury and may be required to invest more time and money in their compliance programme.

Competition authorities can assist by encouraging companies to invest resources appropriate for the size of their organisation and the risks faced by it. One authority, for example, has suggested a four-step, risk-based approach for achieving compliance, consisting of (i) risk identification, (ii) risk assessment, (iii) risk mitigation and (iv) regular review of all steps.

(9) *There was no consensus among the delegates on whether fines should be reduced if a violator demonstrates that it had a genuine competition compliance programme in place when the violation occurred. Some competition authorities may grant such reductions; others do not. However, there was a general agreement that compliance programmes should be encouraged.*

There is no international consensus on whether competition law violators that had compliance programmes in place at the time of the violation should be given lighter sanctions. Some jurisdictions encourage companies to implement compliance programmes by granting a reduction in fines when there is a violation despite the existence of a bona fide programme. Other authorities are neutral towards compliance programmes, neither awarding reductions nor enhancing fines if a defendant has one in place. In rare instances, particularly when they are used as shams, some agencies have used or may use the existence of a compliance programme as a reason to enhance fines in the event of a competition law violation.

Agencies that do not consider compliance programmes as a mitigating factor question why any credit should be given for a programme that not only failed to prevent the conduct leading to the violation, but also failed to detect the conduct before the authority became aware of it. In any event, they contend, a fine reduction is not needed to maintain the incentive for implementing compliance programmes because the instruments of leniency and settlement already reward the implementation of a compliance programme. An effective compliance programme will not only prevent the infringement in the first place, saving the undertaking from fines, civil damage redress and reputation loss. Even if the programme fails to prevent the infringement, it still would bring substantial benefits in the leniency race: the undertaking would be more likely to discover infringements on its own (and faster than other cartel members) and would therefore be much more likely to qualify as an immunity candidate. The same holds true even in cases where the competition authority has already become aware of the violation, as the undertaking will likely be in a better position to present evidence swiftly and thoroughly, which in turn will raise its reduction bonus within leniency programmes. Similarly, the odds of reaching a quick and satisfactory settlement would be higher for undertakings that are able to get an early and good internal overview of the alleged infringement through the work of their compliance departments. Furthermore, those against awarding reductions for compliance programmes argue that giving a discount may encourage cartels by making them cheaper. Also, some agencies believe that a reduction of fines for the mere existence of a compliance programme would promote sham programmes. In any event, it would put a significant administrative burden on authorities, namely having to check the validity of the plethora of different, individually tailored compliance programs and to follow up on this in case of litigation. Finally, it could be difficult for agencies to draw a distinction between large firms with extensively documented compliance programmes and small

and medium sized companies that may not have the same means, though may in reality be equally effective in instilling the right culture of compliance into their organisations.

Authorities in favour of awarding credit for compliance programmes believe that if the programme is genuine, misconduct by a few people should not represent the majority, and that in any case the fact that one violation occurred and went undetected does not mean that the programme failed to prevent or detect others. Providing incentives for companies to put a compliance programme in place may also prevent new cartels from forming, they assert. With regard to the expense of identifying sham programmes, the proponents of fine reductions note that it is the parties who have the burden of proof, not the competition authorities, i.e. the parties must show that their programmes are genuine, rather than the competition authority having to show that they are shams. In some jurisdictions, companies are required to implement effective compliance and ethics programmes before being admitted to a leniency programme, or when settlement or commitment agreements are signed.

If credit is awarded for a compliance programme, then steps must be taken to ensure companies do not simply implement low cost, low maintenance, superficial or sham programmes that do not contribute to prevention. Defendants may therefore be required to demonstrate the programme is reasonably designed, implemented and enforced before any recognition is granted. Directors must be knowledgeable about the content and the operation of the programme and must exercise reasonable supervision over its implementation and effectiveness. Companies may have to submit their compliance programme for assessment, or demonstrate they have carried out independent audits. Despite the lack of consensus on fine reductions, the view that compliance programmes should be encouraged was generally accepted.

SYNTHÈSE

Par le Secrétariat

Plusieurs points essentiels ressortent des débats de la table ronde, des contributions écrites des délégués et de la note de réflexion du Secrétariat:

- (1) *Pour promouvoir plus efficacement la conformité avec le droit de la concurrence, les autorités de la concurrence doivent comprendre les nombreux facteurs ayant une incidence sur la conformité et la non-conformité.*

Au nombre des facteurs qui favorisent la conformité figurent les sanctions financières, l'interdiction d'exercer la fonction d'administrateur, les sanctions pénales, la crainte d'une atteinte à la réputation de l'entreprise ou à la réputation de personnes mises en causes, le sens moral et une forte culture de la conformité au sein de l'entreprise. Parmi les facteurs de non-conformité, citons l'engagement ambigu – ou l'absence d'engagement – de la direction de l'entreprise, les incertitudes quant aux obligations juridiques à respecter, la naïveté des salariés et/ou de simples erreurs commises par eux, la malhonnêteté des salariés, l'arrogance et les intérêts antagonistes dus à la coexistence d'autres domaines dans lesquels les entreprises doivent aussi se mettre en conformité.

Si elles connaissent bien ces facteurs, les autorités de la concurrence sont alors en mesure de gérer leurs ressources à meilleur escient en concevant et en ciblant mieux leur action. Par exemple, si les entreprises n'ont pas une connaissance suffisante du droit de la concurrence, les autorités de la concurrence peuvent centrer leur action sur un renforcement de la sensibilisation, en dispensant des formations ou en lançant des activités de promotion. Si les entreprises connaissent le droit de la concurrence, mais estiment tout simplement qu'elles sont au-dessus des règles et ne se feront jamais prendre en cas d'infraction, les autorités peuvent intensifier leurs efforts d'enquête afin d'augmenter les taux de détection. Si les entreprises jugent que les avantages tirés d'infractions au droit de la concurrence valent de courir le risque d'être prises, alors le ratio avantages/risques doit être abaissé en alourdissant les conséquences juridiques auxquelles elles s'exposent.

- (2) *Les amendes sont couramment employées pour dissuader les entreprises d'agir en infraction au droit de la concurrence. Le montant des amendes infligées en l'occurrence – particulièrement en cas d'entente – a nettement augmenté ces dix dernières années. Pourtant, la détection des ententes se poursuit à peu près au même rythme et certains analystes estiment de ce fait qu'un relèvement supplémentaire des sanctions pécuniaires est nécessaire pour que l'effet de dissuasion soit réel. D'autres s'interrogent sur le réel pouvoir de dissuasion des amendes, quel que soit leur montant.*

Il est généralement admis que le montant élevé des sanctions pécuniaires a une importance cruciale du point de vue de la dissuasion. Le montant des amendes infligées en cas d'infraction au droit de la concurrence, et en particulier d'ententes injustifiables, a nettement augmenté ces dix dernières années. Pourtant, le nombre d'ententes a également progressé et le phénomène de la récidive, dans certains secteurs comme celui de la construction, donne à penser que les niveaux de sanction actuels sont encore insuffisants. Certains responsables et analystes estiment donc indispensable d'infliger des amendes encore plus lourdes.

Les débats du Comité ont montré qu'il est impossible de tirer des conclusions précises sur l'efficacité d'un alourdissement des amendes visant à dissuader les comportements préjudiciables pour la concurrence en se bornant à suivre l'évolution du montant des amendes infligées et du nombre d'ententes mises au jour, pour la simple raison que l'on ne dispose d'aucun moyen de savoir combien d'ententes ne sont jamais détectées. Les intervenants représentant les milieux d'affaires ont ajouté que même si l'on considère que les amendes actuellement imposées ne sont pas excessives en soi, les alourdir encore davantage une fois qu'on les aura portées à un niveau suffisant pour que les dirigeants d'entreprise prennent au sérieux la nécessité de se plier aux dispositions du droit n'accroîtra pas leur pouvoir de dissuasion. L'application d'amendes de plus en plus élevées soulève en outre des questions quant à la capacité des entreprises à les payer et au caractère proportionnel de la sanction par rapport au préjudice causé par l'infraction.

D'un point de vue pratique, l'imposition de sanctions pécuniaires lourdes aux entreprises n'a pas toujours un effet dissuasif optimal, car toutes les personnes responsables de l'infraction, notamment les personnes physiques, n'en supportent pas le coût. Certains pays privilégient une approche globale et recourent aux amendes tout en utilisant par ailleurs un arsenal d'autres instruments comme l'interdiction d'exercer la fonction d'administrateur, l'atteinte à la réputation induite par une mauvaise publicité et l'application de sanctions pénales.

(3) *Certains pays jugent que les sanctions pénales sont le moyen le plus dissuasif de lutter contre la formation d'ententes et leur continuation. D'autres estiment que ce type de sanctions n'est pas justifié dans leur régime d'application du droit de la concurrence.*

Bon nombre de pays ont instauré, ces dernières années, des sanctions pénales pour lutter contre les ententes. Ces infractions sont désormais passibles de peines d'emprisonnement dans 17 des 34 pays de l'OCDE, même si tous ces pays n'ont pas infligé dans les faits de véritables sanctions pénales. Il a été dit que, s'agissant des ententes, la crainte d'une incarcération exerce un pouvoir de dissuasion sans équivalent et peut en outre pousser les individus à bien peser leurs priorités. À la différence des amendes, les entreprises ne peuvent pas réellement indemniser leurs salariés encourant des peines privatives de liberté. Les sanctions pénales permettent donc de combler le déficit de dissuasion lié à l'application d'amendes qui ne permettent pas d'atteindre le but visé. Elles ciblent la personne responsable de l'infraction et non les actionnaires de l'entreprise. Certaines ententes internationales ont préféré s'abstenir d'opérer sur des marchés extrêmement rentables en raison du risque de sanctions pénales encourues dans les pays en question. Cet état de fait donne à penser que les régimes d'application du droit de la concurrence qui comptent l'incarcération dans leur arsenal de sanctions peuvent être extrêmement efficaces en termes de dissuasion.

Cela étant – à part aux États-Unis où les sanctions pénales infligées aux contrevenants ayant formé des ententes sont de plus en plus fréquentes et sévères – le nombre plutôt limité de personnes physiques mises en examen à ce jour pour des infractions pénales de ce type tend à démontrer que nombre d'autorités de la concurrence et de tribunaux ne sont pas entièrement convaincus par l'argument de l'incarcération. Dans les pays n'ayant pas instauré de sanctions pénales pour les infractions au droit de la concurrence, le point de vue dominant est que l'application d'amendes élevées et l'atteinte causée à la crédibilité de l'entreprise suite à une décision rendue en cas d'infraction constituent sans conteste un puissant instrument de dissuasion. Certains travaux économétriques ont également remis en cause le caractère approprié de l'incarcération en tant qu'élément de dissuasion, faisant état de facteurs tenant à une disposition des personnes, à l'organisation, au contexte et aux mentalités, autant de facteurs négligés mais qui ont une influence importante sur les comportements individuels. De la même façon, si les sanctions à l'encontre des personnes physiques ont en théorie un fort effet dissuasif, leur pouvoir de dissuasion dépend du fait que le risque de détection de l'infraction et de poursuites est plus grand lorsque les sanctions à l'encontre des personnes physiques viennent s'ajouter dans les faits à l'arsenal répressif.

- (4) *Les autorités de la concurrence recourent à des méthodes innovantes pour promouvoir la conformité.*

Si des méthodes comme les amendes, l’incarcération, l’interdiction d’exercer la fonction d’administrateur et les programmes de clémence sont toutes mises en œuvre depuis un certain temps, les autorités de la concurrence utilisent encore d’autres approches depuis quelques années. On peut citer les mesures qu’elles ont prises pour convaincre les fonds d’investissement « éthiques » de ne pas investir dans des entreprises participant de manière avérée à des ententes et les efforts qu’elles déploient pour entretenir des relations avec les entreprises et leur faire connaître les dispositions du droit de la concurrence tout en acquérant ainsi une meilleure connaissance de leur état d’esprit en matière de conformité et, dans certains cas, pour les inciter à mettre en œuvre des programmes de conformité. Parmi les autres approches utilisées, les autorités peuvent faire preuve d’une indulgence particulière au moment de l’entrée en vigueur d’une nouvelle législation sur la concurrence, par exemple en dispensant aux entreprises, à titre gracieux, des avis consultatifs de transition en vue de déterminer si les accords commerciaux qu’elles ont déjà conclues sont ou non conformes au droit de la concurrence. Enfin, une autorité de la concurrence au moins a mis au point un outil de formation interactif qui peut être téléchargé gratuitement sur son site Internet.

- (5) *Les entreprises doivent se conformer à de nombreuses dispositions juridiques et notamment à celles du droit de la concurrence. Dans l’idéal, les efforts qu’elles déploient pour s’y conformer devraient s’inscrire dans un programme de conformité plus général. Il convient donc de prendre des mesures pour assurer que le respect des règles de concurrence figure bien au tout premier rang de leurs priorités en matière de conformité – ou n’en est pas loin.*

Les obligations en matière de conformité ne cessent de se multiplier, investissant un nombre croissant de domaines juridiques (concurrence, corruption, fiscalité, santé et sécurité, etc.) et poussant les exigences toujours plus loin. Les entreprises ne peuvent consacrer au respect du droit de la concurrence toutes les ressources qu’elles mobilisent pour se mettre en conformité avec la loi et elles n’ont pas nécessairement mis en place un dispositif distinct pour chaque domaine du droit dont elles doivent se soucier. La clé de la réussite des programmes de conformité en général tient à l’efficacité, à l’impulsion de la hiérarchie, à la formation, à l’éducation, à l’information et à la vigilance. Si chaque domaine du droit auquel les entreprises doivent se conformer possède ses propres caractéristiques, tous les programmes de conformité et d’éthique efficaces sont néanmoins composés d’éléments similaires. La concurrence devrait donc faire partie intégrante d’un programme général englobant tous les aspects à prendre en compte en matière de conformité et d’éthique.

Cela étant, les entreprises peuvent être plus enclines à affecter des ressources aux domaines du droit auxquels est associée la condamnation morale la plus lourde. Autrement dit, l’idée, admise par la société, que la loi proscrie à juste titre tel ou tel comportement influe sur la décision des entreprises de promouvoir la conformité avec telle ou telle disposition du droit. C’est pourquoi, le respect du droit de la concurrence peut parfois être relégué, sur la liste des priorités, derrière d’autres domaines comme la corruption et la fraude. Certains analystes ont souligné qu’il est impératif – si l’on veut que les entreprises prennent davantage au sérieux le respect du droit de la concurrence – de leur faire prendre conscience plus fermement du caractère immoral des infractions commises dans ce domaine. Les autorités de la concurrence devraient donc envisager de faire plus activement cause commune avec les médias à ce sujet et de renforcer leurs efforts de promotion pour faire prévaloir l’idée que les infractions au droit de la concurrence ne sont pas seulement illégales mais aussi immorales.

- (6) *Les programmes de conformité des entreprises avec le droit de la concurrence sont sans doute le moyen le plus efficace de prévenir et de détecter les ententes injustifiables.*

Les programmes de conformité des entreprises avec le droit de la concurrence sont davantage susceptibles de prévenir certains types d'agissement répréhensible que d'autres. Ces programmes ne sont ainsi pas particulièrement adaptés pour prévenir les comportements – comme les abus de position dominante et les concentrations monopolistiques – dont il est connu qu'ils impliquent d'effectuer des analyses juridiques et économiques complexes et de mener des enquêtes approfondies sur le contexte factuel et les effets sur le marché. En revanche, ces programmes peuvent être très utiles pour prévenir et mettre au jour les ententes injustifiables, qui sont illégales en soi et que des non-spécialistes sont plus facilement en mesure d'appréhender. Il est toutefois difficile de mettre au jour ce type d'ententes car il s'agit d'infractions délibérées, supposant l'existence d'un complot, dans le cadre desquelles les contrevenants recourent à la tromperie et au secret pour dissimuler le caractère illégal de leur activité.

- (7) *Certaines autorités de la concurrence sont prêtes à dispenser des conseils pour aider les entreprises à mettre au point des programmes de conformité efficaces alors que d'autres se montrent plus réticentes sur ce point. Toutes conviennent cependant généralement que l'application aux programmes de conformité d'une approche standard convenant à tous les cas de figure n'est pas très utile.*

Les délégués et les représentants du secteur privé sont tombés d'accord sur le fait que l'application aux programmes de conformité d'une approche standard convenant à tous les cas de figure n'est pas indiquée en raison de la singularité de chaque secteur d'activité et de chaque entreprise. Cela étant, il peut être utile de préciser les objectifs généraux que doivent poursuivre les programmes de conformité et les principales caractéristiques qu'ils doivent revêtir pour être efficaces. Selon le consensus général, on peut résumer ces objectifs par « les 5 mots d'ordre de la conformité » que sont (i) l'engagement, (ii) la culture, (iii) les compétences et l'organisation de la conformité, (iv) les contrôles et (v) la surveillance et l'amélioration permanentes. Les programmes de conformité authentiques sont donc pris au sérieux à tous les niveaux de l'entreprise et donnent lieu à des formations, des contrôles, des vérifications et des mises à jour périodiques.

Un certain nombre d'autorités de la concurrence ont activement réalisé des études et/ou dispensé des conseils sur les programmes de conformité. D'autres ont conclu qu'il appartient à chaque entreprise de mettre en place le programme de conformité le plus adapté à son activité. Quoi qu'il en soit, l'intensification du dialogue entre les autorités de la concurrence et les milieux d'affaires au sujet de la conformité ne peut pas nuire. Les autorités de la concurrence pourront peut-être ainsi mieux comprendre les décisions prises par les entreprises, leurs objectifs et leurs contraintes et les entreprises auront une meilleure connaissance des obligations qui leur incombent en vertu du droit de la concurrence et sauront mieux comment les respecter.

- (8) *Pour que les programmes de conformité portent leurs fruits, la direction doit véritablement s'impliquer. Seuls les hauts dirigeants sont en position d'instaurer et de propager une culture de la conformité au sein de l'entreprise. Cet aspect est particulièrement important pour les PME dont les budgets sont certes limités mais dont les effectifs sont moins nombreux et dont les salariés peuvent de ce fait communiquer directement avec les dirigeants.*

Les programmes de conformité avec le droit de la concurrence ne porteront pas leurs fruits sans l'implication des dirigeants de l'entreprise. Un programme de conformité authentique et crédible exige en outre d'engager en permanence du temps et des ressources pour instaurer des normes éthiques et des valeurs culturelles au sein de l'entreprise. Par ailleurs, les salariés doivent être suffisamment incités à respecter la loi, et cette incitation dépendra de l'attitude de la direction vis-à-vis de la conformité.

Les PME ne peuvent financièrement se permettre de mettre en place de coûteux programmes de conformité. Cela étant, la direction de ces entreprises peut tirer parti de leur taille pour s'adresser personnellement à la majorité ou à la totalité des salariés et favoriser de manière plus concrète l'instauration d'une culture de la conformité. Il s'agit là d'un luxe que les administrateurs des grandes entreprises dotées de filiales et d'effectifs bien plus importants ne disposent généralement pas, ce qui peut les amener à devoir investir davantage de temps et d'argent dans leur programme de conformité.

Les autorités de la concurrence peuvent aider les entreprises en les encourageant à investir des ressources correspondant à leur taille et aux risques qu'elles encourent. Pour aider les entreprises à se mettre en conformité, une autorité a ainsi prôné une approche en quatre étapes : la première consistant pour l'entreprise à identifier les risques, la deuxième à les évaluer, la troisième à les atténuer et la quatrième à réévaluer périodiquement ces trois premières étapes.

(9) *Les délégués ne sont pas tombés d'accord sur la question de savoir s'il convient d'alléger les amendes lorsqu'un contrevenant démontre qu'il avait mis en place un authentique programme de conformité avec le droit de la concurrence au moment où l'infraction a été commise. Certaines autorités de la concurrence peuvent consentir de tels allègements, d'autres ne le font pas. Quoiqu'il en soit, les délégués se sont accordés à dire qu'il convient d'encourager l'instauration de tels programmes.*

Il n'existe pas de consensus international sur le point de savoir s'il convient d'imposer des sanctions plus légères aux contrevenants qui étaient dotés de programmes de conformité de l'entreprise avec le droit de la concurrence lorsque l'infraction a été commise. Certains pays incitent les entreprises à mettre en place de tels programmes en allégeant les sanctions pécuniaires infligées en cas d'infraction commise malgré l'existence d'un authentique programme de conformité au droit de la concurrence. Dans d'autres, les autorités ont un point de vue neutre sur ces programmes, ne prônant ni allègement ni alourdissement des sanctions pécuniaires pour les contrevenants qui en sont dotés. Dans de rares cas, notamment quand ces programmes ne sont que des simulacres, certaines autorités invoquent ou peuvent invoquer l'argument selon lequel l'existence d'un tel programme constitue une raison d'alourdir les sanctions pécuniaires en cas d'infraction.

Les autorités qui n'estiment pas que l'existence d'un programme de conformité constitue une circonstance atténuante demandent ce qui justifierait d'accorder un traitement favorable à l'entreprise lorsque le programme dont elle est dotée ne lui pas davantage permis d'empêcher le comportement ayant abouti à l'infraction que de le détecter avant que les autorités en aient pris connaissance. Elles affirment qu'en tout état de cause, il n'est pas nécessaire de réduire le montant de l'amende pour que les entreprises restent incitées à mettre en œuvre des programmes de conformité car les instruments que sont les procédures de clémence et les transactions récompensent déjà cette mise en œuvre. De fait, un programme de conformité efficace devrait empêcher de prime abord la commission de l'infraction, épargnant à l'entreprise des amendes, des recours en dommages-intérêts et une atteinte à sa réputation. Cela étant, même si le programme de l'entreprise ne lui permet pas de prévenir la commission de l'infraction, il lui vaudra tout de même des avantages substantiels dans la course à la clémence. En effet, l'entreprise sera de ce fait d'autant plus susceptible de mettre au jour les infractions par elle-même (plus rapidement que les autres membres de l'entente) et pourra donc d'autant plus prétendre bénéficier de l'immunité. Cela vaut même dans les cas où l'autorité de la concurrence a déjà eu connaissance de l'infraction, car l'entreprise sera mieux placée pour présenter des éléments probants rapidement et dans le détail, ce qui lui vaudra une prime dans le cadre de la procédure de clémence en termes d'allègement de la sanction. De même, les entreprises qui sont en mesure de se faire sans tarder, en interne, une bonne vue d'ensemble de l'infraction présumée grâce au travail de leur service chargé de la conformité auront de meilleures chances de conclure rapidement une transaction satisfaisante. Par ailleurs, ceux qui s'opposent aux réductions d'amendes pour les entreprises dotées d'un programme de conformité font valoir qu'un tel allègement reviendrait à

encourager les ententes en en diminuant le coût. Certaines autorités de la concurrence estiment en outre qu'un allègement des amendes lié à la simple existence de ces programmes favoriserait la mise en place de simulacres de programmes. En tout état de cause, cela ferait peser sur elles une importante charge administrative puisqu'elles devraient alors contrôler la validité d'une multitude de programmes de conformité différents et conçus sur mesure et en assurer le suivi en cas d'action en justice. Enfin, les autorités pourraient avoir du mal à faire une distinction entre les grandes entreprises dotées de programme de conformité dont la validité est bien attestée et les petites et moyennes entreprises ne disposant pas des mêmes moyens, quand bien même elles auraient, pour beaucoup, instauré tout aussi efficacement une vraie culture de la conformité en leur sein.

Les autorités qui prônent l'application d'un traitement favorable aux entreprises dotées d'un programme de conformité estiment pour leur part que si le programme mis en place est authentique, les agissements répréhensibles d'une poignée de personnes ne sauraient être représentatifs des actes de la majorité et qu'en tout état de cause, le fait qu'une infraction ait été commise et n'ait pas été détectée ne veut pas dire que le programme en place n'a pas permis d'empêcher que d'autres le soient. Elles font valoir que le fait d'inciter les entreprises à mettre en place un programme de conformité peut en outre éviter la formation de nouvelles ententes. Concernant les coûts induits par l'identification des programmes de pure forme, les tenants d'un allègement des amendes notent que la charge de la preuve revient aux parties et non à l'autorité de la concurrence et que ce sont donc les parties qui doivent démontrer que leur programme est authentique et non l'autorité de la concurrence qui doit établir la preuve du simulacre. Dans certains pays, les entreprises sont tenues d'instaurer des programmes de conformité et d'éthique efficaces avant de pouvoir être admises à un programme de clémence ou lorsqu'elles concluent une transaction ou un accord faisant suite à une procédure d'engagement

Si un traitement favorable est accordé aux contrevenants dotés d'un programme de conformité, il est alors nécessaire de prendre des mesures pour veiller à ce que les entreprises ne se bornent pas à mettre en œuvre des programmes à bas coût, nécessitant peu de suivi, superficiels ou de pure forme qui ne contribuent en rien à prévenir les infractions. Les entreprises mises en cause pourraient donc être tenues de démontrer que leur programme de conformité a été conçu comme il faut et a été mis en œuvre et respecté comme il se doit au moment de la commission de l'infraction, avant qu'une quelconque réduction des sanctions, justifiée par l'existence même du programme, ne leur soit accordée. Les administrateurs doivent connaître le contenu et le fonctionnement du programme et exercer un contrôle suffisant de sa mise en œuvre et de son efficacité. Les entreprises pourraient être tenues de soumettre leur programme de conformité à une évaluation ou d'apporter la preuve qu'elles ont fait procéder à des vérifications indépendantes de leur programme. Malgré l'absence de consensus au sujet de l'allègement des sanctions, l'idée qu'il convient d'encourager la mise en place de programmes de conformité a été généralement approuvée.

ISSUES PAPER

*By The Secretariat**

1. Introduction

“In the last two decades, the world has seen the proliferation of effective leniency programs, ever-increasing sanctions for cartel offenses, and a growing global movement to hold individuals criminally accountable,” a top antitrust enforcement official recently observed.¹ Statistics from several of the largest OECD economies do show dramatic growth in the fines imposed for corporate and (in some jurisdictions) individual cartel activity over the past twenty years. During the same time, prison sentences for cartel participants became more frequent and severe in the US, while leniency programmes and the criminalisation of cartel violations spread to more countries. Yet cartels remain a substantial problem, as do recidivists.² Between 1990 and 2005, 174 companies violated laws against price-fixing at least twice, with some reoffending as many as 26 times – that we know of.³

These trends raise troubling questions. Courts and competition agencies have been sending stronger and stronger signals to potential offenders for years. But is anyone receiving the message? If they are, do they care?

The statistics raise other questions, as well. What factors other than fines and prison might motivate compliance with competition law? What factors undermine it? How can competition authorities promote better compliance? What strategies have not been tried yet that are worth considering?⁴ What (if anything)

* This paper was prepared by Jeremy West, Principal Administrator, OECD Competition Division.

¹ Scott Hammond, “The Evolution of Criminal Antitrust Enforcement over the Last Two Decades,” Speech before the National Institute on White Collar Crime (25 February 2010) at p. 1.

² Douglas Ginsburg & Joshua Wright, “Antitrust Sanctions,” 6 Competition Policy International 3, 4 (2010). See also John Connor, “The United States Department of Justice Antitrust Division’s Cartel Enforcement: Appraisal and Proposals” American Antitrust Institute Working Paper No 08-02 (June 2008) at 9 (“the number of cartels being discovered each year continues to rise as [does] the number of firms that are price-fixing recidivists”); but see the comments of the US delegate in the Summary of Discussion for this roundtable (arguing that Connor’s conclusions about recidivism are inaccurate because he does not distinguish concurrent offences from successive ones, and he counts situations in which separate subsidiaries of large companies commit violations and situations in which violations occur many years apart as instances of recidivism).

³ John Connor & C. Gustav Helmers, Statistics on Modern Private International Cartels, 1990-2005 at 38 (Working Paper, January 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=%201103610; see also Ron Knox, “Is DG Comp More Likely to Raise a Fine Than to Lower It?,” Global Competition Review (21 November 2010) at p.2, available at www.globalcompetitionreview.com/indepth/analysis/29350/is-dg-comp-likely-raise-fine-lower-it/ (finding that the most common reason DG Comp increased fines between 2005 and 2010 was recidivism, which resulted in higher fines 35 times).

⁴ Note that this paper does not cover merger-related issues, in particular because the Competition Committee is holding a separate roundtable on the impact evaluation of merger decisions during this (June 2011) session. Instead, this paper focuses on compliance in the context of non-merger violations, especially those

should competition agencies be doing to encourage and improve competition compliance programmes in the private sector? This paper provides some background to help address those issues.

2. Determinants of compliance

The competition policy literature mentions quite a few factors that affect the degree of compliance with competition laws. (This part of the paper simply identifies the range of possible influences on compliance. It does not discuss how strong they are. That topic is addressed in Part 3.) These include the following, most of which are self-explanatory:

2.1 Factors that encourage compliance

- *Fear of monetary sanctions imposed on corporations or individuals.*
- *Fear of imprisonment.*
- *Fear of damage to individual or corporate reputation.*
- *Morality.*
- *Good training.*
- *Employer-driven incentives for employees.* Rewarding compliance and/or penalising non-compliance, such as by linking bonuses and/or promotions to compliance or otherwise making it clear that management is serious about complying with competition law, can be a motivating factor.
- *Desire to avoid the diversion of the company's attention that competition investigations and litigation cause.*
- *A culture of competition within the firm, industry, and/or country.* Companies and individuals that operate in environments where the value of competition is widely understood and appreciated, and in which competition laws are respected, are more likely to comply with those laws.

Notably, this simple list of factors suggests that promoting compliance could involve more than deterrence alone.

2.2 Factors that encourage non-compliance

- *A culture of non-compliance – or at least lack of a culture of compliance – within the firm, industry, and/or country.*
- *Mixed signals about compliance from management.* For example, a company's top executives might express support for competition law compliance, but simultaneously give signals in other contexts that they really do not care how sales targets are met, just as long as they *are* met.
- *Market conditions that facilitate collusion or an abuse of dominance.* The market conditions that facilitate cartels are well known and include features such as a small number of players, price transparency, a homogenous product, pervasive exchanges of information among competitors, and/or sending public signals about planned price and/or output levels. Conditions that facilitate abuses of dominance vary, depending on the conduct. As an example, characteristics that favour predatory pricing include a dominant incumbent with very high market share, deep pockets, excess capacity and low price elasticity of demand.

related to cartels, which are a top priority for most competition agencies and which are subject to a wider variety of deterrents than unilateral conduct violations.

- *The perception that the likely gains from not complying outweigh the likely costs.*
- *Ignorance of the likely legal consequences of not complying.*
- *Arrogance among the senior leaders and/or perpetrators.* When individuals in a company believe they are above the law or that they are so smart that they will not get caught or convicted, they are more likely to violate the law.
- *The insularity of large organizations.* To the people who work in them, large organizations' internal priorities and incentive systems may have a much greater bearing on their behaviour than the seemingly distant threat of external rules.

What other factors influence companies' decisions to comply or not comply with competition laws?

3. Promoting better compliance

Depending on how certain data are interpreted, one might conclude that the tools and strategies that competition authorities currently use to promote compliance are not working as well as desired, at least with respect to hard core cartels. Over the past 20 years or so, the average amount of fines imposed for cartel violations increased dramatically in the EU, US and other jurisdictions; imprisonment became an option for dealing with cartelists in more OECD jurisdictions; in the US, courts imposed more and lengthier prison sentences on violators; and leniency programmes proliferated around the world. Meanwhile, "there is evidence that the number, size, and injuriousness of discovered cartels is increasing."⁵ We might infer that tools like fines, prison, and leniency have not been very effective because there seems to be at least as much cartel activity now as there ever was. If that is true, enforcers need to determine why their methods are not working better and to start using new approaches.

Alternatively, the inference that current tools are not working so well would be erroneous if a higher percentage of violations are detected now than in the past (perhaps due to the rise of leniency programmes) but the total number of detected plus undetected cartels has decreased.

In either case, the enforcement community will benefit by asking questions and sharing answers about which approaches work, which ones do not, and why.

3.1 *Are the main approaches to promoting compliance working?*

The main enforcement methods used by competition authorities for encouraging compliance with competition laws are fines, imprisonment (where available), and leniency programmes. The frequency and intensity with which all three methods have been used increased sharply over the years, yet cartel activity, in particular, continues without any apparent abatement. The total number of detected international cartels, for example, climbed from an average of 6.3 per year in the 1990-1995 period to an average of 32.9 in the 2004-2007 period.⁶ One might fairly expect that if conventional approaches to deterrence have been working well, the number of cartel prosecutions would be dwindling by now. Perhaps sanctions are still too low, or prison sentences should be lengthened and used more widely.

Actually, it is impossible to know exactly how well or how poorly the current approaches are working because it is impossible to observe how many cartels go undetected. At least four different factors might explain the increase in the number of international cartels that have been uncovered: 1) leniency

⁵ Connor, *supra* note 2, at 1.

⁶ *Id.* at 6.

programmes were used more widely; 2) more national competition authorities pursued cartels and shared information with each other; 3) competition authorities began focusing more on international cartels than domestic ones; and 4) the rate of cartel formation increased. Some commentators, such as Connor, believe that factor 4) is at least partially responsible. He contends that even if detection rates have increased it is doubtful that they have increased by a factor of 5 or 6 – which is how much the number of international cartels detected annually has grown since the early 1990s.⁷ It therefore appears that cartel formation rates have risen, as well.

Other commentators paint a more optimistic picture. Clarke and Evenett, for instance, studied the vitamins cartel of the 1990s and found that exports from countries where the conspirators were located to nations in Africa, Europe, and Latin America that did not have anti-cartel laws tended to grow faster than exports to those nations that did have such laws. It therefore appeared that the cartel particularly targeted nations without anti-cartel laws. In fact, the pattern of discrimination between export destinations was especially strong in Europe, suggesting that the deterrent value of European anti-cartel laws is relatively high.⁸

3.1.1 *Fines*

In a classic article, Gary Becker solidified in economic terms the idea that decisions about whether to engage in criminal behaviour can be reduced to expected value calculations. In other words, he showed how rational actors would compare the anticipated economic value of a contemplated crime with the product of the probability of detection and the cost of the consequences of being detected.⁹ One of the results of his work was the theoretical insight that there was another, less expensive way to deter competition law violations besides trying to catch every one of them and making the offenders pay fines that merely equalled the social cost of their crimes. Instead, detection rates could remain well below 100 percent but the level of the fines that are imposed on violators could be increased until the expected value of violations is negative. If fines are high enough, Becker contended, even a low probability of detection could be consistent with sufficient deterrence.¹⁰

About 40 years after Becker's article was published, a report commissioned by the OFT confirmed that "at a fundamental level, the most important result [of a review of the literature] is that high fines are a crucially important element of deterrence."¹¹ There is no denying that agencies like the European Commission and the USDOJ's Antitrust Division have succeeded in imposing higher and higher fines over the years.¹²

The total fines imposed at the EU level for cartel violations, adjusted for Court judgments, rose from 344 million euros in the 1990-1994 period to 9.6 billion euros during 2005-2009, a total increase of

⁷ Connor, supra note 2, at 9.

⁸ Julian Clarke & Simon Evenett, "The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel," 48 *Antitrust Bulletin* 289 (2003).

⁹ Gary Becker, "Crime and Punishment: An Economic Approach," 76 *Journal of Political Economy* 169 (1968).

¹⁰ More precisely, the total optimal sanction would equal the expected gain from the violation multiplied by the inverse of the probability of detection (plus the enforcement cost of imposing the sanction).

¹¹ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, OFT1132 (2009) at p. 8.

¹² The methodologies that competition authorities in several OECD jurisdictions use to calculate fine levels are explained and compared in Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, supra note 11. The jurisdictions are Australia, the EU, Germany, the Netherlands, the US, and the UK.

roughly 2700 percent.¹³ The average corporate fine grew from less than two million euros in 1990-1994 to 46 million euros during 2005-2009, or approximately 2200 percent.¹⁴ Meanwhile, the number of cartel cases decided by the European Commission climbed from 11 in 1990-1994 to 33 in 2005-2009.¹⁵

Over the same time periods, the Antitrust Division at USDOJ chalked up similarly impressive numbers. It collected \$142 million in total corporate fines during 1990-1994, a figure that rose to \$3.35 billion in the 2005-2009 timeframe (an increase of about 2250 percent). During the same time intervals, the average corporate fine rose from \$480,000 to about \$44 million (about 9000 percent).¹⁶ The average fine levied on individuals rose from \$125,000 in 1998 to more than \$600,000 in 2007.¹⁷ Interestingly, those figures were all rising during a period when the total number of criminal price fixing cases brought per year by DOJ was falling. In fact, the figure fell by 68 percent from the early 1990s to the 2004-2006 timeframe. The downward trend applies both to cases brought against corporations as well as cases brought against individuals.¹⁸ These statistics suggest that DOJ has been targeting a relatively small number of “big cases” with the potential for large penalties rather than a great number of “little cases” with smaller penalties. That strategy is consistent with the rising number of cases brought against large, international cartels.

The EU and US are not alone in imposing substantial fines for competition law violations. Germany's Bundeskartellamt, for example, fined corporate and individual offenders a total of €969.2 million from 2001-2006. France's Autorité de la Concurrence imposed a total of €2 billion from 2001 to 2008.¹⁹ Just this year, Mexico's Comisión Federal de Competencia imposed a US\$1 billion fine on Telcel, a mobile telecommunications company for monopolistic practices.

Should other competition authorities follow suit? And should those who have already increased their fines to very high levels continue to raise them? According to some commentators, higher monetary sanctions are needed to achieve deterrence even in the jurisdictions that have already had years of steeply increasing fines. Connor and Helmers, for instance, argued in 2007 that even though monetary sanctions imposed on international cartels had reached their highest levels ever, “extensive recidivism implies that present cartel sanctions are inadequate to deter cartel formation.”²⁰

That same year, Connor published an article with Lande in which they compared the average amounts cartels gained from their illegal overcharges with the levels of fines imposed in the US and EU. After finding that cartel overcharges ranged from 18 to 37 percent in the US and from 28 to 54 percent in the EU, the authors concluded that the gains were significantly higher than the resulting fines. They therefore

¹³ European Commission Cartel Statistics (as of 13 April 2011), available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

¹⁴ Ginsburg & Wright, *supra* note 2, at 11.

¹⁵ European Commission Cartel Statistics (as of 13 April 2011), available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

¹⁶ Ginsburg & Wright, *supra* note 2, at 10.

¹⁷ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, *supra* note 11, at 154; but see Connor, *supra* note 2, at 33 (pointing out that the average is distorted by a few very high individual fines, and contending that “[c]ompared with the wealth and high positions of the majority of convicted cartel managers, personal fines are an insignificant potential source of deterrence”).

¹⁸ Connor, *supra* note 2, at 18-19.

¹⁹ Ginsburg & Wright, *supra* note 2, at 13.

²⁰ *Id.* at 15 (citing Connor & Helmers, *supra* note 3); see also Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, *supra* note 11, at 19 (noting that “[t]he literature suggests that current antitrust fines in practically all jurisdictions are too low to achieve cartel deterrence”).

recommended that both the US and the EU raise fines substantially.²¹ Wils concurs that fines are too low, having calculated that they need to be at least 150 percent of the defendant's turnover in the relevant market(s).²² The view that fines need to be higher seems to be the prevailing one, among both academics and agencies.

Other commentators have interpreted the data quite differently, though. Rather than calling for even higher fines, they question the ability of *any* level of fines to achieve effective deterrence. Ginsburg & Wright point to Connor's and Helmer's finding that in the US, "detected instances of price-fixing remained relatively frequent from 1990 to 2005, extracting from consumers (in constant 2005 dollars) aggregate overcharges exceeding \$200 billion, with an average overcharge of \$2.1 billion per cartel,"²³ and then remind us that the increase in total fines for cartels could mean different things. Either agencies have gotten better at uncovering and prosecuting cartels, or detection/prosecution rates have not changed but the rate of cartel formation has increased in spite of higher fines. But if fines are the best way to deter cartels, then we should have seen a decrease in the number of cartel cases as fines increased. That has not happened. "At this point, we do not have any evidence that a still higher corporate fine would deter price-fixing more effectively. It may simply be that corporate fines are misdirected, so that increasing the severity of sanctions along this margin is at best irrelevant and might counter-productively impose costs upon consumers in the form of higher prices as firms pass on increased monitoring and compliance expenditures."²⁴

Moreover, there are limits to what a corporation can pay and to what sound policy dictates that it should be made to pay. At some point, imposing higher and higher fines can become counterproductive. A very heavy fine might be beyond the ability of a company to pay²⁵ and thus may push it into bankruptcy and cause it to exit the market permanently. The market might then be less competitive than it would have been if the company had been punished but allowed to survive. Consequently, consumers might pay higher prices, receive poorer service, or benefit from less innovation.²⁶ The European Parliament identified another reason to avoid relying too heavily on fines last year, stating that "the use of ever higher fines as the sole instrument [for sanctioning competition law violations] may be too blunt, not least with a view to potential job losses as a result of the inability to pay[.]"²⁷ Thus it is possible for a fine to be optimal for the purpose of achieving deterrence, but sub-optimal for preserving competition or promoting other policy objectives such as employment.

²¹ John Connor & Robert Lande, "Cartel Overcharges: Implications for U.S. and EU Fining Policies," 51 Antitrust Bulletin 983 (2007).

²² Wouter Wils, "Is Criminalization of EU Competition Law the Answer?," 28 World Competition: Law and Economics Review (2005). This is not to suggest that Wils believes it is actually advisable to raise fines to such a high level, though. The point is simply Wils's conclusion that following a pure Becker type of analysis leads to "optimal" fines that would have to be set at 150 percent of the defendant's turnover in the relevant market.

²³ Ginsburg & Wright, *supra* note 2, at 12 & n.32 (citing Connor & Helmers, *supra* note 3).

²⁴ Ginsburg & Wright, *supra* note 2, at 12.

²⁵ See Frederic Jenny, "Optimal Antitrust Enforcement: From Theory to Policy Options", in *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos & Ioannis Kokkoris, eds. 2010) 121, 128 (citing a study showing that firms might need assets as much as six times their annual sales to be able to pay an optimal fine, Gregory Werden & Marilyn Simon, "Why Price Fixers Should Go to Prison," 32 Antitrust Bulletin 917 (1987)).

²⁶ Gregory Werden, "Sanctioning Cartel Activity: Let the Punishment Fit the Crime", 5 European Competition Journal 1, 30-31 (2009).

²⁷ European Parliament Resolution of 9 March 2010 on the Report on Competition Policy 2008, para. 45.

In addition, extremely high fines could raise questions about the proportionality of the punishment relative to the harm caused by the violation. Regardless of their mathematical optimality, if fines become so high that the public begins to perceive them as vindictive, they may undermine respect for competition law and thus do more harm than good. Very high fines might also raise concerns about over-deterrence, as companies may react to them by over-investing in monitoring and compliance and by avoiding conduct that is not actually anticompetitive. Those outcomes would ultimately impose higher costs on consumers.

Another drawback is that although there is some intuitive logical appeal to the idea of imposing “optimal” fines that are calculated to reduce the expected value of anticompetitive behaviour to zero, doing that consistently in practice is all but impossible. Reliable case-by-case data on the risks of detection and conviction, as well as on the likely amount of the gain from the unlawful conduct, is not usually available.

Furthermore, practical considerations suggest that high corporate fines alone cannot provide sufficient deterrence. For example, the interests of individuals in a company may not align perfectly with the best interests of the company. If executives or officers believe they can advance more rapidly, collect higher bonuses, or gain prestige by padding profits via cartel activity, they may be inclined to do so even though the company could eventually be fined as a result. By then, the responsible individuals may have moved on to another company. Even if they did not, it is unlikely that the costs imposed on those individuals will match the costs imposed on the company.²⁸ Simply put, a divergence of interests is likely to be a problem whenever directors, officers, or managers believe they personally have more to gain from committing a violation than they stand to lose if their company is fined.

In response to that latter point, proponents of relying heavily on corporate fines tend to reason that fines have the desired effect on individual behaviour because when corporations are stung by optimal fines, they (and other corporations, as well) respond by putting controls and incentives in place to prevent conduct that could lead to further fines. While that view may make sense for privately held corporations, Ginsburg and Wright acknowledge, it does not reflect the reality of how publicly traded corporations function. Directors oversee officers who oversee employees. The owners are shareholders, and most shareholders are merely passive investors who have little control over the corporation’s conduct. They therefore cannot prevent price fixing by the corporation’s employees. Instead, they will simply make decisions about buying, holding, and selling their shares based on how the corporation’s conduct is affecting profits, and thus the value of their shares, within a given time horizon. In fact, shareholders may benefit greatly from the corporation’s participation in a cartel, and the same is true of the directors and officers, who may not only benefit from an increase in the value of their shares but from bonuses and greater prestige triggered by higher profits. As the data suggest and scholars like Connor have argued, price-fixing does still seem to be profitable, despite the trend of higher corporate fines.²⁹

Of course, some agencies impose fines on individuals, as well. But there is not much faith in the deterrent value of individual fines because it is easy for corporations to provide compensation for monetary sanctions on individuals.³⁰

Should fines for competition law violations be increased beyond current levels? Where optimal deterrence might clash with the preservation of competition in a market (because a heavy fine could cause

²⁸ Office of Fair Trading, An Assessment of Discretionary Penalties Regimes, supra note 11, at 21.

²⁹ Ginsburg & Wright, supra note 2, at 17-18.

³⁰ See OECD, Cartel Sanctions against Individuals, [DAF/COMP\(2004\)39](#) at 8 (“There appears to be widespread agreement that financial penalties on individuals alone are relatively ineffective because it is difficult to prevent a corporation from reimbursing the individual.”), available at www.oecd.org/dataoecd/61/46/34306028.pdf.

an important competitor to exit), which objective should enforcement agencies prioritise? Can one be achieved without the other? Furthermore, what causes recidivism? Why are some firms repeat offenders while others are not? Why do certain sectors (e.g., construction³¹) have a chronic problem complying with competition laws, regardless of the number or the severity of the punishments imposed?

3.1.2 Imprisonment

One thing that corporations cannot give back to their executives, officers and employees is time spent behind bars. Imprisonment, therefore, certainly has the ability to realign individuals' incentives in a way that fines cannot. It is being adopted as a form of cartel deterrence in a growing number of jurisdictions. Seventeen OECD countries now have competition laws that authorise prison terms for cartel offences.³²

The US has the lion's share of experience with using imprisonment as a deterrent for cartel behaviour and has long been an enthusiastic proponent of this approach.³³ Prison sentences for cartelists in the US have increased quite substantially since 1990, both in the aggregate and in terms of their average length. Total incarceration days imposed rose from about 18,000 in 1990-1994 to nearly 90,000 during 2005-2009. Not only has the average number of persons per year receiving prison sentences for price fixing increased, but the proportion of defendants imprisoned has grown, as well. Meanwhile, the average sentence length grew from 247 days to 717 days.³⁴

Some commentators argue that the threat of serving time in jail has unparalleled power to deter cartels. A recent report by London Economics states that "[i]mprisonment is widely regarded as a very strong means of deterring anti-trust infringements and even a relatively low probability of facing a jail term may prove significantly deterrent relative to jurisdictions where this possibility is altogether absent."³⁵ The results of a 2007 survey of UK businesses yielded results that attest to the deterrent power of imprisonment. When asked to rank the factors that motivate compliance with UK competition law, the companies rated criminal penalties higher than any other type of sanction. (Interestingly, fines were rated fourth out of five.³⁶) The same respondents indicated that the perceived risk of attracting an OFT investigation caused them to abandon or significantly modify between 5 out of 6 and 16 out of 17 potential cartel-related infringements.³⁷ Thus the study suggests that competition regimes that feature imprisonment as a potential sanction are highly effective at achieving deterrence.

³¹ See OECD, Construction Industry (2008), [DAF/COMP\(2008\)36](#) (exploring cartel recidivism in the construction sector).

³² See Ginsburg & Wright, *supra* note 2, at Appendix. Note that Mexico very recently amended its Federal Economic Competition Law and Federal Criminal Code to authorise imprisonment as a sanction for hard-core cartel violations.

³³ Scott Hammond, "Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program," Speech before the Cartel Enforcement Roundtable, ABA Section of Antitrust Law, 2007 Fall Forum, Washington, DC, (November 16, 2007) at p. 2 ("The Division has long emphasised that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences").

³⁴ Connor, *supra* note 2, at 34.

³⁵ Office of Fair Trading, An Assessment of Discretionary Penalties Regimes, *supra* note 11, at 10.

³⁶ OFT, The Deterrent Effect of Competition Enforcement by the OFT, OFT962 (November 2007), available at www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of962.pdf. The other factors that the responding companies said motivated compliance were, in order: (2) disqualification of directors; (3) adverse publicity; (4) fines; and (5) private damages actions.

³⁷ *Id.*

Intuitively, it should not be surprising that prison is a strong deterrent to people who are in a position to form a cartel. As Arthur Liman wrote in a frequently quoted passage, "To the businessman . . . prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations."³⁸ US officials confirm that their enforcement experience is in line with Liman's insight. They cite instances in which their investigations have revealed that the threat of imprisonment has deterred global cartels from expanding to the US, even though the individual cartel members already operated there.³⁹

There are additional reasons for using imprisonment as a sanction for price fixing. One, discussed earlier, is that effective deterrence via corporate sanctions alone might require impossibly high fines. The threat of prison helps to shrink the deterrence deficit left by sub-optimal corporate fines. Another advantage is that fining corporations does not necessarily ensure that responsible individuals will have proper incentives to comply with competition laws. It is consumers and shareholders, not abstract "corporations," who are hurt most by corporate sanctions. But it is the officers and directors who violated the law or might have prevented the violation. Therefore it is the officers and directors who should typically feel the heat of deterrence, and imprisonment definitely provides that heat.⁴⁰

It is interesting, by the way, to contrast that view with one expressed by the Deputy Director General for Antitrust of DG COMP, who said in a recent speech that "[i]t is the companies that pocket the extra profits resulting from the cartel and they must therefore bear responsibility for their actions. We believe that such sanctions are able to ensure a high degree of deterrence and that criminal sanctions are not warranted in our enforcement system."⁴¹

A third advantage is that the possibility of going to prison motivates both individuals and corporations to use leniency programmes and co-operate with investigators, at least with respect to leniency programmes that offer immunity from jail sentences. Knowing that, in order to avoid prison, their own employees may expose a company's involvement in cartel activity, the company's board and executives are more likely to apply for corporate leniency when they discover the cartel activity, and to avoid cartel schemes in the first place whenever possible.⁴² On the other hand, leniency programmes that only reduce fines could be harmed by criminalisation because the threat of prison creates a wedge between individual and corporate interests. This possibility could arise, for example, with respect to leniency programmes in jurisdictions that do not impose prison sentences for competition law violations. Executives participating in an international cartel might wish to take advantage of that programme for purposes of reducing fines, but opt not to do so because of the concern that competition agencies in other jurisdictions might then impose prison sentences on them.

Finally, making a violation punishable by a prison sentence communicates a message that the activity is not just undesirable, but immoral. That will matter to executives and managers who feel some moral

³⁸ Arthur Liman, "The Paper Label Sentences: Critique," 86 Yale Law Journal 619, 630-31 (1977).

³⁹ Scott Hammond, "Cornerstones of an Effective Leniency Program," Speech before the ICN Workshop on Leniency Programs (Sydney, 22-23 November 2004).

⁴⁰ Ginsburg & Wright, *supra* note 2, at 18; Wils, *supra* note 22, at C.1.2.

⁴¹ Cecilio Madero Villarejo, "Introductory Remarks," Speech before IBA/KBA Competition Law Conference (Seoul, 28 April 2011).

⁴² Hammond, *supra* note 39.

responsibility, or at any rate a moral responsibility to follow the law. Wils notes that psychological research suggests that moral commitment is an important factor in motivating people to comply with laws.⁴³

In spite of all those strengths and the incorporation of prison as a sanction for cartel conduct in 17 OECD countries, jail sentences are rarely imposed on price fixers outside Canada and the US. Clearly, some enforcers and courts are not entirely persuaded by the arguments for imprisonment, and there are detractors among the commentators, as well. For example, just as they doubt the effectiveness of higher and higher fines, Ginsburg and Wright are sceptical about the deterrent effect that imprisonment has had so far:

There is no indication that the dramatic increase in both corporate fines and the average length of jail sentences has resulted in a significant decline in cartel activity. . . . While it is impossible to quantify what, if any, effect the increase in criminal antitrust sanctions has had upon the level of cartel activity, the available data on the duration of price-fixing conspiracies, on stock price movements in response to cartel-related indictments, and on recidivism among companies all suggest current penalties under-deter.⁴⁴

In a forthcoming article, Beaton-Wells and Fisse question the idea that imprisonment is a highly effective deterrent to cartel activity, labelling it under-scrutinised and unproven. They point out that in spite of record-level numbers of convictions and sentence lengths for cartel participants in the US, the available evidence shows that the number, size and harm to consumers of discovered cartels are all increasing.⁴⁵ They contend that the empirical work that has been done so far to analyze the impact of imprisonment on compliance actually provides little support for the idea that jail is a strong deterrent to cartel activity. Among other things, they quote a 2005 report by this Committee, which found that “there is no systematic empirical evidence available to prove the deterrent effects of criminal sanctions or, more importantly, to assess whether the marginal benefit of introducing sanctions against individuals . . . exceeds the additional costs that a system of criminal sanctions entails[.]”⁴⁶

Beaton-Wells and Fisse also assert that rising convictions and growing sentences do not necessarily show anything about effectiveness in achieving individual accountability. Those figures alone do not contain information about which individuals are prosecuted and which ones negotiate pleas. The authors point to Connor’s observation that the USDOJ “does not indict all guilty individual price fixers in a company convicted for price-fixing” and that “in a large proportion of cases, no individuals are charged.”⁴⁷ While it would probably be a poor use of resources to press charges against every underling involved in a

⁴³ Wils, *supra* note 22, at 31 & nn.137, 138 (citing Christopher Stone, “Sentencing the Corporation,” 71 *Boston University Law Review* 383, 389 (1991); Tom Tyler, *Why People Obey the Law* (1990)).

⁴⁴ Ginsburg & Wright, *supra* note 2, at 14; but see *id.* at 19 for a surprisingly contrary view by the same authors (“[t]here is ample evidence that jail sentences significantly deter individuals in general and business executives in particular.”) For more on recidivism, see *id.* at 15, Figure 7 (citing Connor & Helmers, *supra* note 3).

⁴⁵ Caron Beaton-Wells & Brent Fisse, “U.S. Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique,” 56(2) *Antitrust Bulletin* 277 (2011) (citing Connor, *supra* note 2 and Ginsburg & Wright, *supra* note 2).

⁴⁶ OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation 27* (2005), available at www.oecd.org/dataoecd/58/1/35863307.pdf.

⁴⁷ Connor, *supra* note 2, at 35, 112 n.137 (noting that while DOJ obtained guilty pleas from companies involved in 53 international cartels from 1990 to 2007, no individuals from about half of those cartels were indicted). As Beaton-Wells and Fisse also mention, though, the decision not to charge individuals may be made for a variety of valid reasons, such as that it is not always possible to determine who within a corporation should be held accountable and that the responsible individual(s) may not be located in or extraditable to the US.

cartel conspiracy, charging the ringleaders would probably be an efficient way to achieve deterrence. Yet “it is evident that the Division does not indict all the leaders either.”⁴⁸ DOJ officials have publicly stated, though, that the Division has been prosecuting more and more culpable executives from corporate defendants since 1999.⁴⁹

Beaton-Wells and Fisse add that an individual’s choice to take part in a cartel is likely to be influenced just as much, if not more, by dispositional, organisational, situational and cultural factors as it is by legal sanctions, including jail. That claim echoes points raised by Parker, who finds that the empirical literature on cartel enforcement shows that rational choice is influenced not only by formal legal sanctions, but by the confluence of many other factors such as normative views about the prohibition of cartel conduct and social pressures to engage (or not engage) in it.⁵⁰ For example, individuals may be told by a firm’s top executives to follow the law while their immediate superiors, the industry culture and the criteria for performance appraisals push them in a different direction. In that kind of an environment, people may feel just as much or more pressure from the other factors as they do from the threat of formal legal sanctions. That, in turn, can lead to situations in which the junior people blame the senior people and vice-versa when cartel activity is detected.⁵¹

Parker also attacks the methodologies underlying studies that have been used to support the criminalisation of competition law violations.⁵² For example, she commends the Deloitte study commissioned by the OFT as the best of the ones that survey business people about their perceptions of deterrence and their involvement in cartel behaviour. Nevertheless, she calls one of its results – that as many as 16 contemplated or actual cartels are abandoned or modified for every enforcement action – “nonsense” for a variety of reasons.⁵³ The primary one is that

*. . . ideally, law and enforcement activity should make cartel activity unthinkable. From a competition policy perspective, it is surely preferable that the company not think about it at all, rather than propose illegal activity and then abandon it. But the more cartel behaviours are proposed, the more successful the OFT’s deterrence appears to be on this measure. If the OFT succeeds in making cartel activity mostly unthinkable (and therefore not even proposed), it appears less successful.*⁵⁴

⁴⁸ Connor, supra note 2, at 35.

⁴⁹ Hammond, supra note 1, at 9-10.

⁵⁰ Christine Parker, “Criminalisation and Compliance: The Gap Between Rhetoric and Reality,” Presentation at University of Oxford Centre for Competition Law and Policy on Criminalising Cartels (12 November 2009); Christine Parker, “Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality,” in *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos & Ioannis Kokkoris, eds. 2010) 239; see also Maurice Stucke, “Am I a Price Fixer? A Behavioural Economics Analysis of Cartels,” in *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos & Ioannis Kokkoris, eds. 2010) 272, 279 (describing situational factors that may lead people to engage in cartel conduct).

⁵¹ Parker (presentation), supra note 50, at 4.

⁵² Parker (chapter), supra note 50.

⁵³ *Id.* at 243-44. The reasons “include the inherent unreliability of asking people to report on their own firms’ ‘existing or proposed’ illegal activity and then generalising the results from those who answered to all businesses; the questionable validity of trying to define to what extent ‘proposed’ cartel activity had to be ‘agreed’ before it was deterred; and seeking to draw conclusions about effectiveness from the number of contemplated cartel activities not undertaken at one point in time without comparing it with a benchmark at another time when there was less enforcement activity by the OFT.”

⁵⁴ *Id.* at 244.

Likewise, the choice to comply or not comply with a law is influenced by the degree to which society accepts the idea that the illegal behaviour should be illegal and, if it is punishable with criminal sanctions, that it should be treated as a crime. There needs to be a general consensus, in other words, that the conduct is very harmful and that criminal sanctions are appropriate. In this regard, competition authorities – especially those in jurisdictions that have just recently introduced criminal penalties for competition violations – may have some advocacy work to do.⁵⁵ But authorities in jurisdictions where cartel conduct has been criminalised for years can make some improvements, too. A review of hundreds of U.S. newspapers, magazines and trade publications over the period 1990-2009 by Daniel Sokol shows that accounting fraud cases receive far more attention in the press than cartel cases do, despite the fact that global cartel overcharges in some cases have been more significant than the biggest accounting frauds of the last decade.⁵⁶ Similarly, Florian Wagner-von Papp recently criticized the lack of publicity in Germany of the Bundeskartellamt’s criminal convictions.⁵⁷ The implications are that cartels do not matter much outside the insular world of antitrust practitioners and companies that have already been caught, and that competition authorities have been inattentive in allowing that to happen.

The good news is that when it comes to cartels, at least, the message can be both simple and powerful. Werden succinctly states the case:

*Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition. Cartel activity is never efficient or otherwise socially desirable; cartel participants can never gain more than the public loses.*⁵⁸

Should imprisonment be introduced in more jurisdictions as a punishment for participation in cartels? Should sentences be lengthened in those jurisdictions that already imprison price fixers?

3.1.3 Leniency programmes

Leniency programmes (LPs) are widespread and well known to the competition community. They raise cartel detection rates by offering corporate and/or individual applicants reduced penalties in exchange for disclosing their participation in cartels and otherwise co-operating with authorities. The mere existence of these programmes can have a destabilising effect on cartels because participants know that their co-conspirators may turn them in at any moment and that they have powerful incentives to do so, as the first participants to apply for leniency are typically granted greater reductions than subsequent applicants.

⁵⁵ See Vasiliki Brisimi & Maria Ioannidou, “Criminalizing Cartels in Greece: A Tale of Hasty Developments and Shaky Grounds,” 34 *World Competition* 157 (2011) (noting that although Greece’s Competition Act was amended in 2009 to include imprisonment as a sanction for horizontal agreements, there have not been any cases yet in which criminal sanctions were imposed under the law, and suggesting that one reason for this outcome is that cartel conduct is still not perceived as a real crime in Greece, so there is no strong sense of moral condemnation toward them).

⁵⁶ D. Daniel Sokol, “Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement,” 78 *Antitrust Law Journal* __ (2012) (forthcoming).

⁵⁷ Florian Wagner-von Papp, “Criminal Antitrust Law Enforcement in Germany,” in *Criminalising Cartels* (Caron Beaton-Wells & Ariel Ezrachi, eds. 2011).

⁵⁸ Werden, *supra* note 26, at 23. For perspectives on how enforcement programmes can be designed to win acceptance of the idea of treating certain anticompetitive conduct as criminal violations, see William Kovacic, “Criminal Enforcement Norms in Competition Policy: Insights from US Experience,” in *Criminalising Cartels* (Caron Beaton-Wells & Ariel Ezrachi, eds. 2011) 45.

The adoption of LPs around the world has been called the “single most significant development in cartel enforcement.”⁵⁹ They have the very substantial advantage of motivating cartel participants to come forward with information that is otherwise usually difficult or impossible for competition authorities to obtain. Because cartels are necessarily secretive, the participants usually hold the best information about their illegal activities. In fact, they may be the only parties that have the information needed by competition authorities to secure a conviction. Leniency may be the only way to get that information in some cases. In addition, leniency frees up agency resources so that they can be used to pursue other matters. On the negative side, because LPs remove some or all of the punishment for committing competition law violations, they clash with the objective of persuading society that those violations are morally wrong.

Of course, LPs are effective only when they are part of a well designed enforcement regime. The system must, first and foremost, have real teeth. If it does not, then potential offenders will not fear the consequences of unlawful behaviour very much, so they will lack an incentive to come forward and apply for leniency. They must also perceive a substantial risk of being caught and convicted. In addition, the laws and likely outcomes must be transparent and consistent so that potential offenders can reliably predict and compare what will happen to them if they apply for leniency and what will happen to them if they do not.⁶⁰

In terms of the number of applicants, LPs have been very successful across jurisdictions. “There is no question that there have been large numbers of leniency applications in response to the [USDOJ Antitrust] Division’s Corporate Leniency Program after 1993, to the EU’s revised leniency policy after 2002, and adoption of similar programs in a dozen or more additional antitrust authorities.”⁶¹ Furthermore, both theoretical models and early empirical evidence indicated that leniency programs raise deterrence in the long run.

Motta and Polo, however, have shown that LPs might actually *encourage* collusion under some circumstances.⁶² In essence, their point is that there is a trade-off between leniency and fines because agencies offer reductions in fines as an enticement for companies to disclose the existence of a cartel. If the reductions are too high and/or the information disclosed is only marginally helpful to the agency, then the increase in the probability of detection due to the LP might be outweighed by the lower deterrent effect of the reduced fines.

Such concerns can be overstated, though. Connor, for example, has written that in the US “[a]mnesty recipients pay no fines, and since 2004 are liable for only single rather than treble private damages. The routine approval of qualified amnesty applicants means that the total amount of fines and private monetary penalties collected for price fixing is reduced compared to a no-leniency regime.”⁶³ That statement ignores the fact that LPs also raise detection rates and expose other companies. Thus, while it is true that LPs reduce the financial burden on applicants if one takes for granted that they would have been caught, it is also true that many of those price-fixers would not have been caught but for the LP, that co-conspirators often receive harsher penalties than the first applicant that exposes a given cartel, and that the co-conspirators, too, might not have been caught but for the LP.

⁵⁹ Hammond, *supra* note 1, at 1.

⁶⁰ *Id.* at 3-4.

⁶¹ Connor, *supra* note 2, at 7.

⁶² Massimo Motta & Michele Polo, “Leniency Programs and Cartel Prosecution,” 21 *International Journal of Industrial Organization* 347 (2003).

⁶³ Connor, *supra* note 2, at 42.

Similarly, Veljanovski laments that 90 percent of 39 EU cartel decisions that resulted in fines between 1998 and 2004 involved some type of leniency: "The Commission's leniency program is essentially in the business of 'buying' convictions by discounting penalties[.]"⁶⁴ This is presented as a defect, or perhaps as an injustice. But that is what all LPs do, and that is why they are called "leniency" programmes. It is what LPs *ought* to do because they have to do it to be effective. The real issue is not whether convictions should be bought, but whether the price being paid is too high.

Then again, there is another genuine issue, which is how effective LPs are at deterring cartels. It is difficult to know the answer because no one knows how many undetected cartels there are, so we cannot know how effective LPs have been at reducing the number of cartels. But as Stucke points out, there is another way to approach the problem, and it does not suggest that LPs have been very useful. If LPs have significantly increased the probability of detection, then the average duration of cartels should have decreased. That has not occurred, though. The average duration of prosecuted cartels in the US does not seem to have changed much during the past century, which is especially interesting because cartels were not always illegal during that time.⁶⁵

What solid evidence do we have that LPs are working? What is the best evidence on each side? If they are useful, then should the benefits that attract leniency applicants be enhanced? If so, why? And how?

3.2 Other approaches and considerations

3.2.1 Private actions

Private actions for damages arising from competition law violations augment the deterrent effect of fines imposed by enforcement agencies. They also put money back in the actual victims' pockets, rather than in the public treasury. In addition, private actions may raise the probability of detection. In fact, in some cases private enforcement may be superior to public enforcement in terms of efficiency, such as when private plaintiffs have access to more or higher quality information.⁶⁶ However, the deterrent effect of private actions is limited by the same factors that apply to high fines imposed as a result of public enforcement actions.

While it is possible to bring private competition law actions in several jurisdictions, this form of deterrence is by far most prevalent in Canada and the US, where its financial impact on defendants exceeds that of the fines imposed via public enforcement. A 2008 study of 40 of the largest successful private antitrust actions in the US since 1990 found that when only the cases that also resulted in a criminal fine or prison sentence were counted, they netted a total of between US\$6.2 and 7.5 billion in damages. In contrast, the total of *all* criminal antitrust fines imposed in cases brought by the USDOJ since 1990 was US\$4.2 billion.⁶⁷

⁶⁴ Cento Veljanovski, "Penalties for Price Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission," 27 *European Competition Law Review* 510, 511 (2006).

⁶⁵ Stucke, *supra* note 50, at 268.

⁶⁶ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, *supra* note 11, at 27 (citing Mitchell Polinsky & Steven Shavell, "The Economic Theory of Public Enforcement of Law," 38 *Journal of Economic Literature* 45 (2000)).

⁶⁷ Robert Lande & Joshua Davis, "Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases," 42 *University of San Francisco Law Review* 879 (2008).

If private actions become more common in a given jurisdiction, should the competition authority lower its detection rate and/or fine levels? Do private actions undermine leniency programmes?

3.2.2 *Plea bargaining/settlement*

Sometimes competition agencies will offer reduced penalties to offenders in exchange for their agreement not to contest the charges that have been brought. As with LPs, there is an important trade-off. While settlements help authorities to be more efficient and raise their conviction rates, they also reduce the severity of the punishment. If the settlement terms are too gentle, then there will not be an adequate deterrent effect left. Furthermore, settlements can harm the effectiveness of LPs if the settlement terms are too generous relative to leniency because companies that would otherwise have applied for leniency might instead wait to see if they get caught. If they do, they will negotiate a settlement. If they do not get caught, though, they would continue to behave illegally.

90 percent of US antitrust cases are settled.⁶⁸ Connor finds that troubling, particularly because in the cartel area there have been almost no prosecutions of price fixers at trial in the past 18 years. He worries that corporations will begin to view the possibility of being brought to court by DOJ as an empty threat, compromising its ability to impose meaningful fines. He would rather see DOJ make a point of bringing one or two companies to trial per year.⁶⁹

Given that they save agency resources and secure convictions, can settlements nevertheless be used too often? If so, how often is too often? If an example needs to be set by bringing defendants to trial from time to time, how should agencies determine which cases to use for that purpose?

3.2.3 *Reputational effect of prosecution*

Both corporations and individuals may suffer reputational damage if they are prosecuted for competition law violations. That could reduce the levels of fines and prison sentences needed for effective deterrence. The next section on debarment describes one way to use reputational effects as a deterrent. Another way to do it is simply to publicise findings of infringements. Most competition agencies issue a press release when a defendant is found to have violated the law. Brazil's CADE can go farther, though, by requiring competition law violators to publish (at their own expense) an acknowledgement of their infringement in newspapers.⁷⁰ Similarly, France's Conseil de la Concurrence can order violators to pay for the publication of an infringement announcement in newspapers, or to put an announcement about the infringement in a company's own annual report.⁷¹

To the extent that the fear of reputational damage (at either the individual or corporate level) has a strong influence on behaviour, it raises the possibility that being prosecuted is more important than the severity of fines or imprisonment, at least to some potential offenders. In fact, Parker states that “[e]mpirical deterrence research persistently finds that the factors that make the most difference to compliance behaviour are the perceived likelihood of detection and enforcement, rather than the objective severity and subjective fearsomeness of the sanctions imposed.”⁷² If the studies she cites are correct, they

⁶⁸ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, supra note 11, at 11.

⁶⁹ Connor, supra note 2, at 76-77.

⁷⁰ Law No. 8.8884 (1994), as amended in 2000 and 2007 (cited in George Lusty, “Refining the Anti-cartel Tool Kit: Complements to Corporate Fines”, 9 *Competition Law Journal* 338, 345 (2010)).

⁷¹ Article L464-2 I, para. 5 of the Commercial Code (cited in Lusty, supra note 70, at 346).

⁷² Parker (chapter), supra note 50, at 250 (citing John Braithwaite & Toni Makkai, “Testing an Expected Utility Model of Corporate Deterrence,” 25 *Law & Society Review* 7, 8-9 (1991); Raymond Paternoster &

indicate that Becker was wrong about the probability of detection and the magnitude of the sanctions being equally important. Accordingly, they also suggest that competition agencies would deter more violations by raising the probability of detection than by only continuing to amplify the legal consequences of detection.

Should detection efforts be stepped up, so that the likelihood of simply getting caught (regardless of the penalty imposed) increases? Are potential offenders deterred more when competition authorities catch a small number of prominent defendants and assess very large average penalties, or when authorities catch a large number of defendants and assess smaller average penalties? In what other ways can courts and competition authorities use companies' and individuals' desire to maintain good reputations as a means of deterrence?

3.2.4 Debarment/disqualification

One approach that capitalises on reputational effects is debarment, also known as disqualification. Like imprisonment, debarment is a sanction aimed at individuals. Rather than taking away all of the defendant's liberties, though, debarment only removes the offender from his or her position as a company's director, officer, or manager and prevents him or her from serving in a similar position in any company for some defined period. Both prison and debarment tarnish the defendant's reputation, prevent him or her from committing a similar offence again, and at least when these sanctions are imposed on directors or executives, all but guarantee that the way a company does business will change. That is something that fines do not necessarily do. But debarment is much less expensive to society than incarceration.

Ginsburg and Wright argue that continually increasing corporate fines to solve the under-deterrence problem is unwise and that in any case, neither fines nor prison sentences seem to be adequate no matter how severe they are. Consumers and shareholders suffer more than the corporation itself does when corporate sanctions are imposed. It would be more effective to punish the officers and directors, the authors reason.⁷³

With regard to imprisonment, it is an appropriate measure for all types of actual perpetrators, in Ginsburg's and Wright's view. But debarment is appropriate and effective as a complementary sanction not only for officers and directors who were direct participants in cartels, but also as a stand-alone sanction for officers and directors who negligently failed to prevent such participation by employees. Debarment, they argue, not only imposes an opportunity cost (in the form of lost wages and bonuses), but it raises the likelihood and severity of the reputational effect. To the extent that debarment augments deterrence, it also shortens the length of both the optimal prison sentence and the optimal personal fine, thereby reducing costs to society. What is more, debarment – like imprisonment – protects against recidivism by keeping offenders out of positions from which they could re-offend.⁷⁴ Thus, while the authors would like to see more severe individual sanctions, their preferred approach is to incarcerate and debar individuals who are directly involved in price fixing while debarring negligent corporate officers whose conduct does not warrant imprisonment.⁷⁵

Debarment does seem to be a potent sanction. A survey of UK corporations commissioned by the OFT in 2010 found that debarment is the second most powerful deterrent (behind criminal penalties) of

Leeann Iovanni, "The Deterrent Effect of Perceived Severity: A Reexamination," 64 *Social Forces* 751 (1986).

⁷³ Ginsburg & Wright, *supra* note 2, at 18.

⁷⁴ *Id.* at 19.

⁷⁵ *Id.* at 6.

competition law violations.⁷⁶ In the UK, regulators may seek court orders debaring directors from serving again as directors or participating in the management of any UK company for up to 15 years.⁷⁷

Debarment is also a possible penalty for price-fixers in Australia, Canada, Slovenia, Spain and Sweden. In the US, there is some precedent for the use of debarment, but not directly in the antitrust context. The FTC has signed consent decrees that have the same effect as debarments, but only in consumer protection matters. The financial regulator, the Securities and Exchange Commission, has also signed consent decrees that prevent securities law violators from acting as officers or directors of public companies.

3.2.5 *Bounty systems*

Behaviour that is beneficial for executives might not be beneficial for other staff in a firm, and anyone in a firm could have ethical qualms about anticompetitive business conduct. Bounty systems aim to leverage these possibilities into better compliance by giving uneasy potential informants financial incentives to become whistleblowers.

Bounty systems have some similarity to leniency programmes for individuals. In both instances, the strategy works by driving or expanding a wedge between the individual's incentives and the employer's incentives. Whereas LPs for individuals use reduced penalties as an enticement, though, bounty systems actually pay reward money to informants.

At least two competition authorities have bounty systems in place. Korea's Fair Trade Commission implemented a bounty system in 2006 that rewards informants with a modest share of fines imposed against exposed cartels. The UK's OFT has had a program since 2008 that awards up to £100,000 to individuals who provide tips about cartels.

Where are non-compliance risks generally largest? Specifically, which sectors, which types of firms within sectors, and which types of employees are causing the greatest problems? What are the most effective compliance tools currently used by competition authorities? What potentially helpful strategies have not been tried yet? Should the private sector be recruited into the fight against anticompetitive conduct? If so, how should that be done? Behaviour that is beneficial for executives might not be beneficial for other staff in the firm. How might that fact be leveraged into better compliance?

4. **Corporate competition compliance programmes**

There is no international consensus on whether competition law violators that have corporate antitrust compliance programmes (CPs) should receive lighter (or heavier) sanctions. Some jurisdictions encourage companies to implement bona fide CPs by granting a reduction in fines when there is a violation despite the programme. In the UK, for example, the OFT may reduce a defendant's fine by up to ten percent if it has a CP.⁷⁸ In France, the *Autorité de la Concurrence* gives credit to companies who demonstrate the

⁷⁶ UK Office of Fair Trading, *The Deterrent Effect of Competition Enforcement by the OFT*, OFT 962 at paras. 5.55 – 5.59 (November 2007).

⁷⁷ See *Company Directors Disqualification Act 1986*; Article 204, *Enterprise Act 2002*.

⁷⁸ Office of Fair Trading, *Drivers of Compliance and Non-Compliance with Competition Law*, OFT 1227 (2010) at p. 8. The UK's Competition Appeal Tribunal recently issued a judgment stating that a defendant should be "given credit for its early and extensive post-infringement compliance programme." *Kier Group plc v Office of Fair Trading* [2011] CAT 3. The Tribunal said in another recent decision, though, that undertakings should be encouraged to adopt strong compliance measures before any infringement occurs. *Hays PLC v Office of Fair Trading* [2011] CAT 8.

existence of a genuine CP.⁷⁹ Some authorities are neutral toward CPs, neither awarding reductions nor enhancing fines if a defendant has a CP in place.⁸⁰ Finally, some agencies brandish the possibility of using the existence of a CP as a reason to *enhance* fines in the event of a competition law violation. The OFT, for instance, is generally opposed to using the existence of a CP as an aggravating factor when calculating fines. Nevertheless, it reserves the right to increase a company's fine in exceptional circumstances, such as if a CP was used to conceal an infringement or to mislead the OFT during an investigation.⁸¹

Those who say CPs should be ignored tend to ask why any credit should be given for a programme that did not work. They also argue that giving a discount for CPs will actually encourage cartels by making them cheaper. Those in favour of awarding credit for CPs usually reply that if the programme is genuine, one or two bad apples should not represent the whole barrel and the programme might actually be doing a lot of good by preventing other cartels from forming. Proponents also tend to argue that the way to handle companies who would view the discounts as a way to make their cartel activity cheaper is to penalise them for having sham programmes.

But, say those who are opposed, any good that the CP does is its own reward. After all, it keeps the company out of greater trouble and thereby saves it money by avoiding fines.⁸² So why is there any need to enhance those savings by piling on reductions when cartels are formed in spite of the CP? The savings already generated by the CP should be adequate to create and sustain the incentive to have a good CP. Yes, proponents might respond, but it is not only the company itself that benefits when it stays out of cartel trouble. Consumers benefit, too, as do the competition authority and the courts, which will save resources and be able to devote them to other matters. To reflect the true level of the benefits from CPs, then, a reduction should be granted for having a good one.

Wils acknowledges that effective CPs can help to prevent violations and, failing that, to detect them. Nevertheless, he is not persuaded that agencies should reduce fines just because a defendant has a genuine CP in place. If fines are set at a level that deters adequately in the first place, he reasons, then companies should already have all the incentive they need to prevent violations.⁸³ Yet Wils himself argues elsewhere that fines would have to be 150 percent of turnover in the relevant market(s) to achieve adequate cartel deterrence – a level that he describes as “impossibly high.”⁸⁴ Although the shortfall in deterrence might be made up by the threat of imprisonment, that is not a possibility in many jurisdictions. If Wils' estimate is correct, therefore, companies do not have all the incentives they need to prevent violations, at least in some settings. Then again, if the problem is that fines are already too low, then the best solution probably is not to make them even lower.

⁷⁹ Other competition authorities that give credit for CPs include those in Israel, Canada, and India.

⁸⁰ The European Commission is one such authority. See, e.g. Joaquín Almunia, “Compliance and Competition Policy,” Speech before *BusinessEurope* and the US Chamber of Commerce (Brussels, 25 October 2010) (“[W]hy should I reward a compliance programme that has failed?”); *Electrical and Mechanical Carbon and Graphite Products*, Case COMP/E-23/38.359 (3 December 2003) (“It is not appropriate to take the existence of a compliance programme into account as an attenuating circumstance for a cartel infringement, whether committed before or after the introduction of such a programme.”); see also Judgments of the Court of First Instance, e.g. *ABB Asea Brown Boveri v Commission*, Case T-31/99 [2002] ECR 11-1884, (20 March 2002) at para. 221.

⁸¹ Office of Fair Trading, *Drivers of Compliance and Non-Compliance with Competition Law*, supra note 78, at 80.

⁸² See *id.* at 8 (“The key reward of an effective compliance programme is the avoidance of an infringement decision in the first place.”)

⁸³ Wouter Wils, “Optimal Antitrust Fines: Theory and Practice,” 29 *World Competition* 183 (2006).

⁸⁴ Wils, supra note 22, at C.1.1.

Connor points out a different reason for not granting reductions to violators that have CPs: truly effective CPs lead to self-reporting, and most self-reporting leads to a grant of amnesty, which nullifies the fine.⁸⁵ But Connor would have to acknowledge that even the very best CPs probably cannot catch all illegal conduct 100 percent of the time, so there cannot be self-reporting in every case.

Parker offers yet another reason, which is that it is not clear that CPs necessarily do anything to prevent cartels. She reasons that most cartelists already know that what they are doing is illegal. In fact, they go to a lot of trouble to hide it. Furthermore, most of them are senior managers.⁸⁶

Ginsburg and Wright, however, not only agree with the idea of reducing corporate fines for violators that have reasonably good CPs; they believe that corporate fines should be reduced to *zero* in such cases: "If a company has made a reasonable effort to comply with the antitrust law, and an employee nevertheless engages in price-fixing, then it makes no sense to fine the corporation, or to sanction the directors or officers."⁸⁷

In any case, if a reduction is going to be awarded, something more than simply creating a CP in good faith and then ignoring it should be required. Otherwise, companies will have incentives merely to implement low-cost, low-maintenance, superficial CPs that do not actually contribute much to prevention. In fact, one can envision how such laissez-faire oversight might lead to a determination of negligence, with resulting penalties on individuals, despite the existence of a nominal programme. The Canadian Competition Bureau deals with this problem by requiring defendants to demonstrate that their CP was reasonably designed, implemented and enforced in the circumstances of the case, before granting any reduction in recognition of the CP.⁸⁸

The World Bank, in its leniency programme for corruption, requires those admitted to the programme to implement effective compliance and ethics programs.⁸⁹ Similarly, the Fraud Section of the US Department of Justice's Criminal Division has required companies that settled cases to adopt compliance programmes.⁹⁰ The Competition Commission of South Africa requires firms with which it reaches a settlement to commit to implementing a competition compliance program. In court proceedings, the Australian Competition and Consumer Commission regularly applies for orders that require a company to implement a CP.

⁸⁵ Connor, *supra* note 2, at 55 n.162.

⁸⁶ Parker (presentation), *supra* note 50, at 4 (citing Michelle Berzins & Francesco Sofo, "The Inability of Compliance Strategies to Prevent Collusive Conduct," 8 *Corporate Governance* 669 (2008) (finding that cartel participants in 71% of cases knew their conduct was illegal and that senior management were involved in it in 80% of cases).

⁸⁷ Ginsburg & Wright, *supra* note 2, at 18. The passage continues: "On the other hand, if the directors or officers were negligent in performing their duty to supervise the employee who actually fixed prices, then they should be held accountable along with the perpetrator." *Id.*

⁸⁸ Canadian Competition Bureau, Bulletin: Corporate Compliance Programs (2010), available at [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf).

⁸⁹ World Bank Voluntary Disclosure Program Guidelines for Participants, available at: http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf

⁹⁰ See US Department of Justice, "Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties," (4 November 2010) (press release regarding settlements with five companies, in which the DOJ stated that "each of these companies is required to implement and adhere to a set of enhanced corporate compliance and reporting obligations"), available at www.justice.gov/opa/pr/2010/November/10-crm-1251.html

Under the US federal criminal sentencing guidelines, which are no longer mandatory but rather are advisory,⁹¹ the existence or lack of an effective CP can change the amount of the applicable criminal fine for federal corporate criminal convictions, including antitrust convictions. Furthermore, the guidelines recommend that maintaining an effective CP should ordinarily be a condition for granting probation to corporate defendants.⁹² The Guidelines Manual helpfully specifies that organisations with “effective” CPs exercise due diligence to prevent and detect criminal conduct, and otherwise promote an organisational culture that encourages ethical conduct and a commitment to compliance. Due diligence means that the directors must be knowledgeable about the content and operation of the CP and exercise reasonable supervision over its implementation and effectiveness. The organisation must also take reasonable steps to ensure that the CP is followed through, e.g., monitoring and audits, periodic evaluations of the program, mechanisms that allow for anonymous and/or confidential reporting of violations, and reasonable steps when criminal conduct is discovered.

Important elements of good competition CPs can easily be found in a variety of publications.⁹³ There are many such elements, but some of the main ones include:

- *Risk assessment, prioritisation, and abatement* – The company should regularly identify and assess its compliance risks, being particularly certain to re-evaluate them when entering new markets or making new hires in key positions. Specific risks that may arise in each business unit should be considered. The idea is to identify who the violation-prone groups are, given the nature of their operations and/or personalities. For cartel violations, these groups tend to include senior executives, persons who make pricing or marketing decisions, and those who attend trade association meetings. Risks can then be prioritised and steps can be taken to mitigate them via training, monitoring, seeking expert legal advice, and setting up reward/punishment incentives for personnel.
- *Commitment* – To be effective, CPs must have the full, visible support of a company’s Board and CEO, and it must be given adequate resources, including (in larger firms) a dedicated and empowered compliance officer. It should be made clear that violations, especially price fixing, will not be tolerated, i.e. that the company will not defend or support violators and that they will lose their jobs.
- *Screening/monitoring* – Compliance should be monitored, evaluated and reported.
- *Documentation* – Compliance efforts should be well documented so that they can be not only proven in the event of a breach, but studied with regard to what went wrong and then improved.

⁹¹ United States v. Booker, 543 U.S. 220 (2005).

⁹² US Federal Sentencing Guidelines Manual (2009) at s. 8B2.1, available at www.ussc.gov/2009guid/TABCON09.htm. For more information on the EU’s, US’s, Canada’s and Australia’s policies toward the treatment of CPs in the competition context, see Office of Fair Trading, Drivers of Compliance and Non-Compliance with Competition Law, supra note 78, at 19-24.

⁹³ See, e.g. Office of Fair Trading, Drivers of Compliance and Non-Compliance with Competition Law, supra note 78; Office of Fair Trading, How Your Business Can Achieve Compliance, OFT424 (2005); Australian Competition and Consumer Commission, Corporate Trade Practices Compliance Programs (2005); Canadian Competition Bureau, Bulletin: Corporate Compliance Programs (2010); Kai Hüschelrath, “Competition Law Compliance Programmes: Motivation, Design and Implementation,” 9 Competition Law Journal 481 (2010). Cf. OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance (18 February 2010), available at www.oecd.org/dataoecd/11/40/44176910.pdf (setting out desirable elements of a CP in the corruption/bribery context).

- *Continuous improvement* – The company should periodically update its CP and ensure that it remains well-suited to the company's actual activities.

In sum, genuine CPs are taken seriously at every level of the corporation, and they involve regular training, audits, screening, and updates. The details are critical for all of those features. For instance, what kind of audits should be required? Should they be surprise audits or can they be pre-announced? Doing a surprise, full-scale, simulated dawn raid and/or investigation with deep document searches by external counsel would probably be not only excessive, but prohibitively expensive for most businesses. On the other hand, it might be fair to expect some incidence of surprise inspections, perhaps of a manageable number of business units within the company, selected based on their risk profiles.

It has to be noted that abuse of dominance and monopolisation cases are typically much more complex than cartel cases, requiring deep inquiries into the facts and economic effects. Unilateral conduct cases are difficult even for antitrust practitioners (which is one reason why criminal penalties are not imposed for unilateral conduct violations); trying to train laymen on this area of the law may be a fool's errand, as the target audience may simply ignore the message. Worse still, the audience may misunderstand the message. This area of competition policy therefore does not lend itself so well to CPs, in comparison to anti-cartel provisions. Companies that are or may soon become dominant should probably seek expert legal advice regarding new strategic conduct, rather than relying on a CP to avoid trouble.

Should competition agencies treat the fact that a competition law violator has a competition CP as an aggravating, mitigating, or neutral factor? Under what criteria should CPs be assessed? In particular, how can competition authorities distinguish sham programmes from genuine ones? Do approaches that require the implementation of CPs, such as the World Bank's and the USDOJ's (with respect to fraud) have a place in competition law enforcement?

DOCUMENT DE RÉFLEXION

*Par le Secrétariat**

1. Introduction

Comme le faisait récemment remarquer un haut responsable de l'application du droit de la concurrence, « on assiste depuis une vingtaine d'années à la multiplication de programmes de clémence efficaces, à un alourdissement des sanctions en cas d'entente et à une tendance croissante, au niveau international, à engager des actions pénales contre les personnes physiques »¹. Les statistiques de certaines des économies les plus importantes de l'OCDE révèlent, sur les 20 dernières années, une progression spectaculaire des sanctions pécuniaires imposées aux personnes morales et (dans certains pays) aux personnes physiques reconnues coupables d'entente. Simultanément, les peines de prison à l'encontre des personnes ayant participé à des ententes se sont faites plus fréquentes et plus lourdes aux États-Unis, tandis que d'autres pays ont adopté à leur tour des programmes de clémence et attribué la qualification pénale aux ententes. Ces pratiques demeurent toutefois un problème important, de même que la récidive². Entre 1990 et 2005, 174 entreprises ont enfreint au moins deux fois la législation interdisant les ententes illégales sur les prix et certaines ont récidivé jusqu'à 26 fois (en ne comptant que les infractions qui ont été découvertes)³.

Ces évolutions soulèvent des questions préoccupantes. Les tribunaux et les autorités de la concurrence adressent depuis des années des signaux de plus en plus forts à ceux qui seraient tentés de transgresser la loi. Pourtant, ce message est-il reçu ? S'il l'est, a-t-il un effet ?

* Ce rapport a été rédigé par Jeremy West, Administrateur principal à la division de la concurrence de l'OCDE.

¹ Scott Hammond, « The Evolution of Criminal Antitrust Enforcement over the Last Two Decades », discours prononcé devant le National Institute on White Collar Crime (le 25 février 2010), p. 1.

² Douglas Ginsburg et Joshua Wright, « Antitrust Sanctions, » 6 Competition Policy International 3, 4 (2010) ; voir également John Connor, « The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals » American Antitrust Institute Working Paper No 08-02 (juin 2008), p. 9 (« le nombre des ententes découvertes chaque année continue d'augmenter, de même que le nombre d'entreprises coupables de récidive en matière d'ententes illégales sur les prix »). Voir toutefois les commentaires du délégué américain figurant dans la synthèse des débats de cette table ronde (faisant valoir que les conclusions de Connor au sujet de la récidive sont inexactes car cet auteur ne fait pas de distinctions entre les infractions concomitantes et les infractions successives puisqu'il dénombre comme des récidives à la fois les cas où plusieurs filiales de grandes entreprises commettent simultanément des infractions et ceux où les infractions sont commises à plusieurs années d'intervalle).

³ John Connor et C. Gustav Helmers, Statistics on Modern Private International Cartels, 1990-2005, p. 38 (document de travail, janvier 2007), disponible en suivant le lien http://papers.ssrn.com/sol3/papers.cfm?abstract_id=%201103610 ; voir également Ron Knox, « Is DG Comp More Likely to Raise a Fine Than to Lower It? », Global Competition Review (21 novembre 2010) p.2, disponible en suivant le lien www.globalcompetitionreview.com/indepth/analysis/29350/is-dg-comp-likely-raise-fine-lower-it/ (concluant que la récidive est la principale raison de l'augmentation du montant, qui a été multiplié par 35, des amendes infligées par la Direction générale de la concurrence de la Commission européenne entre 2005 et 2010).

Les statistiques soulèvent en outre d'autres questions. Quels facteurs autres que les sanctions pécuniaires et les peines de prison sont-ils susceptibles de promouvoir la conformité au droit de la concurrence ? Quels facteurs entravent cette conformité ? Comment les autorités de la concurrence peuvent-elles la promouvoir ? Quelles stratégies qui n'auraient pas encore été employées valent-elle la peine d'être envisagées⁴ ? Quelles mesures les autorités de la concurrence devraient-elles prendre (le cas échéant) pour encourager et améliorer les programmes de conformité du secteur privé au droit de la concurrence ? Ce document fournit quelques informations générales utiles pour répondre à ces questions.

2. Les facteurs déterminant la conformité

Les ouvrages de référence sur la politique de la concurrence énumèrent certains des facteurs qui affectent le degré de conformité au droit de la concurrence. (Nous nous contenterons, dans cette partie, d'identifier l'éventail des facteurs susceptibles d'avoir une influence, sans nous poser la question de leur efficacité, sujet de la troisième partie du présent document). Voici donc une liste de ces facteurs, qui n'ont pas, pour la plupart, besoin d'être explicités :

2.1 Facteurs favorisant la conformité

- *Crainte de sanctions pécuniaires à l'encontre des personnes physiques ou morales.*
- *Crainte d'une incarcération.*
- *Crainte d'une atteinte à la réputation des personnes physiques ou morales.*
- *Sens moral.*
- *Formation satisfaisante.*
- *Incitations mises en place par les entreprises à l'intention de leurs collaborateurs. Les entreprises peuvent notamment motiver leurs collaborateurs en récompensant la conformité ou en sanctionnant la non-conformité, en instituant par exemple un lien avec les rémunérations variables et/ou les promotions ou en faisant savoir sans équivoque aux salariés que la direction prend au sérieux le respect du droit de la concurrence.*
- *Volonté d'éviter la déconcentration des collaborateurs causée par la réalisation d'une enquête ou une action en justice.*
- *Culture de la concurrence au sein de l'entreprise, du secteur et/ou du pays. Les entreprises ou les personnes intervenant dans des environnements où la concurrence est une valeur comprise et appréciée et où le droit de la concurrence est respecté sont davantage enclines à s'y conformer.*

Cette simple énumération montre que les facteurs favorisant la conformité peuvent ne pas être uniquement de l'ordre de la dissuasion.

2.2 Facteurs favorisant la non-conformité

- *Culture de non-conformité, ou en tout cas absence de culture de la conformité, au sein de l'entreprise, du secteur et/ou du pays.*

⁴ À noter que cette étude ne porte pas sur les problèmes liés aux fusions, en particulier parce que le Comité de la concurrence organise une table ronde distincte sur l'évaluation de l'impact des décisions de fusion lors de cette session (juin 2011). Le présent document s'intéresse plus spécialement à la conformité dans le cadre d'infractions commises hors du contexte des fusions, en particulier celles liées aux ententes, qui font partie des principales priorités de la plupart des autorités de la concurrence et qui font l'objet d'un éventail plus large de mesures dissuasives que les comportements unilatéraux délictueux.

- *Signaux contradictoires adressés par la direction de l'entreprise au sujet de la conformité.* Les dirigeants d'une entreprise pourront par exemple se déclarer favorables au respect du droit de la concurrence, tout en faisant comprendre, dans d'autres contextes, qu'ils ne se soucient pas de la façon dont les objectifs de chiffre d'affaires seront atteints, pourvu qu'ils le *soient*.
- *Conditions de marché facilitant la collusion ou les abus de position dominante.* Les conditions de marché qui facilitent la formation d'ententes sont bien connues. Elles se caractérisent notamment par le nombre réduit des intervenants, la transparence des prix, l'homogénéité des produits, la généralisation des échanges d'information entre concurrents et/ou la diffusion publique d'indications sur les niveaux de prix et/ou de production programmés. Les conditions qui favorisent les abus de position dominante varient en fonction du comportement à l'œuvre. Par exemple, les caractéristiques qui encouragent la pratique des prix d'éviction sont la présence d'un intervenant historique dominant détenant une part de marché très importante, une marge de manœuvre financière élevée, l'existence de surcapacités et une faible élasticité de la demande par rapport aux prix.
- *Perception d'un rapport coûts probables-avantages probables favorable à la non-conformité.*
- *Ignorance des conséquences juridiques probables de la non-conformité.*
- *Arrogance des dirigeants et/ou des contrevenants.* Lorsque des individus, dans l'entreprise, pensent être au-dessus des lois ou trop intelligents pour se faire attraper ou être condamnés, ils sont davantage susceptibles d'enfreindre la loi.
- *Insularité des grandes entreprises.* Pour les personnes qui y travaillent, les priorités internes des grandes entreprises ou les systèmes d'incitation en place peuvent avoir une incidence beaucoup plus grande sur leur comportement que la menace apparemment éloignée représentées par les règles extérieures.

Quels autres facteurs influencent la décision des entreprises de se conformer ou non au droit de la concurrence ?

3. Promouvoir l'amélioration de la conformité

L'interprétation de certaines données pourrait conduire à la conclusion que les outils et les stratégies actuellement utilisés par les autorités de la concurrence pour promouvoir la conformité ne fonctionnent pas aussi bien qu'il serait souhaitable, en tout cas en ce qui concerne les ententes injustifiables. Depuis une vingtaine d'années, le montant moyen des amendes imposées en cas d'entente a augmenté spectaculairement dans l'UE, aux États-Unis et dans d'autres juridictions ; davantage de pays de l'OCDE se sont dotés de la possibilité de prononcer des peines de prison à l'encontre des contrevenants ; aux États-Unis, le nombre et la durée des peines d'emprisonnement prononcées ont augmenté et les programmes de clémence se sont multipliés à travers le monde. Simultanément, « il apparaît que la fréquence, l'ampleur et le caractère préjudiciable des ententes recensées augmentent »⁵. On pourrait conclure à un manque d'efficacité des outils comme les amendes, l'incarcération et les programmes de clémence, car il semble qu'aujourd'hui le nombre d'ententes conclues est au moins égal à ce qu'il était auparavant. Si c'est le cas, les autorités doivent se demander pourquoi leurs méthodes ne fonctionnent pas mieux et commencer à utiliser de nouvelles approches.

⁵ Connor, p.1, supra note 2.

En revanche, on ne saurait conclure à l'inefficacité relative des outils actuels si le pourcentage d'infractions désormais détectées (peut-être en raison du développement des programmes de clémence) a augmenté, alors que le nombre total d'ententes (détectées ou non) a en fait diminué.

Dans un cas comme dans l'autre, les instances chargées d'appliquer la loi gagneront à poser des questions et à partager les réponses sur les approches qui fonctionnent, celles qui ne fonctionnent pas et les raisons de cet état de fait.

3.1 Les principales approches visant à promouvoir la conformité fonctionnent-elles ?

Les sanctions pécuniaires, l'incarcération (le cas échéant) et les programmes de clémence sont les principales méthodes utilisées par les autorités de la concurrence pour promouvoir la conformité au droit de la concurrence. La fréquence et l'intensité avec lesquelles ces trois méthodes sont utilisées se sont accrues considérablement avec le temps et pourtant le nombre d'ententes conclues, en particulier, ne semble pas reculer. Le nombre total d'ententes internationales détectées, par exemple, est passé de 6,3 par an en moyenne entre 1990 et 1995 à 32,9 entre 2004 et 2007⁶. On pourrait raisonnablement penser que si les approches dissuasives classiques avaient été efficaces, le nombre des poursuites engagées dans les affaires d'entente aurait diminué au cours de cette période, à moins que les sanctions ne soient encore trop indulgentes ou qu'il ne soit nécessaire d'allonger et de multiplier les peines d'emprisonnement.

Il est en fait impossible de connaître exactement l'efficacité ou l'inefficacité des approches actuelles, parce que l'on ne dispose d'aucun moyen de savoir combien d'ententes ne sont pas détectées. Il existe au moins quatre facteurs susceptibles d'expliquer l'augmentation du taux de détection des ententes internationales : 1) la généralisation des programmes de clémence, 2) le fait que les autorités nationales de la concurrence ont été plus nombreuses que par le passé à engager des poursuites et à partager entre elles des informations, 3) une nouvelle tendance de la part des autorités de la concurrence à cibler davantage les ententes internationales que nationales et 4) une augmentation du taux de formation des ententes. Certains observateurs, comme Connor, estiment que l'augmentation du taux de détection des ententes internationales est au moins en partie attribuable au facteur 4). Ce dernier considère que même si les taux de détection ont augmenté, il est peu probable qu'ils aient été multipliés par 5 ou 6, ce qui correspond au taux de progression annuel du nombre d'ententes internationales détectées depuis le début des années 90⁷. Il semble par conséquent que le taux de formation des ententes a également augmenté.

D'autres commentateurs peignent un tableau plus optimiste. Clarke et Evenett, par exemple, ont étudié l'entente sur les vitamines dans les années 90 et ont conclu que les exportations en provenance des pays où les conspirateurs étaient implantés et à destination des pays d'Afrique, d'Europe et d'Amérique latine qui n'avaient pas légiféré contre les ententes ont eu tendance à augmenter plus rapidement que celles à destination des pays dotés d'une telle législation. Il ressortait par conséquent que l'entente en question avait ciblé particulièrement les pays qui n'étaient pas dotés de lois contre les ententes. Le profil d'évolution de la distinction existant entre les différentes destinations d'exportation était spécialement évident en Europe, mettant en relief le caractère relativement dissuasif des lois communautaires contre les ententes⁸.

⁶ Connor, p.6, supra note 2.

⁷ Id. p.9.

⁸ Julian Clarke et Simon Evenett, « The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel, » 48 Antitrust Bulletin 289 (2003).

3.1.1 Sanctions pécuniaires

Dans un article qui a fait date, Gary Becker confirme en termes économiques l'idée selon laquelle la décision de se livrer à des actes délictueux peut se réduire à un calcul de la valeur attendue. Autrement dit, il montre que des acteurs rationnels comparent la valeur économique attendue de l'infraction qu'ils envisagent de commettre avec le produit que représentent le risque de détection et le coût induit par les conséquences de la détection⁹. Cette étude apporte notamment un éclairage théorique sur le fait qu'il existe une autre façon, moins coûteuse, de dissuader la commission d'infractions au droit de la concurrence que d'essayer d'appréhender tous les contrevenants et de leur imposer des amendes qui ne font qu'égaliser le coût que leurs délits font supporter à la collectivité. Le taux de détection pourrait en fait demeurer nettement inférieur à 100 %, mais l'on pourrait porter les amendes jusqu'au niveau où la valeur attendue de l'infraction deviendra négative. Selon Becker, si les amendes sont suffisamment élevées, même une faible probabilité de détection pourrait être suffisamment dissuasive¹⁰.

Quelque 40 ans après la publication de l'article de Becker, une étude réalisée sous l'impulsion de l'Office of Fair Trading (OFT) concluait que « le principal apport, sur le plan fondamental, [de l'examen des ouvrages réalisés sur le sujet] est que le montant élevé des sanctions pécuniaires a une importance cruciale du point de vue de la dissuasion »¹¹. Or il est indéniable que certaines autorités, comme la Commission Européenne et la division de la concurrence du ministère américain de la Justice, sont parvenues à imposer des amendes de plus en plus élevées au fil des ans¹².

Le montant total des amendes infligées au niveau de l'UE en cas d'entente, en tenant compte des décisions rendues, est passé de 344 millions EUR de 1990 à 1994 à 9.6 milliards EUR de 2005 à 2009, ce qui correspond en gros à une augmentation de 2700 %¹³. Le montant moyen des sanctions pécuniaires imposées aux entreprises était inférieur à 2 millions EUR de 1990 à 1994 et avoisinait 46 millions EUR de 2005 à 2009, soit une hausse de 2200 %¹⁴. Simultanément, le nombre de décisions rendues par la Commission Européenne dans des affaires d'entente est passé de 11 de 1990 à 1994 à 33 de 2005 à 2009¹⁵.

Au cours des mêmes périodes, les données correspondantes enregistrées par la division de la concurrence du ministère américain de la Justice sont aussi impressionnantes. Cette division a collecté au total 142 millions USD au titre des amendes infligées aux entreprises de 1990 à 1994, chiffre qui a atteint 3.35 milliards USD de 2005 à 2009, soit une hausse de quelque 2250 %. Sur ces deux mêmes périodes, le montant moyen des sanctions pécuniaires imposées aux entreprises est passé de 480 000 USD à environ

⁹ Gary Becker, « Crime and Punishment: An Economic Approach, » 76 *Journal of Political Economy* 169 (1968).

¹⁰ Pour être plus précis, la sanction optimale totale serait égale au gain attendu de l'infraction multiplié par l'inverse de la probabilité de détection (majoré du coût d'application de la sanction).

¹¹ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, OFT1132 (2009) p. 8.

¹² Les méthodologies utilisées par les autorités de la concurrence de plusieurs pays de l'OCDE pour calculer le montant des amendes sont expliquées et comparées dans le document de l'Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, supra note 11. Ces juridictions sont l'Allemagne, l'Australie, les États-Unis, les Pays-Bas, le Royaume-Uni et l'UE dans son ensemble.

¹³ European Commission Cartel Statistics (au 13 avril 2011), disponible en suivant le lien <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

¹⁴ Ginsburg et Wright, p.11, supra note 2.

¹⁵ European Commission Cartel Statistics (au 13 avril 2011), disponible en suivant le lien <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

44 millions USD, soit environ 9000 % de plus.¹⁶ Le montant moyen des sanctions pécuniaires contre des personnes physiques est passé de 125 000 USD en 1998 à plus de 600 000 USD en 2007¹⁷. On note en outre avec intérêt que ces progressions sont survenues alors que le nombre total d'affaires d'entente sur les prix instruites par le ministère américain de la Justice diminuait. Ce chiffre a chuté de 68 % entre le début des années 90 et la période 2004-06. La même orientation à la baisse concerne aussi bien les poursuites contre les personnes physiques que contre les personnes morales¹⁸. Ces statistiques permettent de penser que le ministère américain de la Justice préfère s'en tenir à un nombre relativement réduit de « grandes affaires » susceptibles de donner lieu à des sanctions pécuniaires élevées plutôt que d'instruire une multitude de « petites affaires » qui aboutiraient à des amendes moins importantes. Cette stratégie est conforme à l'augmentation du nombre de poursuites engagées à l'encontre d'ententes internationales de grande ampleur.

Les États-Unis et l'UE ne sont pas les seuls à imposer des sanctions pécuniaires importantes pour des infractions au droit de la concurrence. En Allemagne, par exemple, le Bundeskartellamt a infligé, au total, 969.2 millions EUR d'amendes entre 2001 et 2006, à des personnes morales ou physiques ayant commis ce type d'infractions. En France, l'Autorité de la Concurrence a imposé des sanctions pécuniaires se chiffrant au total à 2 milliards EUR entre 2001 et 2008¹⁹. Pour la seule année en cours, la Comisión Federal de Competencia mexicaine a infligé à Telcel, un opérateur de télécommunications mobiles, une amende de 1 milliard USD, pour pratiques monopolistiques.

Les autres autorités de la concurrence devraient-elles leur emboîter le pas ? Celles qui ont déjà porté le montant de leurs sanctions pécuniaires à des niveaux très élevés devraient-elles le relever encore ? Certains analystes estiment qu'un relèvement est nécessaire pour que l'effet de dissuasion soit réel, même dans les pays qui ont déjà considérablement augmenté, depuis plusieurs années, le montant des amendes qu'elles infligent. Connor et Helmers, par exemple, remarquaient en 2007 que même si le montant des amendes sanctionnant les ententes internationales avait atteint des sommets, « l'ampleur de la récidive laisse supposer que les sanctions actuelles ne suffisent pas à dissuader la formation d'ententes »²⁰.

La même année, dans un article publié conjointement avec Lande, ces auteurs comparaient le montant moyen des gains tirés par les contrevenants des surcoûts illégaux qu'ils pratiquaient avec celui des sanctions pécuniaires imposées aux États-Unis et dans l'UE. Après avoir estimé que les surcoûts permis par les ententes s'établissaient dans une fourchette comprise entre 18 % et 37 % aux États-Unis et 28 % et 54 % dans l'UE, ils concluaient que les gains retirés par les contrevenants étaient nettement plus élevés que les amendes résultant de l'infraction. Ils recommandaient par conséquent une augmentation substantielle du montant de ces amendes tant aux États-Unis que dans l'UE²¹. Wils considère également que leur montant est trop faible, ayant calculé qu'elles devraient représenter au moins 150 % du chiffre d'affaires des

¹⁶ Ginsburg et Wright, p. 10, supra note 2.

¹⁷ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, p. 154, supra note 11 ; mais voir l'étude de Connor, p 33, supra note 2 (montrant que la moyenne est faussée par quelques amendes d'un montant extrêmement élevé et soutenant l'idée selon laquelle « par comparaison avec la fortune et les postes élevés de la majorité des dirigeants condamnés pour entente, le pouvoir de dissuasion des amendes personnelles est insignifiant »).

¹⁸ Connor, p. 18-19, supra note 2.

¹⁹ Ginsburg et Wright, p.13, supra note 2.

²⁰ Id., p.15 (citant Connor et Helmers, supra note 3) ; voir également le document de l'Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, p.19, supra note 11 (notant que « les études indiquent que les amendes actuellement infligées dans la quasi-totalité des juridictions en cas d'entente sont d'un montant trop faible pour être réellement dissuasives »).

²¹ John Connor et Robert Lande, « Cartel Overcharges: Implications for U.S. and EU Fining Policies, » 51 *Antitrust Bulletin* 983 (2007).

prévenus sur le ou les marchés concernés²². Le point de vue dominant des théoriciens comme des autorités de la concurrence paraît être que les sanctions pécuniaires devraient être plus élevées.

D'autres commentateurs ont toutefois une interprétation très différente des données. Plutôt que de recommander que l'on augmente encore le montant des amendes, ils s'interrogent sur leur réel pouvoir de dissuasion, *quel que soit* leur montant. Ginsburg et Wright citent les observations de Connor et Helmer qui notaient qu'aux États-Unis, « les ententes sur les prix détectées sont restées relativement fréquentes de 1990 à 2005, représentant pour les consommateurs (en dollars constants de 2005) un surcoût cumulé de plus de 200 milliards USD, le surcoût de chaque affaire se chiffrant en moyenne à quelque 2.1 milliards USD »²³, avant de nous rappeler que la hausse des amendes totales infligées en cas d'entente peut signifier différentes choses. Soit les autorités de la concurrence ont été plus efficaces en termes de détection des ententes et de poursuites à l'encontre des contrevenants, soit les taux de détection et de poursuites sont restés stables, mais le taux de formation des ententes a augmenté en dépit du relèvement du montant des amendes. Or, si les sanctions pécuniaires sont le meilleur moyen de dissuasion, on aurait dû observer une diminution du nombre d'ententes à mesure que les amendes augmentaient. Cela ne s'est pas produit. « À ce stade, rien ne prouve que des sanctions pécuniaires encore plus lourdes à l'encontre des entreprises serait plus dissuasives concernant la formation d'ententes sur les prix. Il se pourrait simplement que les amendes infligées aux entreprises ne produisent pas l'effet recherché, si bien qu'augmenter leur montant est inutile dans le meilleur des cas et pourrait être contre-productif si les entreprises répercutent sur le prix qu'elles facturent aux consommateurs le surcoût induit par l'augmentation des frais liés aux dispositifs de contrôle et de mise en conformité. »²⁴

Il y a en outre des limites à ce qu'une entreprise peut payer et à ce que l'action des pouvoirs publics, pour être efficace, doit leur imposer de payer. À partir d'un certain point, l'alourdissement des sanctions pécuniaires devient contre-productif. Une amende très élevée pourrait dépasser la capacité de paiement d'une entreprise²⁵ et donc l'acculer à la faillite et l'exclure du marché de façon permanente. Le marché deviendrait de ce fait moins concurrentiel que ce qu'il aurait été si l'entreprise avait été sanctionnée mais avait pu survivre. En conséquence, les consommateurs pourraient pâtir de prix plus élevés, d'une moindre qualité de service et d'un déficit d'innovation²⁶. L'année dernière, le Parlement européen a mis en lumière une autre raison pour laquelle il conviendrait d'avoir moins recours aux sanctions pécuniaires, s'inquiétant de ce que « l'application d'amendes de plus en plus élevées comme seul moyen [de sanctionner les infractions au droit de la concurrence] pourrait par trop manquer de nuances, surtout eu égard aux risques de destruction d'emplois résultant de l'incapacité des entreprises à payer[.] »²⁷ Il est donc possible qu'une

²² Wouter Wils, « Is Criminalization of EU Competition Law the Answer? », 28 *World Competition: Law and Economics Review* (2005). On ne suggère toutefois pas ici que selon Wils, il est réellement recommandé de porter les amendes à un tel niveau. L'idée avancée ici reprend simplement la conclusion de Wils qui amène à penser, en suivant une pure analyse de type Becker, qu'une amende « optimale » devrait représenter 150 % du chiffre d'affaires réalisé sur le marché concerné par l'entreprise défenderesse.

²³ Ginsburg et Wright, p. 12, supra note 2 et note 32 (citant Connor et Helmers, supra note 3).

²⁴ Ginsburg et Wright, p.12, supra note 2.

²⁵ Cf. Frédéric Jenny, « Optimal Antitrust Enforcement: From Theory to Policy Options », in *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos et Ioannis Kokkoris, eds. 2010) p.121 et 128 (citant une étude qui montre que les entreprises devraient avoir un actif représentant 6 fois leur chiffre d'affaires annuel pour être en mesure de payer une amende optimale, Gregory Werden et Marilyn Simon, « Why Price Fixers Should Go to Prison », 32 *Antitrust Bulletin* 917 (1987)).

²⁶ Gregory Werden, « Sanctioning Cartel Activity: Let the Punishment Fit the Crime », 5 *European Competition Journal* 1, 30-31 (2009).

²⁷ Résolution du Parlement européen du 9 mars 2010 sur le rapport relatif à la politique de concurrence 2008, paragraphe 45.

amende soit optimale du point de vue de la dissuasion, mais non en ce qui concerne la préservation de la concurrence ou la promotion d'autres priorités, comme l'emploi.

En outre, des amendes très élevées pourraient soulever des questions quant au caractère proportionnel de la sanction par rapport au préjudice causé par l'infraction. Indépendamment de leur optimalité mathématique, des amendes atteignant des montants tels qu'elles commencent à être perçues comme l'expression d'une justice vindicative pourraient remettre en cause le respect du droit de la concurrence et être plus préjudiciables que bénéfiques. On peut également craindre que des amendes extrêmement lourdes puissent être par trop dissuasives, incitant les entreprises à investir de façon excessive dans des dispositifs de contrôle et de mise en conformité et à s'interdire des pratiques qui ne seraient pas vraiment anticoncurrentielles. Ces conséquences se traduiraient au bout du compte par des coûts plus élevés pour les consommateurs.

Un autre inconvénient est lié au fait que même s'il peut être intuitivement tentant, d'un point de vue logique, d'appliquer une amende « optimale », calculée de façon à annihiler la valeur attendue d'un comportement anticoncurrentiel, cela serait impossible à réaliser de façon constante dans la pratique. En effet, on ne dispose pas, en règle générale, de données fiables, au cas par cas, sur les risques de détection et de condamnation encourus par les entreprises, non plus que sur le montant du gain qu'elles sont susceptibles de retirer d'un comportement illégal.

Certains aspects pratiques tendent en outre à montrer que l'imposition de sanctions pécuniaires lourdes aux entreprises n'est pas suffisamment dissuasive en soi. Les intérêts des individus au sein d'une entreprise peuvent, par exemple, ne pas coïncider exactement avec l'intérêt supérieur de l'entreprise. S'ils pensent pouvoir progresser plus rapidement, percevoir des primes plus élevées ou se mettre en valeur en étoffant les bénéfices de l'entreprise grâce à ententes, les dirigeants et les mandataires sociaux peuvent être tentés d'en former, même si leur entreprise était susceptible, de leur fait, de se voir infliger par la suite des sanctions pécuniaires. Les personnes responsables pourraient alors fort bien avoir quitté l'entreprise pour une autre. Même si ce n'est pas le cas, il est peu probable que les coûts qu'elles auront à supporter soient équivalents à ceux assumés par l'entreprise²⁸. De façon schématique, une divergence d'intérêts est susceptible de poser un problème à chaque fois que les administrateurs, les mandataires sociaux ou les dirigeants estiment avoir personnellement davantage à gagner en commettant une infraction qu'ils n'ont à perdre si l'entreprise doit payer une amende.

En réponse à ce dernier point, les partisans de l'imposition de lourdes sanctions pécuniaires tendent à estimer qu'elles ont l'effet désiré sur les comportements individuels, car les entreprises sanctionnées par une amende d'un montant optimal (et les autres) réagissent en instaurant des mécanismes de contrôle et des incitations pour empêcher les comportements qui les exposeraient à d'autres amendes. Si ce point de vue peut sembler logique en ce qui concerne les entreprises à capitaux privés, concèdent Ginsburg et Wright, il ne reflète pas la réalité du fonctionnement des sociétés qui font appel public à l'épargne. Les administrateurs supervisent les dirigeants qui supervisent les salariés. Les propriétaires sont les actionnaires dont la plupart sont simplement des investisseurs passifs qui n'exercent guère de contrôle sur le comportement de l'entreprise. Ils ne peuvent donc pas empêcher les salariés de l'entreprise de conclure des ententes sur les prix. Ils se bornent plutôt à prendre des décisions concernant l'achat, la conservation et la cession de leurs actions en fonction de l'impact du comportement de l'entreprise sur ses bénéfices et donc sur la valeur de leurs actions dans un horizon d'investissement donné. Les actionnaires peuvent en fait retirer un avantage important de la participation d'une entreprise à une entente, et cela vaut également pour les administrateurs et les dirigeants, qui pourront non seulement bénéficier de l'appréciation du cours des actions, mais aussi de primes et du prestige accru résultant de la hausse des bénéfices. Les statistiques montrent et des théoriciens comme Connor ont fait valoir que les ententes sur les prix paraissent quand

²⁸Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, p. 21, supra note 11.

même profitables, en dépit de la tendance à l'imposition de sanctions pécuniaires plus lourdes à l'encontre des entreprises²⁹.

Certaines autorités imposent certes des sanctions pécuniaires à l'encontre des personnes physiques. On accorde toutefois peu de crédit à leur valeur dissuasive, car les entreprises peuvent facilement dédommager les personnes tenues de s'en acquitter³⁰.

Devrait-on encore augmenter le montant des sanctions pécuniaires imposées en cas d'infraction au droit de la concurrence ? En cas de conflit entre un niveau de dissuasion optimal et la préservation de la concurrence sur un marché (sachant qu'une amende lourde pourrait conduire un concurrent important à quitter le marché), quel objectif les autorités de la concurrence devraient-elles viser en priorité ? Ces deux objectifs peuvent-ils être dissociés ? Par ailleurs, quelle est la cause des récidives ? Pourquoi certaines entreprises et pas d'autres commettent-elles des infractions à répétition ? Pourquoi certains secteurs (comme le bâtiment³¹) éprouvent-ils des difficultés chroniques à se conformer au droit de la concurrence, indépendamment du nombre ou de la sévérité des sanctions qui leur sont imposées ?

3.1.2 Peines de prison

Une chose que les entreprises ne peuvent pas rendre à leurs dirigeants, mandataires et salariés, c'est le temps passé derrière les barreaux. Assurément, l'incarcération a donc, contrairement aux sanctions pécuniaires, le pouvoir de contraindre les individus à bien peser leurs priorités. Les pays sont de plus en plus nombreux à s'en servir comme d'un outil de dissuasion. Dans dix-sept pays de l'OCDE, le droit de la concurrence contient désormais des dispositions autorisant les peines d'emprisonnement en cas d'entente³².

Les États-Unis ont la pratique la plus développée en la matière et sont depuis longtemps de fervents partisans de cette approche³³. Le nombre total et la durée moyenne des peines de prison qui y sont prononcées à l'encontre de personnes coupables d'ententes ont considérablement augmenté depuis 1990. Le nombre total de jours d'incarcération pour ce motif est passé d'environ 18 000 de 1990 à 1994 à près de 90 000 de 2005 à 2009. Le nombre annuel moyen de personnes condamnées à une peine de prison pour entente sur les prix s'est accru, mais aussi le pourcentage du nombre de prévenus incarcérés pour cette raison. Simultanément, la durée moyenne des peines prononcées est passée de 247 jours à 717 jours³⁴.

²⁹ Ginsburg et Wright, p. 17 à 18, supra note 2.

³⁰ Cf. OCDE, Cartel Sanctions against Individuals, [DAF/COMP\(2004\)39](#) p. 8 (« Il semble largement entendu que les sanctions pécuniaires imposées aux personnes physiques sont, à elles seules, relativement inefficaces car il est difficile d'empêcher une entreprise de dédommager la personne physique sanctionnée. »), disponible en suivant le lien www.oecd.org/dataoecd/61/46/34306028.pdf.

³¹ Cf. OCDE, Construction Industry (2008), [DAF/COMP\(2008\)36](#) (sur la récidive dans le domaine des ententes dans le secteur du bâtiment).

³² Cf. Ginsburg et Wright, supra note 2, dans l'Annexe. À noter que le Mexique a modifié très récemment sa Loi fédérale sur la concurrence économique et son code pénal fédéral afin d'autoriser les peines de prison pour entente injustifiable.

³³ Scott Hammond, « Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, » discours prononcé devant la table ronde consacrée à la répression des ententes, Section chargée du droit de la concurrence de l'Association américaine du barreau, 2007 Forum d'automne, Washington, DC, (16 novembre 2007) p. 2 (« la Division souligne depuis longtemps que l'incarcération est l'instrument de dissuasion et de sanction le plus efficace dans le domaine des ententes »).

³⁴ Connor, p 34, supra note 2.

Certains observateurs voient dans la menace d’incarcération un outil dissuasif d’une efficacité incomparable pour empêcher les ententes. Selon une récente étude du cabinet London Economics, « l’incarcération est généralement perçue comme un moyen extrêmement dissuasif et même la probabilité relativement réduite de devoir purger une peine de prison pour infraction au droit de la concurrence peut s’avérer extrêmement dissuasive dans les pays où cette possibilité existe par rapport à ceux où elle n’existe pas »³⁵. Les conclusions d’une enquête réalisée en 2007 auprès des entreprises du Royaume-Uni attestent du pouvoir dissuasif de l’incarcération. Invitées à classer par ordre d’importance les facteurs motivant la conformité au droit britannique de la concurrence, les entreprises citent les sanctions pénales avant tout autre type de sanction (les sanctions pécuniaires arrivant, sur cinq facteurs, en quatrième et avant-dernière position)³⁶. Ces mêmes entreprises indiquent que la conscience du risque de faire l’objet d’une enquête de l’OFT les a incitées à cesser ou à modifier considérablement entre 5 infractions éventuelles en rapport avec une entente sur 6 et 16 sur 17³⁷. Cette étude indique par conséquent que les régimes de concurrence qui comptent l’incarcération dans leur arsenal de sanctions sont extrêmement efficaces en termes de dissuasion.

Rien de surprenant, logiquement, à ce que la prison exerce un pouvoir de dissuasion sur les personnes susceptibles de former une entente. Comme le notait Arthur Liman dans un passage fréquemment cité : « Pour l’homme d’affaires ... la prison est un enfer et l’analyse classique du rapport risque/avantage devient caduque en présence d’un tel risque. La menace d’une incarcération demeure donc l’instrument de dissuasion le plus utile en ce qui concerne les infractions au droit de la concurrence. »³⁸ Les responsables américains confirment que leur expérience est conforme à l’analyse de Liman. Ils citent des cas où leurs enquêtes ont mis en lumière le fait que la menace d’une peine d’emprisonnement avait dissuadé les contrevenants d’étendre aux États-Unis des ententes d’envergure internationale, même si les différentes entreprises qui y participaient étaient déjà présentes dans ce pays³⁹.

D’autres raisons militent en faveur de l’utilisation de l’incarcération comme sanction en cas d’entente sur les prix. L’une d’entre elles, comme on l’a vu, est que la dissuasion s’opérant uniquement au moyen de sanctions prises à l’encontre des entreprises exigerait l’imposition d’amendes bien trop lourdes et impossibles à appliquer. La menace de l’emprisonnement permet de combler le déficit de dissuasion lié à l’application d’amendes qui ne permettent pas d’atteindre le but visé. Un autre argument en faveur de l’incarcération est que les amendes infligées aux entreprises ne garantissent pas nécessairement que les personnes responsables seront incitées comme il le faut à se conformer au droit de la concurrence. Ce sont les consommateurs et les actionnaires, et non des « personnes morales » abstraites, qui pâtissent le plus des sanctions pécuniaires contre les entreprises alors que ce sont les dirigeants et les administrateurs qui enfreignent la loi ou qui auraient pu empêcher la commission de l’infraction. C’est par conséquent sur les dirigeants et les administrateurs que doit s’exercer la force de dissuasion et l’incarcération est sans conteste un puissant instrument à cet effet⁴⁰.

³⁵ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, p. 10, supra note 11.

³⁶ OFT, *The Deterrent Effect of Competition Enforcement by the OFT*, OFT962 (novembre 2007), disponible en suivant le lien www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft962.pdf. Les autres facteurs qui, selon les entreprises citées, les incitent à respecter la loi, sont par ordre décroissant : (2) l’interdiction d’exercer la fonction d’administrateur ; (3) la mauvaise publicité ; (4) les amendes et (5) les actions civiles en dommages et intérêts.

³⁷ Id.

³⁸ Arthur Liman, « The Paper Label Sentences: Critique, » 86 *Yale Law Journal* 619, 630-31 (1977).

³⁹ Scott Hammond, « Cornerstones of an Effective Leniency Program, » allocution prononcée devant l’atelier du RIC consacré aux programmes de clémence (Sydney, 22-23 novembre 2004).

⁴⁰ Ginsburg et Wright, p. 18, supra note 2 ; Wils, C.1.2, supra note 22.

On pourra par ailleurs opposer avec intérêt ce point de vue à celui exprimé par le Directeur général adjoint chargé des activités Antitrust à la Direction générale de la concurrence de la Commission européenne, qui déclarait récemment dans une allocution que « ce sont les entreprises qui engrangent le surcroît de bénéfices produit par les ententes et [que] ce sont donc elles qui doivent assumer la responsabilité de leur actes. Nous estimons que de telles sanctions sont capables de garantir un niveau de dissuasion élevé et que les sanctions pénales ne sont pas justifiées dans notre système de répression »⁴¹.

Un troisième avantage est que la possibilité d'une peine de prison encourage les individus et les entreprises à utiliser les programmes de clémence et à coopérer avec les enquêteurs, tout du moins lorsque ces programmes leur offrent une immunité les mettant à l'abri d'une incarcération. Sachant qu'afin d'éviter la prison, leurs propres collaborateurs pourraient en venir à dénoncer la participation de l'entreprise à une entente, le conseil d'administration et la direction seront davantage tentés d'effectuer une demande de clémence en découvrant une entente et incités à éviter autant que possible d'y participer de prime abord⁴². En revanche, les programmes de clémence qui se bornent à diminuer le montant des amendes pourraient pâtir de l'instauration de sanctions pénales, car la menace de l'incarcération crée une dichotomie entre les intérêts des individus et ceux de l'entreprise. Cela peut être le cas, par exemple, pour les programmes de clémence des pays qui ne prévoient pas de peines de prison en cas d'infraction au droit de la concurrence. Les dirigeants impliqués dans une entente internationale pourraient être tentés de tirer parti de ce type de programmes pour obtenir une minoration du montant des amendes tout en préférant s'abstenir de le faire de crainte que les autorités de la concurrence d'autres pays ne les condamnent ensuite à une peine de prison.

Enfin, en sanctionnant une infraction par une peine de prison, les autorités signifient que les ententes ne sont pas seulement répréhensibles, mais qu'elles sont aussi immorales. Cet aspect comptera pour les dirigeants et les cadres dotés d'un certain sens moral ou, en tout cas, que leur sens moral incite à respecter la loi. Wils remarque que les études psychologiques indiquent que les convictions morales sont un facteur important qui incite les individus à se conformer au droit⁴³.

Malgré tous ces atouts et l'inscription des peines de prison en tant que sanction en cas d'entente dans la législation de 17 pays de l'OCDE, les contrevenants se voient rarement condamnés à la prison en dehors du Canada et des États-Unis. Certaines autorités répressives et certains tribunaux ne sont à l'évidence pas entièrement persuadés du bien-fondé de l'incarcération et certains commentateurs s'y opposent également. De la même façon qu'ils doutent de l'efficacité d'un alourdissement des sanctions pécuniaires, Ginsburg et Wright, par exemple, sont sceptiques quant à l'effet dissuasif qu'a pu avoir jusqu'ici l'incarcération.

Rien n'indique que l'augmentation spectaculaire tant des amendes infligées aux entreprises que de la durée moyenne des peines de prison prononcées ait induit une diminution significative du nombre d'ententes conclues. . . . S'il est impossible de quantifier les effets éventuels du renforcement des sanctions pénales sur le nombre d'ententes conclues, les données dont on dispose relatives à la durée des ententes sur les prix, aux fluctuations boursières faisant suite à

⁴¹ Cecilio Madero Villarejo, « Introductory Remarks, » discours prononcé lors de la conférence sur le droit de la concurrence organisée par l'Association internationale du barreau (IBA) et l'Association coréenne du barreau (KBA) (Séoul, 28 avril 2011).

⁴² Hammond, supra note 39.

⁴³ Wils, p. 31, supra note 22 et notes 137 et 138 (citant Christopher Stone, « Sentencing the Corporation, » 71 Boston University Law Review 383, 389 (1991) ; Tom Tyler, Why People Obey the Law (1990)).

l'annonce de mises en examen pour entente illicite et à la récidive des entreprises semblent toutes indiquer que les sanctions actuelles ne sont pas suffisamment dissuasives⁴⁴.

Dans un article à paraître, Beaton-Wells et Fisse remettent en cause le pouvoir fortement dissuasif de l'incarcération dans le domaine des ententes, épinglant le manque d'observations et de preuves en ce sens. Ils soulignent que malgré le nombre record de condamnations et la durée sans précédent des peines prononcées à l'encontre de personnes ayant participé à des ententes aux États-Unis, les données disponibles montrent que le nombre et l'ampleur des ententes découvertes, ainsi que le préjudice qu'elles occasionnent pour les consommateurs sont tous en augmentation⁴⁵. Ils estiment que les analyses empiriques réalisées jusqu'ici sur l'impact de l'incarcération sur le respect du droit ne confirment guère dans les faits l'idée selon laquelle l'emprisonnement serait fortement dissuasif. Ils citent notamment un rapport de 2005 du Comité de la concurrence concluant qu'« il n'existe pas d'éléments empiriques systématiques démontrant l'effet dissuasif des sanctions pénales et, surtout, permettant d'évaluer si l'avantage marginal de sanctions à l'encontre de personnes physiques ... est supérieur au coût additionnel lié à des sanctions pénales[.] »⁴⁶

Beaton-Wells et Fisse estiment en outre que la multiplication des condamnations et l'alourdissement des peines ne signifient pas forcément que les individus sont davantage tenus de rendre des comptes. Ces chiffres en eux-mêmes ne font pas de distinction entre les individus poursuivis et ceux qui ont négocié un allègement de peine. Les auteurs rappellent l'observation de Connor quant au fait que le ministère américain de la Justice « ne met pas en examen tous les collaborateurs coupables d'ententes sur les prix au sein d'une entreprise condamnée pour cette infraction » voire que « dans de nombreux cas, aucun collaborateur de l'entreprise n'est mis en examen. »⁴⁷ Même si une utilisation optimale des ressources justifie de ne pas retenir de chefs d'accusation contre tous les collaborateurs subalternes ayant pris part à l'entente, la mise en examen des principaux contrevenants serait certainement un moyen dissuasif efficace. Pourtant, « à l'évidence, la division de la concurrence n'inquiète pas non plus tous les meneurs. »⁴⁸ Les agents du ministère américain de la Justice ont toutefois fait savoir que la division avait intenté des poursuites contre un nombre croissant de cadres dirigeants coupables de telles pratiques depuis 1999⁴⁹.

Beaton-Wells et Fisse ajoutent que la décision d'un individu de prendre part à une entente a autant de chances, sinon plus, d'être influencée par des facteurs tenant à une disposition de cette personne, à

⁴⁴ Ginsburg et Wright, p.14, supra note 2 et voir id. p.19 pour prendre connaissance d'une opinion étonnamment contradictoire des mêmes auteurs (« il est amplement démontré que les peines de prison exercent un pouvoir dissuasif sur les individus en général et sur les cadres dirigeants en particulier. ») Pour davantage d'informations sur la récidive, voir id. Graphique 7, p.15 (citant Connor et Helmers, supra note 3).

⁴⁵ Caron Beaton-Wells et Brent Fisse, « U.S. Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique, » 56(2) Antitrust Bulletin 277 (2011) (citant Connor, supra note 2 et Ginsburg et Wright, supra note 2).

⁴⁶ OCDE, Les ententes injustifiables : Troisième rapport sur la mise en œuvre de la Recommandation de 1998 (2005), disponible en suivant le lien www.oecd.org/dataoecd/58/1/35863307.pdf.

⁴⁷ Connor, p. 35 supra note 2 et p. 112 note 137 (constatant que si le ministère américain de la Justice a convaincu les entreprises impliquées dans 53 ententes internationales de plaider coupables de 1990 à 2007, dans environ la moitié de ces affaires aucune personne physique n'a été mise en examen). Comme le mentionnent également Beaton-Wells et Fisse toutefois, la décision de ne pas retenir de chefs d'accusation contre une personne peut se justifier par diverses raisons valables, comme le fait qu'il n'est pas toujours possible de déterminer les responsabilités au sein de l'entreprise et que la ou les personnes responsables peuvent se trouver hors des États-Unis ou ne pas être extradables aux États-Unis.

⁴⁸ Connor, p. 35, supra note 2.

⁴⁹ Hammond, p.9 à 10, supra note 1.

l'organisation, au contexte et aux mentalités que par les sanctions judiciaires et notamment les peines de prison. Ce point de vue fait écho à des arguments défendus par Parker qui estime que les études empiriques réalisées sur la répression des ententes montrent que le choix rationnel est influencé non seulement par des sanctions judiciaires officielles, mais aussi par la confluence de nombreux autres facteurs, tels que les points de vue normatifs concernant l'interdiction des ententes et les pressions sociales incitant à y participer (ou non)⁵⁰. Des salariés peuvent ainsi s'entendre dire par les hauts dirigeants de leur entreprise qu'ils doivent respecter la loi alors que leurs supérieurs hiérarchiques directs, la culture de leur secteur d'activité et les critères d'évaluation de leurs performances les poussent dans la direction inverse. Dans un tel contexte, les personnes peuvent être tout autant, voire davantage, sensibles à la pression de ces autres facteurs qu'à la menace des sanctions judiciaires officielles. Lorsqu'une entente est mise au jour, il peut en résulter des situations où les collaborateurs subalternes rejettent la responsabilité sur leurs supérieurs hiérarchiques et réciproquement⁵¹.

Christine Parker s'attaque aussi aux méthodologies qui sous-tendent les études ayant servi à appuyer l'incrimination des infractions au droit de la concurrence⁵². Cet auteur estime ainsi que l'analyse réalisée par Deloitte à la demande de l'OFT est la meilleure de celles dans le cadre desquelles des salariés ont été interrogés sur leur perception des effets dissuasifs et sur leur participation à des ententes. Elle juge toutefois « absurde » l'une des conclusions de cette étude, à savoir que pour chaque action répressive engagée, les entreprises renoncent à 16 ententes envisagées ou effectives ou modifient leur comportement pour diverses raisons⁵³, la principale étant que :

. . . « idéalement la législation et la répression devraient rendre les ententes impensables. Du point de vue de la politique de la concurrence, il est certainement préférable qu'une entreprise n'y pense pas du tout plutôt que d'envisager de se livrer à ces activités illégales avant d'y renoncer. Or, plus les entreprises envisagent de telles pratiques, plus, par comparaison, l'action dissuasive de l'OFT apparaîtra efficace. Si l'OFT parvient à rendre les ententes quasi impensables (et si les entreprises n'envisagent, de ce fait, même pas d'en former), son action apparaîtra donc d'autant moins performante. »⁵⁴

De même, le choix de respecter ou non la loi dépend du degré d'acceptation par la société du fait que le comportement illégal doit bien être considéré comme tel et, s'il est passible de sanctions pénales, de le

⁵⁰ Christine Parker, « Criminalisation and Compliance: The Gap Between Rhetoric and Reality, » Exposé présenté lors de l'atelier consacré à l'incrimination des ententes organisé par le Centre for Competition Law and Policy de l'université d'Oxford (12 novembre 2009) ; Christine Parker, « Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality, » dans *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos et Ioannis Kokkoris, eds. 2010) 239 ; voir également Maurice Stucke, « Am I a Price Fixer? A Behavioural Economics Analysis of Cartels, » dans *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos et Ioannis Kokkoris, eds. 2010) 272, 279 (décrivant les facteurs contextuels susceptibles d'inciter les individus à former des ententes).

⁵¹ Parker (exposé), p.4, supra note 50.

⁵² Parker (chapitre), supra note.50.

⁵³ Id., p. 243 à 244. Ces raisons « incluent le manque de fiabilité inhérent au fait de demander aux individus de dénoncer les activités illicites « effectives ou envisagées » menées par leur propre entreprise, puis d'extrapoler ces réponses à l'ensemble des entreprises ; la validité sujette à caution des tentatives visant déterminer dans quelle mesure les ententes « envisagées » avaient été approuvées avant que les entreprises ne soient dissuadées de les former et le fait de chercher à tirer des conclusions sur l'efficacité de l'action dissuasive, à un moment donné, à partir du nombre d'ententes envisagées mais non formées sans la comparer à une autre période de référence au cours de laquelle l'activité répressive de l'OFT était moindre. »

⁵⁴ Id. p. 244.

traiter comme une infraction. Autrement dit, un consensus est nécessaire quant au fait que ce comportement est fortement préjudiciable et que des sanctions pénales s'imposent. De ce point de vue, les autorités de la concurrence – en particulier celles des pays qui se sont récemment dotés de sanctions pénales pour les infractions au droit de la concurrence – pourraient avoir à accomplir certains efforts de sensibilisation⁵⁵. Cela étant, dans les pays où les ententes ont été incriminées depuis des années, les autorités peuvent, elles aussi, faire des progrès. Daniel Sokol, qui a passé en revue plusieurs centaines de journaux, magazines et publications commerciales de 1990 à 2009, démontre que les affaires de fraude comptable suscitent une bien plus grande attention dans la presse que les affaires d'entente, bien que les surcoûts générés par les ententes à l'échelon mondial aient été largement supérieurs au montant des plus grandes fraudes comptables de ces dix dernières années⁵⁶. De même, Florian Wagner-von Papp a récemment critiqué le manque de publicité donné par le Bundeskartellamt allemand aux condamnations pénales prononcées⁵⁷. Il en découle que les ententes ne sont pas jugées très importantes en dehors du cercle fermé des professionnels du droit de la concurrence et des entreprises qui se sont déjà fait prendre et que les autorités de la concurrence ne se soucient guère de laisser une telle situation s'installer.

La bonne nouvelle est liée au fait que s'agissant des ententes, le message à adresser peut être à la fois simple et fort. Werden le résume ainsi :

« Les ententes sont considérées à juste titre comme des infractions contre les biens, comme le cambriolage ou le vol, même si le préjudice économique qu'elles occasionnent est bien plus important. Les ententes privent les consommateurs et les autres acteurs du marché des bienfaits tangibles de la concurrence. Elles ne sont jamais efficaces et n'ont aucune utilité sociale par ailleurs ; les gains qu'en retirent les contrevenants ne peuvent jamais être supérieurs aux pertes qui en découlent pour la collectivité⁵⁸. »

Un plus grand nombre de pays devraient-ils introduire les peines de prison pour sanctionner la participation à une entente ? Les pays où les participants à des ententes sur les prix encourrent déjà des peines de prison doivent-ils allonger encore la durée de ces peines ?

3.1.3 Les programmes de clémence

Les programmes de clémence sont courants et bien connus des spécialistes de la concurrence. Ils accroissent les taux de détection des ententes en permettant aux personnes morales et/ou physiques qui en font la demande de bénéficier d'un allègement des sanctions en contrepartie d'informations sur leur

⁵⁵ Cf. Vasiliki Brisimi et Maria Ioannidou, « Criminalizing Cartels in Greece: A Tale of Hasty Developments and Shaky Grounds, » 34 *World Competition* 157 (2011) (notant que malgré l'amendement, en 2009, de la Loi grecque sur la concurrence qui permet désormais de sanctionner les accords horizontaux au moyen de peines de prison, aucune affaire n'a, à ce jour, donné lieu à des sanctions pénales en vertu de ce texte, et laissant entendre que cela tient notamment au fait que les ententes ne sont toujours pas perçues comme de véritables infractions en Grèce et ne sont donc pas outre mesure considérées comme moralement condamnables).

⁵⁶ D. Daniel Sokol, « Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement, » 78 *Antitrust Law Journal* __ (2012) (à paraître).

⁵⁷ Florian Wagner-von Papp, « Criminal Antitrust Law Enforcement in Germany, » dans *Criminalising Cartels* (Caron Beaton-Wells et Ariel Ezrachi, eds. 2011).

⁵⁸ Werden, p. 23 supra note 26. Pour un éclairage sur la manière dont il est possible de concevoir les programmes répressifs de façon à faire accepter l'idée de traiter certains comportements anticoncurrentiels comme des infractions pénales, voir William Kovacic, « Criminal Enforcement Norms in Competition Policy: Insights from US Experience, » dans *Criminalising Cartels* (Caron Beaton-Wells et Ariel Ezrachi, eds. 2011) 45.

participation à des ententes ou d'autres formes de coopération avec les autorités. La simple existence de ces programmes peut avoir un effet déstabilisant sur les ententes parce que les contrevenants savent que leurs complices peuvent les dénoncer à tout moment et qu'ils sont fortement incités à le faire sachant que les contrevenants qui sont les premiers à effectuer une demande de clémence bénéficient généralement d'une réduction des sanctions plus importante que les suivants.

Il a été dit de l'adoption de programmes de clémence dans le monde entier que c'était « l'évolution la plus importante en matière de la lutte contre les ententes. »⁵⁹ Ces programmes présentent l'avantage non négligeable d'inciter les contrevenants à fournir des informations que les autorités de la concurrence auraient du mal ou ne pourraient obtenir autrement. Les ententes étant secrètes par nature, ce sont les contrevenants qui détiennent habituellement les meilleures informations existantes sur leurs activités illicites. Ils sont même en fait sans doute les seuls à détenir les informations dont les autorités de la concurrence ont besoin pour réussir à les faire condamner. Dans certains cas, la clémence est donc probablement le seul moyen d'obtenir ces informations. En outre, elle libère des ressources pour les autorités de la concurrence que celles-ci peuvent utiliser à d'autres fins. En revanche, parce qu'ils éliminent tout ou partie des sanctions infligées en cas d'infraction au droit de la concurrence, ces programmes vont à l'encontre de l'objectif qui consiste à convaincre la société que ces infractions sont moralement répréhensibles.

Les programmes de clémence ne peuvent à l'évidence être efficaces que lorsqu'ils font partie intégrante d'un régime répressif bien conçu. Le système doit, d'abord et surtout, être réellement efficace. S'il ne l'est pas, les contrevenants éventuels ne craindront guère les conséquences que peut avoir un comportement illicite et ne seront de ce fait guère incités à se manifester pour solliciter la clémence. Il faut en outre qu'ils aient une conscience aiguë du risque d'être pris et condamnés. De plus, les lois et les conséquences probables des infractions doivent être transparentes et cohérentes pour que les contrevenants potentiels puissent prédire et comparer de façon fiable les retombées de leurs actes selon qu'ils sollicitent ou non la clémence⁶⁰.

Les programmes de clémence ont connu un succès retentissant dans tous les pays qui en sont dotés, sur le plan du nombre de demandes déposées. « Il ne fait aucun doute qu'un grand nombre de demandes ont été déposées après 1993, à la suite de la mise en place, par la division de la concurrence du ministère américain de la Justice, du programme de clémence à l'intention des entreprises, de la mise en œuvre de la politique de clémence révisée de l'UE après 2002 et de l'adoption d'autres programmes similaires par une douzaine ou plus d'autres autorités de la concurrence. »⁶¹ En outre, les modèles théoriques comme les premières données empiriques indiquent que les programmes de clémence peuvent renforcer la dissuasion à terme.

Motta et Polo ont toutefois montré que ces programmes peuvent en fait *encourager* la collusion dans certains cas⁶². Ces auteurs ont essentiellement observé qu'il s'établit un arbitrage entre la clémence et les sanctions pécuniaires du fait que les autorités de la concurrence proposent aux entreprises d'alléger les amendes pour les inciter à révéler l'existence d'une entente. Si les allègements sont excessifs et/ou si les informations divulguées n'aident que marginalement l'autorité de la concurrence, alors l'amointrissement de l'effet dissuasif dû aux allègements d'amendes pèserait plus lourd dans la balance que la probabilité de détection induite par le programme.

⁵⁹ Hammond, p.1, supra note1.

⁶⁰ Id., p. 3 à 4.

⁶¹ Connor, p.7, supra note 2.

⁶² Massimo Motta et Michele Polo, « Leniency Programs and Cartel Prosecution, » 21 International Journal of Industrial Organization 347 (2003).

Ces inquiétudes paraissent toutefois exagérées. Connor écrit par exemple qu'aux États-Unis, « les bénéficiaires d'une amnistie ne paient aucune amende et ne sont plus exposés depuis 2004 dans le cadre d'actions civiles qu'à des réparations égales au simple préjudice causé au lieu du triple. L'agrément systématique accordé aux entreprises pouvant prétendre à l'amnistie en cas d'entente induit une diminution du montant total des amendes imposées et des réparations pécuniaires versées à des parties privées en guise de sanction et de dédommagement par rapport au montant qui serait collecté dans le cadre d'un régime ne proposant pas de programme de clémence »⁶³. Ce calcul ne tient pas compte du fait que les programmes de clémence accroissent les taux de détection et mettent au jour les agissements d'autres entreprises. Par conséquent, s'il est vrai que les programmes de clémence réduisent la charge financière qui aurait été imposée aux entreprises qui en bénéficient dans l'hypothèse où elles auraient été prises, il ne faut pas oublier non plus que bon nombre de ces contrevenants n'auraient pas été inquiétés en l'absence de tels programmes, que leurs complices se voient souvent infliger des peines plus lourdes que la première entreprise à avoir déposé une demande et divulgué l'existence d'une entente et que lesdits complices n'auraient sans doute pas été inquiétés non plus si le programme n'avait pas existé.

De la même façon, Veljanovski regrette que de 1998 à 2004, la clémence soit intervenue sous une forme ou une autre dans 90 % des 39 affaires d'entente jugées dans l'UE et qui ont donné lieu à des amendes : « Le programme de clémence de la Commission s'emploie essentiellement à « acheter » des condamnations en échange de sanctions revues à la baisse[...] »⁶⁴ Cette caractéristique est présentée comme un défaut, voire une injustice. C'est toutefois ce en quoi consistent tous les programmes de clémence, et qui justifie leur appellation. La clémence est même l'*objectif* premier qu'ils poursuivent pour être efficaces. La question n'est pas tant de savoir si l'on doit acheter des condamnations, mais si le prix payé est trop élevé.

Ceci débouche sur un autre véritable problème, celui du pouvoir de dissuasion effectif des programmes de clémence. Il est difficile de savoir si ces programmes sont efficaces car personne ne connaît le nombre des ententes non détectées. Ce nombre étant inconnu, on ne peut évaluer dans quelle mesure les programmes de clémence permettent de faire baisser celui des ententes conclues. Cependant, comme le fait remarquer Stucke, il existe une autre approche du problème et cette approche ne donne pas à penser que les programmes de clémence sont très efficaces. S'ils avaient considérablement augmenté les probabilités de détection des ententes, alors la durée moyenne des celles-ci aurait dû diminuer. Cela ne s'est toutefois pas produit. La durée moyenne des ententes ayant fait l'objet de poursuites aux États ne semble pas avoir beaucoup évolué au cours du siècle écoulé, ce qui est particulièrement intéressant sachant que durant cette période, les ententes n'ont pas toujours été illégales⁶⁵.

Quelles preuves tangibles avons-nous que les programmes de clémence sont efficaces ? Quelles sont les preuves les plus fiables dans un sens ou dans l'autre ? Si ces programmes sont utiles, conviendrait-il alors d'étendre les avantages qui les rendent attrayants ? Si oui, pourquoi ? Et comment ?

3.2 Autres approches et considérations

3.2.1 Actions civiles

Les actions civiles en dommages et intérêts pour des infractions au droit de la concurrence accroissent le pouvoir dissuasif des amendes infligées par les autorités de la concurrence. Elles permettent de restituer

⁶³ Connor, p. 42, supra note 2.

⁶⁴ Cento Veljanovski, « Penalties for Price Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission, » 27 *European Competition Law Review* 510, 511 (2006).

⁶⁵ Stucke, p. 268, supra note 50.

aux victimes l'argent qui leur a été dérobé plutôt que d'alimenter les caisses du trésor public. En outre, les actions civiles peuvent augmenter les chances de détection. Il peut même arriver qu'elles soient plus efficaces que la répression publique, si par exemple les requérants privés disposent d'informations en plus grand nombre et de meilleure qualité⁶⁶. Toutefois, le pouvoir de dissuasion des actions civiles est limité par les mêmes facteurs que lorsque le montant des sanctions pécuniaires infligées dans le cadre d'une action publique est très élevé.

Si la possibilité d'engager des actions au civil relevant du droit de la concurrence existe dans plusieurs pays, cette forme de dissuasion est nettement plus courante au Canada et aux États-Unis, où son impact financier sur les défendeurs est beaucoup plus important que celui des amendes imposées dans le cadre d'actions publiques. Une étude réalisée en 2008 consacrée aux 40 actions en responsabilité civile en droit de la concurrence les plus fructueuses ayant été intentées aux États-Unis depuis 1990 révèle, en ne retenant que les affaires ayant également donné lieu à une amende et à une peine de prison, qu'elles avaient abouti à un montant total de réparations compris entre 6.2 et 7.5 milliards USD. Par comparaison, le montant de la *totalité* des amendes imposées pour infraction au droit de la concurrence dans le cadre d'affaires portées devant les tribunaux par le ministère américain de la Justice depuis 1990 s'élevait à 4.2 milliards USD⁶⁷.

Si les actions civiles deviennent plus courantes dans un pays donné, l'autorité de la concurrence de ce pays devra-t-elle revoir à la baisse son taux de détection et/ou le montant des amendes qu'elle impose ? Les actions civiles portent-elles tort aux programmes de clémence ?

3.2.2 Négociation de peine / procédure de transaction

Il arrive que les autorités de la concurrence proposent aux contrevenants d'alléger les sanctions s'ils acceptent de ne pas contester pas la véracité des griefs notifiés à leur encontre. Comme dans le cas des programmes de clémence, il s'agit d'un arbitrage important. En effet, les procédures de transaction permettent aux autorités d'être plus efficaces et augmentent leurs taux de condamnation, mais diminuent également la sévérité des sanctions. Si les conditions de la transaction sont trop indulgentes, elles n'auront plus le pouvoir de dissuasion voulu. Ces procédures peuvent en outre nuire à l'efficacité des programmes de clémence si leurs conditions sont trop généreuses par rapport à ces programmes, car les entreprises qui auraient autrement fait une demande pour en bénéficier pourraient être incitées à attendre de voir si on les attrape. Le cas échéant, elles peuvent toujours négocier une transaction et, dans le cas contraire, continuer d'enfreindre la loi.

Aux États-Unis, 90 % des affaires relevant du droit de la concurrence donnent lieu à une transaction⁶⁸. Connor juge ces chiffres inquiétants en particulier parce que très peu d'affaires d'entente ont été saisies par les tribunaux depuis 18 ans. Il s'inquiète de ce que les entreprises puissent en arriver à considérer la possibilité d'être traduites en justice par le ministère américain de la Justice comme une vaine menace, sapant la capacité de cette institution à infliger des amendes appropriées. Il préférerait que le ministère américain de la Justice se fasse un devoir de prendre des mesures pour qu'une ou deux entreprises soient jugées chaque année.⁶⁹

⁶⁶ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, p. 27, supra note 11, (citant Mitchell Polinsky et Steven Shavell, « The Economic Theory of Public Enforcement of Law, » 38 *Journal of Economic Literature* 45 (2000)).

⁶⁷ Robert Lande et Joshua Davis, « Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases, » 42 *University of San Francisco Law Review* 879 (2008).

⁶⁸ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, p. 11 note 11.

⁶⁹ Connor, p. 76 à 77, supra note 2.

Les autorités de la concurrence ne recourent-elles pas trop souvent aux procédures de transaction même si celles-ci leur permettent d'économiser des ressources et garantissent des condamnations ? Le cas échéant, quelle est la bonne fréquence ? Si une action en justice est de temps à autre nécessaire pour faire un exemple, selon quels critères les autorités de la concurrence devraient-elles choisir telle ou telle affaire à cet effet ?

3.2.3 *Impact des poursuites sur la réputation*

Les entreprises comme les personnes peuvent pâtir d'une atteinte à leur réputation si elles sont poursuivies pour infraction au droit de la concurrence. Ce risque pourrait induire une diminution du niveau des amendes ou des peines de prison que les autorités doivent imposer si elles souhaitent que ces sanctions aient un réel effet dissuasif. La section suivante consacrée à l'exclusion montre comment cette mesure constitue l'un des moyens grâce auxquels l'atteinte à la réputation peut être utilisée comme instrument de dissuasion. Une autre façon consiste simplement à rendre publiques les informations sur les infractions commises. La plupart des autorités de la concurrence diffusent des communiqués lorsqu'il est avéré qu'un défendeur a enfreint la loi. Le CADE, au Brésil, peut aller encore plus loin en imposant aux contrevenants de publier (à leurs frais) dans la presse un avis sur l'infraction commise⁷⁰. De la même façon, en France, l'Autorité de la concurrence peut ordonner aux contrevenants la publication, à leur frais, par voie de presse, de sa décision ou d'un extrait de celle-ci ou ordonner l'insertion de sa décision ou d'un extrait de celle-ci dans le rapport annuel de l'entreprise⁷¹.

Dans la mesure où la peur d'une atteinte à la réputation (de l'individu ou de l'entreprise) exerce une forte influence sur son comportement, il est possible que le risque de poursuites soit plus dissuasif que la sévérité des amendes ou des peines de prison encourues, tout du moins, pour certains contrevenants potentiels. Parker note d'ailleurs que « les études empiriques sur la dissuasion concluent sans exception que les facteurs qui incitent le plus à se conformer au droit sont les probabilités supposées de détection et de répression plutôt que la sévérité objective et la peur subjective des sanctions imposées. »⁷² Si les études qu'elle cite sont correctes, elles indiquent que Becker a eu tort d'affirmer que les risques de détection et le poids des sanctions exercent une influence égale. Ces études laissent en outre entendre que les autorités de la concurrence dissuaderaient davantage les contrevenants potentiels en accroissant les probabilités de détection qu'en continuant à alourdir les suites judiciaires pour les affaires ayant été détectées.

⁷⁰ Loi No. 8.8884 (1994), modifiée en 2000 et 2007 (citée dans George Lusty, « Refining the Anti-cartel Tool Kit: Complements to Corporate Fines », 9 Competition Law Journal 338, 345 (2010)).

⁷¹ Article L464-2 I, alinéa 5, du Code de commerce (cité dans Lusty, p. 346, supra note 70).

⁷² Parker (chapitre), p. 250 supra note 50 (citant John Braithwaite et Toni Makkai, « Testing an Expected Utility Model of Corporate Deterrence, » 25 Law & Society Review 7, 8-9 (1991) ; Raymond Paternoster et Leeann Iovanni, « The Deterrent Effect of Perceived Severity: A Reexamination, » 64 Social Forces 751 (1986)).

Faudrait-il intensifier les efforts de détection afin d'exposer davantage les entreprises au simple risque de se faire prendre (quelles que soient les sanctions infligées) ? Est-il plus dissuasif pour les contrevenants potentiels que les autorités attrapent un petit nombre d'entreprises très en vue et leur infligent des sanctions très lourdes ou qu'elles en attrapent un grand nombre et leur infligent des sanctions en moyenne moins sévères ? Par quels autres moyens les tribunaux et les autorités de la concurrence peuvent-ils tirer parti, à des fins de dissuasion, de la volonté des entreprises et des personnes de préserver leur réputation ?

3.2.4 Exclusion ou interdiction d'exercice

L'exclusion ou interdiction d'exercice est une façon de tirer parti des effets de réputation. Comme l'incarcération, l'exclusion est une sanction qui vise les personnes physiques. Plutôt que d'ôter aux contrevenants leur liberté, l'exclusion ne les prive que de leurs fonctions d'administrateurs, de mandataires sociaux ou de dirigeants d'entreprise et leur interdit d'occuper des postes similaires dans toute entreprise pour une durée déterminée. L'incarcération et l'exclusion ternissent la réputation des contrevenants, les empêchent de commettre à nouveau des délits similaires et, tout du moins lorsqu'elles touchent des administrateurs ou des cadres dirigeants, garantissent quasiment que l'entreprise va modifier sa façon de se comporter, autant d'effets que les amendes n'ont pas nécessairement. L'exclusion est toutefois beaucoup moins onéreuse pour la collectivité que l'incarcération.

Ginsburg et Wright estiment que l'on aurait tort d'augmenter continuellement le montant des sanctions pécuniaires infligées aux entreprises pour pallier une dissuasion insuffisante et qu'en tout état de cause, ni les amendes, ni les peines de prison ne semblent appropriées quelle qu'en soit la sévérité. Les consommateurs et les actionnaires pâtissent davantage que l'entreprise elle-même des sanctions qui lui sont infligées. Selon les auteurs, il serait plus efficace de sanctionner les dirigeants et les administrateurs⁷³.

En ce qui concerne l'incarcération, c'est une mesure appropriée pour toutes les catégories de contrevenants, selon Ginsburg et Wright, mais l'exclusion est appropriée et efficace à titre de sanction complémentaire non seulement pour les dirigeants et les administrateurs qui ont directement participé à l'entente, mais aussi en tant que sanction autonome à l'encontre des dirigeants et les administrateurs qui, par négligence, n'ont pas su empêcher leurs salariés de se livrer à ces pratiques. Selon eux, l'exclusion n'impose pas seulement un coût d'opportunité (perte de salaires et de primes), mais elle augmente aussi la probabilité et la sévérité de l'atteinte à la réputation. Comme elle accroît la dissuasion, l'exclusion raccourcit aussi d'autant la durée optimale de la peine de prison et le montant optimal de l'amende personnelle, et donc le coût pour la collectivité. Qui plus est, l'exclusion – à l'instar de l'incarcération – prémunit de la récidive en tenant les contrevenants à l'écart de postes où ils seraient à même de réitérer leurs pratiques délictueuses⁷⁴. En conséquence, tout en prônant un alourdissement des sanctions personnelles, les auteurs privilégient l'incarcération et l'exclusion des individus ayant pris directement part à une entente sur les prix et l'exclusion des mandataires sociaux coupables de négligence dont la conduite ne justifie pas l'incarcération⁷⁵.

L'exclusion apparaît comme une sanction redoutable. Une enquête réalisée en 2010 auprès des entreprises du Royaume-Uni à l'initiative de l'OFT conclut que l'exclusion est, après les sanctions pénales, l'instrument de dissuasion le plus efficace pour lutter contre les infractions au droit de la concurrence⁷⁶. Au

⁷³ Ginsburg et Wright, p. 18, supra note 2.

⁷⁴ Id., p.19.

⁷⁵ Id., p 6.

⁷⁶ UK Office of Fair Trading, The Deterrent Effect of Competition Enforcement by the OFT, OFT962 paragraphes 5.55 à 5.59 (novembre 2007).

Royaume-Uni, les autorités assumant un pouvoir réglementaire peuvent requérir du tribunal une ordonnance d'exclusion interdisant à des administrateurs d'occuper à nouveau de telles fonctions ou de participer à la gestion d'une entreprise pendant une durée pouvant atteindre 15 ans⁷⁷.

L'exclusion est aussi une peine applicable en Australie, au Canada, en Espagne, en Slovénie et en Suède. Aux États-Unis, cette mesure a déjà été utilisée à plusieurs reprises, mais pas directement dans le domaine du droit de la concurrence. La FTC a conclu des accords sanctionnés par un tribunal ayant le même effet qu'une exclusion, mais uniquement dans le cadre d'affaires relatives à la protection des consommateurs. La Securities and Exchange Commission, l'autorité de tutelle de marchés financiers, a en outre conclu des accords interdisant aux personnes ayant enfreint le droit boursier d'occuper des fonctions de dirigeants ou d'administrateurs au sein d'entreprises faisant appel public à l'épargne.

3.2.5 *Systèmes de récompense*

Les comportements qui sont avantageux pour les cadres dirigeants peuvent ne pas l'être pour les autres salariés de l'entreprise et tout collaborateur de l'entreprise peut avoir des scrupules à adopter un comportement anticoncurrentiel dans son travail. Les systèmes de récompense visent à tirer parti de ces scrupules pour mieux faire respecter le droit en incitant financièrement les informateurs potentiels à oser alerter les autorités.

L'offre de récompenses s'apparente par certains aspects, pour les personnes physiques, aux programmes de clémence. Dans un cas comme dans l'autre, la stratégie consiste à dissocier les intérêts des salariés de ceux de leur employeur ou à accroître cette divergence. Alors que les programmes de clémence applicables aux personnes physiques leur promettent une réduction des sanctions, les systèmes de récompense impliquent la rétribution des informateurs.

Au moins deux autorités de la concurrence disposent de systèmes de récompenses. La FTC coréenne a adopté, en 2006, un système de récompense prévoyant le versement aux informateurs d'une fraction modeste des amendes infligées pour les ententes qu'ils ont dénoncées. L'OFT britannique dispose depuis 2008 d'un programme rétribuant jusqu'à 100 000 GBP les personnes livrant des informations sur des ententes.

Où les risques de non-conformité sont-ils généralement les plus importants ? Plus précisément, quels secteurs, quels types d'entreprises au sein des secteurs et quelles catégories de salariés posent le plus de problèmes ? Quels sont les outils les plus efficaces dont disposent aujourd'hui les autorités de la concurrence pour faire respecter la loi ? Quelles stratégies susceptibles de s'avérer utiles n'ont pas encore été testées ? Faudrait-il faire participer le secteur privé à la lutte contre les comportements anticoncurrentiels ? Si oui, comment procéder ? Les comportements qui sont avantageux pour les cadres dirigeants peuvent ne pas l'être pour les autres collaborateurs de l'entreprise. Comment tirer parti de cette divergence d'intérêts pour mieux faire respecter la loi ?

4. **Les programmes de conformité des entreprises au droit de la concurrence**

Il n'existe pas de consensus international sur le point de savoir s'il convient d'imposer aux contrevenants qui se sont dotés de programmes de conformité de l'entreprise au droit de la concurrence des sanctions plus légères (ou au contraire plus lourdes). Certains pays incitent les entreprises à mettre en place de véritables programmes de conformité au droit de la concurrence en infligeant des sanctions pécuniaires réduites en cas d'infraction commise malgré l'existence d'un tel programme. Au Royaume-Uni, par

⁷⁷ Cf. Loi de 1986 sur l'interdiction d'exercer les fonctions d'administrateurs ; Loi de 2002 sur les entreprises, article 204.

exemple, l'OFT peut diminuer jusqu'à 10 % le montant des amendes infligées aux entreprises dotées d'un programme de conformité au droit de la concurrence⁷⁸. En France, l'Autorité de la Concurrence réserve un traitement plus favorable aux entreprises attestant de l'existence d'un programme sérieux de conformité⁷⁹. Certaines autorités ont un point de vue neutre sur ces programmes, ne prônant ni réduction ni alourdissement des sanctions pécuniaires pour les contrevenants qui en sont dotés⁸⁰. Enfin, d'autres se font fort d'invoquer que l'existence d'un tel programme constitue une raison d'*alourdir* les sanctions pécuniaires en cas d'infraction. L'OFT, par exemple, s'oppose généralement à ce que l'existence soit considérée comme un facteur aggravant lors du calcul des amendes, mais se réserve toutefois le droit d'en relever le montant dans certains cas exceptionnels, par exemple si un programme de conformité de l'entreprise au droit de la concurrence servait en fait à dissimuler une infraction ou à induire l'OFT en erreur au cours d'une enquête⁸¹.

Ceux qui pensent que l'existence d'un programme ne doit pas être prise en considération demandent généralement ce qui justifierait, lorsqu'un programme mis en place n'a pas fonctionné, d'accorder un traitement favorable à l'entreprise. Ils estiment en outre que le fait d'accorder un allègement des sanctions lorsqu'un programme a été mis en place reviendrait à encourager les pratiques collusoires en en diminuant le coût. Les partisans d'un traitement favorable des entreprises dotées d'un programme de conformité répondent habituellement que si le programme instauré est sérieux, une ou deux pommes pourries ne sont pas représentatives de l'ensemble du panier et que le programme peut quand même être efficace et éviter la formation d'autres ententes. Ils considèrent en outre généralement que les entreprises qui utilisent ces programmes pour diminuer le coût de leurs pratiques collusoires devraient être pénalisées pour avoir mis en place de tels programmes uniquement pour la forme.

Cela étant les détracteurs répondent à cet argument que tout effet bénéfique produit par le programme constitue sa propre récompense. Après tout, ces programmes épargnent aux entreprises de se mettre encore plus en difficulté et leur font économiser de l'argent en leur évitant des amendes⁸². Pourquoi devrait-on en plus augmenter encore les économies qu'elles réalisent en allégeant les amendes qu'elles encourent

⁷⁸ Office of Fair Trading, Drivers of Compliance and Non-Compliance with Competition Law, OFT 1227 (2010) p. 8. La cour d'appel du tribunal de la concurrence du Royaume-Uni a récemment rendu une décision précisant que « le défendeur devait « bénéficier d'un traitement favorable eu égard au fait qu'il s'était doté rapidement d'un programme de conformité de grande ampleur après la commission de l'infraction ». Kier Group plc v Office of Fair Trading [2011] CAT 3. Le Tribunal a toutefois estimé, dans un autre jugement récent, qu'il convenait d'inciter les entreprises à se doter de mesures rigoureuses de conformité avant qu'une infraction ne soit commise. Hays PLC v Office of Fair Trading [2011] CAT 8.

⁷⁹ D'autres autorités de la concurrence accordent un traitement favorable aux entreprises dotées de programmes de conformité au droit de la concurrence : c'est notamment le cas en Israël, au Canada et en Inde.

⁸⁰ C'est notamment le cas de la Commission Européenne. Cf., par exemple Joaquín Almunia, « Compliance and Competition Policy, » discours prononcé devant BusinessEurope et la Chambre de commerce américaine (Bruxelles, 25 octobre 2010) (« [W]hy should I reward a compliance programme that has failed? ») ; Produits à base de carbone et de graphite pour applications électriques et mécaniques, Affaire COMP/E-2/38.359 (3 décembre 2003) (« Il n'y a pas lieu de retenir l'existence d'un programme de mise en conformité comme circonstance atténuante pour une infraction consistant dans une entente illégale, que celle-ci ait été commise avant ou après l'instauration d'un tel programme. ») ; cf. également Arrêts du Tribunal de première instance, par exemple ABB Asea Brown Boveri contre Commission des Communautés européennes, Affaire T-31/99, Recueil de jurisprudence 2002 II-01881, (20 mars 2002) paragraphe 221.

⁸¹ Office of Fair Trading, Drivers of Compliance and Non-Compliance with Competition Law, p. 80, supra note 78.

⁸² Cf. id., p. 8 « La récompense première d'un programme de conformité efficace est d'éviter que ne soit prise, en premier lieu, une décision de commettre une infraction. »)

lorsqu'elles forment des ententes malgré les programmes en place ? Les économies déjà engendrées par le programme devraient suffire à inciter durablement les entreprises à instaurer un programme digne de ce nom. Les partisans d'un allègement des sanctions font valoir pour leur part que l'entreprise qui se tient à l'écart de pratiques collusoires n'est pas la seule à tirer avantage de ce comportement. Les consommateurs en profitent également, de même que les autorités de la concurrence et les tribunaux, qui économisent des ressources qu'ils pourront consacrer à d'autres problèmes. De ce fait, pour rendre compte réellement de l'avantage qu'apportent ces programmes, il convient d'accorder un traitement favorable aux entreprises qui se sont dotées d'un dispositif de conformité efficace.

Wils reconnaît que les programmes efficaces peuvent contribuer à prévenir les infractions ou, quand tel n'est pas le cas, à faciliter leur détection. Il n'est pas persuadé pour autant que les autorités de la concurrence doivent diminuer le montant des amendes simplement parce que l'entreprise mise en cause a instauré un véritable programme de conformité. Si le montant des amendes est fixé à un niveau suffisamment dissuasif dès le départ, les entreprises devraient, selon lui, être déjà incitées comme il le faut à prévenir les infractions⁸³. Pourtant, Wils lui-même estime, dans une autre étude, que les amendes devraient être égales à 150 % du chiffre d'affaires réalisé sur le ou les marchés concernés pour avoir un effet dissuasif réel, niveau qu'il juge pourtant « bien trop élevé et impossible à appliquer »⁸⁴. Bien que le déficit de dissuasion puisse être compensé par la menace de l'incarcération, cette possibilité n'existe pas dans de nombreux pays. Si les estimations de Wils sont correctes, les entreprises ne sont pas incitées comme elles devraient l'être à prévenir la commission des infractions, tout du moins dans certains cas. Encore une fois, si le problème tient au fait que le montant des amendes est déjà insuffisant, le diminuer encore davantage n'est sans doute la meilleure solution.

Connor souligne une autre raison pour laquelle il convient de ne pas accorder de réduction aux contrevenants dotés de programmes : les programmes réellement efficaces donnent lieu à des signalements spontanés qui induisent, pour la plupart, l'octroi d'une amnistie et donc l'annulation de la sanction pécuniaire⁸⁵. Toutefois, Connor serait contraint de concéder que même les meilleurs de ces programmes ne permettent probablement pas de détecter à tout moment tous les actes illégaux commis et que chaque infraction ne peut donc donner lieu à un signalement spontané.

Parker avance encore un autre argument en ce sens. Selon elle, on peut se demander si ces programmes sont d'une quelconque utilité en matière de prévention des ententes. Elle considère en effet que la plupart des contrevenants savent déjà que ce qu'ils font est illégal et se donnent même beaucoup de mal pour dissimuler leurs agissements. En outre, la plupart d'entre eux sont de hauts dirigeants⁸⁶.

Ginsburg et Wright sont toutefois non seulement partisans de diminuer le montant des amendes infligées aux entreprises dotées d'un programme raisonnablement efficace, mais ils estiment que ce montant devrait même être *nul* dans ces cas-là : « Si une entreprise a déployé des efforts raisonnables pour se conformer au droit de la concurrence et qu'un collaborateur a néanmoins participé à une entente sur les

⁸³ Wouter Wils, « Optimal Antitrust Fines: Theory and Practice, » 29 *World Competition* 183 (2006).

⁸⁴ Wilke, C.1.1, supra note 22.

⁸⁵ Connor, p. 55 note 162, supra note 2.

⁸⁶ Parker (exposé), p. 4 supra note 50 (citant Michelle Berzins et Francesco Sofo, « The Inability of Compliance Strategies to Prevent Collusive Conduct », 8 *Corporate Governance* 669 (2008) (concluant que les participants à des ententes savaient dans 71 % des cas que leur comportement était illégal et que la direction générale était impliquée dans 80 % des cas).

prix, il est absurde d'infliger une amende à l'entreprise ou de sanctionner ses administrateurs ou ses dirigeants. »⁸⁷

En tout état de cause, si l'on accorde un allègement des sanctions, il faudrait alors imposer aux entreprises de ne pas se borner à mettre en place un programme de bonne foi, pour se dispenser ensuite de veiller à sa mise en œuvre. Autrement, l'on inciterait les entreprises à instaurer simplement des programmes superficiels à faible coût, et à les maintenir en place, ce qui ne contribuerait en réalité guère à la prévention des infractions. On peut même prévoir qu'un tel laissez-faire pourra amener à conclure qu'il y a eu négligence et entraînera l'imposition de sanctions pécuniaires à l'encontre des individus concernés, malgré l'existence d'un programme de pure forme. Le Bureau de la concurrence du Canada traite ce problème en imposant aux entreprises mises en cause de démontrer que leur programme de conformité a été conçu comme il faut et a été mis en œuvre et respecté comme il se doit au moment de la commission de l'infraction, avant d'accorder une quelconque réduction des sanctions justifiée par l'existence même du programme⁸⁸.

La Banque Mondiale, exige, dans le cadre de son programme de clémence pour les affaires de corruption, que les participants instaurent des programmes efficaces de conformité et d'éthique⁸⁹. De la même façon, la section de lutte contre la fraude de la division criminelle du ministère américain de la Justice a imposé aux entreprises ayant conclu une transaction d'instaurer un programme de conformité⁹⁰. La Commission de la concurrence sud-africaine impose aux entreprises avec lesquelles elle conclut une transaction de s'engager à mettre en œuvre un programme de conformité au droit de la concurrence. Dans le cadre de procédures judiciaires, la Commission de la concurrence et de la protection des consommateurs australienne demande couramment aux tribunaux de prononcer des ordonnances imposant à des entreprises de se doter de programmes de conformité.

Conformément aux lignes directrices fédérales américaines sur la détermination de la peine, qui n'ont plus caractère obligatoire, mais plutôt indicatif⁹¹, la présence ou l'absence d'un programme efficace peut modifier le montant de l'amende pénale applicable en cas de condamnation pénale fédérale d'une entreprise, notamment pour des infractions au droit de la concurrence. Les lignes directrices recommandent en outre de faire du maintien en place d'un programme efficace au sein des sociétés faisant l'objet de poursuites une condition normale de l'octroi d'un sursis avec mise à l'épreuve⁹². Le guide de mise en

⁸⁷ Ginsburg et Wright, p. 18, supra note 2. Cette citation se poursuit ainsi : « En revanche, si les administrateurs ou les dirigeants ont été coupables de négligence dans l'exercice de leurs fonctions de surveillance des collaborateurs de l'entreprise ayant participé à une entente sur les prix, ils doivent être tenus pour responsables au même titre que les auteurs de cette infraction. » Id.

⁸⁸ Bureau de la concurrence Canada, Bulletin: Les programmes de conformité d'entreprise (2010), disponible en suivant le lien [www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-f.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-f.pdf](http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-f.pdf/$FILE/CorporateCompliancePrograms-sept-2010-f.pdf).

⁸⁹ World Bank Voluntary Disclosure Program Guidelines for Participants, disponible en suivant le lien http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.

⁹⁰ Cf. ministère américain de la Justice, « Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties, » (4 novembre 2010) (communiqué de presse concernant les transactions conclues avec 5 entreprises, dans lequel le ministère américain de la Justice précise que « chacune de ces entreprises devra instaurer et respecter un ensemble d'obligations renforcées de conformité et de communication d'informations »), disponible en suivant le lien www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

⁹¹ United States v. Booker, 543 U.S. 220 (2005).

⁹² US Federal Sentencing Guidelines Manual (2009) §8B2.1., disponible en suivant le lien www.ussc.gov/2009guid/TABCON09.htm. Pour de plus amples informations sur la politique de l'UE, des États-Unis, du Canada et de l'Australie vis-à-vis des programmes de conformité dans le contexte du droit

œuvre des lignes directrices précise utilement que les organisations dotées de programmes « efficaces » prennent les précautions voulues pour prévenir et détecter les comportements délictueux et encouragent par ailleurs une culture d'entreprise favorisant une conduite éthique et l'engagement de respecter les dispositions du droit. Prendre les précautions voulues signifie que les administrateurs doivent connaître le contenu et le fonctionnement du programme et exercer un contrôle suffisant de sa mise en œuvre et de son efficacité. L'entreprise doit en outre prendre des mesures raisonnables pour s'assurer que le programme fait l'objet d'un suivi, par exemple en effectuant une surveillance et des vérifications, en procédant à des évaluations périodiques, en instaurant des mécanismes permettant le signalement des infractions de façon anonyme et/ou confidentielle et en prenant les mesures qui s'imposent lors de la découverte de comportements délictueux.

Diverses publications décrivent les aspects importants que doivent couvrir les programmes valables de conformité des entreprises au droit de la concurrence⁹³. Ces aspects sont nombreux, mais voici certains des plus importants :

- *Évaluation, classement et atténuation des risques* – L'entreprise devrait identifier et évaluer régulièrement les risques de conformité et s'assurer en particulier qu'elle procède bien à leur réévaluation lorsqu'elle pénètre de nouveaux marchés ou embauche de nouveaux collaborateurs à des postes clés. Elle devrait prendre en compte les risques spécifiques à chaque unité opérationnelle. L'objectif consiste à repérer les groupes plus disposés que d'autres à commettre des infractions en raison de la nature de leur activité et/ou de leur personnalité. S'agissant des ententes, ces groupes sont souvent composés de personnes qui prennent les décisions tarifaires ou commerciales, ainsi que de celles qui participent aux réunions des organismes professionnels. Les risques peuvent alors être classés par ordre de priorité et des mesures d'atténuation peuvent être prises à l'aide de formations, de mécanismes de contrôle, de conseils d'experts et en instaurant un système incitatif de punitions/récompenses pour les collaborateurs de l'entreprise.
- *Engagement* – Pour être efficace, le programme doit bénéficier, de manière visible, du soutien plein et entier du conseil d'administration et de la direction de l'entreprise et il doit se voir allouer des ressources appropriées, comme la présence (dans les grandes entreprises) d'un responsable de la conformité motivé et doté des moyens nécessaires. Il convient de préciser clairement que les infractions et en particulier les ententes sur les prix ne seront pas tolérées, c'est-à-dire que l'entreprise ne défendra ni ne soutiendra les contrevenants et qu'ils perdront leur emploi.
- *Contrôle / suivi* – La conformité doit faire l'objet d'un suivi, d'évaluations et de l'établissement de rapports.

de la concurrence, voir Office of Fair Trading, Drivers of Compliance and Non-Compliance with Competition Law, p. 19-24, supra note 78.

⁹³

Cf., par exemple, Office of Fair Trading, Drivers of Compliance and Non-Compliance with Competition Law, supra note 78 ; Office of Fair Trading, How Your Business Can Achieve Compliance, OFT424 (2005) ; Australian Competition and Consumer Commission, Corporate Trade Practices Compliance Programs (2005) ; Bureau de la concurrence Canada, Bulletin : Les programmes de conformité d'entreprise (2010) ; Kai Hüscherlath, « Competition Law Compliance Programmes: Motivation, Design and Implementation, » 9 Competition Law Journal 481 (2010). Cf. OCDE, Recommandation du Conseil visant à renforcer la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, Annexe II : Guide de bonnes pratiques sur la mise en œuvre de certains articles de la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales (18 février 2010), disponible en suivant le lien www.oecd.org/dataoecd/11/40/44176910.pdf (énumérant les composantes souhaitables d'un programme de conformité dans le contexte de la corruption et des pots-de-vin).

- *Justificatifs* – Les mesures prises pour garantir la conformité doivent être attestés par des justificatifs afin que leur existence puisse être prouvée en cas d’infraction, mais aussi que ces mesures puissent être étudiées afin de comprendre ce qui n’a pas fonctionné et apporter des améliorations.
- *Amélioration permanente* – L’entreprise devra actualiser périodiquement son programme et s’assurer qu’il reste adapté aux véritables activités de l’entreprise.

En somme, les programmes authentiques sont pris au sérieux à chaque niveau de l’entreprise et ils donnent lieu à des formations, des vérifications, des contrôles et des mises à jour périodiques. Pour chacun de ces aspects, les détails revêtent une importance cruciale. Par exemple, quels types de vérifications devraient être exigés ? Devrait-il s’agir de vérifications surprises ou peut-on les annoncer à l’avance ? Des simulations à grande échelle d’interpellations surprises au petit matin et/ou d’enquêtes avec intervention de conseillers externes se livrant à des recherches approfondies à l’aide de documents seraient probablement excessives, mais auraient en outre un coût prohibitif pour l’entreprise. En revanche, on devrait pouvoir raisonnablement tabler sur la réalisation d’inspections surprises, de temps à autre, qui pourraient avoir lieu dans un nombre pas trop important d’unités de l’entreprise choisies en fonction de leur profil de risques.

On notera que les affaires d’abus de position dominante et de pratiques monopolistiques sont généralement bien plus complexes que les affaires d’ententes, exigeant des enquêtes plus approfondies concernant les faits et les effets économiques. Les cas de comportements unilatéraux sont difficiles, même pour les spécialistes (c’est d’ailleurs l’une des raisons pour lesquelles les sanctions pénales ne sont pas applicables pour cette catégorie d’infractions) ; les tentatives de formation des non spécialistes à ce domaine du droit semblent vouées à l’échec car le public ciblé peut tout simplement ne faire aucun cas du message que l’on essaie de lui faire passer ou, pire encore, mal l’interpréter. Les programmes de conformité ont donc plus de mal à couvrir ce domaine du droit de la concurrence que les dispositions relatives à la lutte contre les ententes. Pour plus de sécurité, il est donc conseillé aux entreprises en position dominante ou en passe de l’être de demander à des spécialistes des conseils juridiques concernant l’adoption d’une nouvelle stratégie plutôt que de se fier uniquement au programme qu’elles ont mis en place.

Les autorités de la concurrence devraient-elles considérer comme une circonstance aggravante, atténuante ou neutre le fait qu’une entreprise ayant commis une infraction au droit de la concurrence soit dotée d’un programme de conformité ? Quels critères devrait-on employer pour évaluer les programmes de conformité ? Comment les autorités de la concurrence peuvent-elles, en particulier, distinguer les programmes de pure forme de ceux qui sont authentiques ? Les approches imposant l’instauration de programmes de conformité, comme celles utilisées par la Banque Mondiale ou le ministère américain de la Justice (s’agissant des fraudes) ont-elles leur place en matière d’application du droit de la concurrence ?

AUSTRALIA

1. Introduction

In Australia, promoting compliance with competition law is primarily the responsibility of the Australian Competition and Consumer Commission (ACCC). The ACCC is the national competition and consumer protection agency responsible for administering and enforcing the *Competition and Consumer Act 2010* (formerly the *Trade Practices Act 1974*) and a range of other legislation.

The object of the Competition and Consumer Act is:¹

...to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The ACCC's role is to promote competition and fair trading in the market place and provide for consumer protection and regulation of national infrastructure for the benefit of all Australians. An important part of this role is ensuring that individuals and businesses comply with Commonwealth competition, fair trading and consumer protection laws.

The ACCC's approach to enforcement and compliance is set out in its *Compliance and Enforcement Policy*.² The Policy sets out the three flexible and integrated strategies employed by the ACCC to achieve its compliance objectives:

- enforcement of the law, including resolution of possible contraventions both administratively and by litigation
- encouraging compliance with the law by educating and informing consumers and businesses about their rights and responsibilities under the Competition and Consumer Act, and
- working with other agencies to implement these strategies.

It is the ACCC's experience that compliance activities must be undertaken in conjunction with an active and effective enforcement program. The program must create both a credible threat of detection and a real prospect that any penalty that applies to the businesses and individuals involved will outweigh the private gain that can be obtained through anti-competitive conduct.

In January 2007, civil pecuniary penalties under the Competition and Consumer Act were increased substantially. For corporations the maximum penalty per contravention was raised to the greater of:

- A\$10 million
- three times the value of the benefit obtained directly or indirectly by the body corporate and all related bodies corporate reasonably attributable to the act or omission, or
- 10 per cent of the annual turnover of the body corporate in the 12-month period when the act/omission occurred.

¹ See section 2 of the Competition and Consumer Act: <http://www.comlaw.gov.au>.

² The *Compliance and Enforcement Policy* is available here: <http://www.accc.gov.au/content/index.phtml/itemId/867964>.

In July 2009, criminal sanctions for serious cartel conduct were introduced in Australia with imprisonment of up to 10 years for individuals and significant fines for both individuals and corporations. In addition, the ACCC gained stronger investigative powers and revised its immunity policy³ to reflect the new criminal law environment.

As a result of these changes to the legal framework, the potential costs to businesses and individuals for engaging in anti-competitive conduct in Australia have risen considerably. Personal and corporate costs are now likely to exceed any gain from engaging in anti-competitive conduct.

At the same time, the ACCC has continued to promote compliance with the law through a combination of enforcement and non-enforcement based actions, including awareness raising activities, educating business about compliance and working with industry and procurement officials to help equip them to detect anti-competitive behaviour. One recent initiative by the ACCC is encouraging procurers to warrant that they have not engaged in anti-competitive conduct and to disclose any previous anti-competitive conduct prior to tendering.

2. The importance of a strong and effective enforcement record

The ACCC's approach to enforcement and compliance is represented by a "compliance pyramid". At the base of the pyramid are compliance activities, in the middle are non-court based resolutions, and at the apex are court based actions. According to the pyramid theory, regulatory agencies should deploy a range of interventions of increasing intrusiveness, matched by decreasing frequency of use, as conduct becomes more serious and/or more recalcitrant.⁴ Interventions used by the ACCC include, in order:

- *Education, advice and persuasion:* The ACCC provides targeted and general publications to, and liaises broadly with, business, consumers and government agencies about the Competition and Consumer Act, the ACCC's role and the benefits of competition law.
- *Voluntary industry self-regulation codes and schemes:* The ACCC encourages and assists voluntary compliance initiatives by individual businesses and industry sectors, including compliance programs.
- *Administrative resolution:* The ACCC may accept an administrative resolution in some cases, such as where it assesses the potential risk flowing from conduct as low. An administrative resolution may include an agreement with a trader to stop conduct, compensate those who have suffered detriment or attend compliance training.
- *Section 87B enforceable undertakings:* The ACCC often resolves contraventions of the Competition and Consumer Act by accepting undertakings under s. 87B of the Act. These undertakings are more formal than administrative resolutions. They are public and court enforceable but less intrusive than litigation.
- *Litigation:* Legal action is taken where, having regard to all the circumstances, the ACCC considers litigation is the most appropriate way to achieve its enforcement and compliance objectives. The ACCC is more likely to proceed to civil or criminal litigation where conduct is particularly egregious, where there is reason to be concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution. Court-based remedies available

³ The ACCC's *Immunity Policy for Cartel Conduct* is available here: <http://www.accc.gov.au/content/index.phtml/itemId/891982>. The ACCC also has a *Cooperation Policy for Enforcement Matters* available here: <http://www.accc.gov.au/content/index.phtml/itemId/459482>.

⁴ Ayres, Ian and Braithwaite, John, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992.

under the Competition and Consumer Act include declarations, injunctions, community service orders, disqualification, pecuniary penalties and, in the case of criminal cartel conduct, imprisonment.

During the past few years the ACCC has brought a number of competition cases before the Federal Court of Australia in which high penalties have been imposed. For example, since 2009 the Federal Court has ordered a total of A\$46.5 million against seven airlines in the Air Cargo cartel⁵ and in September 2010 the Court imposed A\$15 million against Cabcharge Australia Limited for misuse of market power, the highest penalty ever recorded under section 46 of the Competition and Consumer Act.⁶

In 2004, the Australian Centre for Competition and Consumer Policy undertook a project to evaluate the impact of ACCC enforcement strategies on compliance and noted the crucial relationship between compliance activities and enforcement activities:⁷

...much of the ACCC's most effective 'compliance' activity (ie in education, liaison and codes) has been facilitated by strong enforcement activity of various types. Indeed, some of the ACCC's most innovative and successful enforcement activity has been successful, at least partially because it has motivated commitment to significant compliance education activities or voluntary codes. Thus, as predicted by the theory of responsive regulation, compliance and enforcement activities must be used together to support one another for regulation to have an impact on industry.

A recent survey found there to be very high public awareness of the ACCC in Australia.⁸ This awareness is built on a number of factors, including that the ACCC regulates competition and consumer laws and national infrastructure industries and therefore has a high profile as a national regulator. In addition, the ACCC has worked hard under successive Chairs to maintain a prominent media profile that both educates the community about the importance of competition law and publicises enforcement outcomes in a way that emphasises the impact of offending conduct on the community.

3. Maintaining an effective deterrence framework

While it is very important to have an active and visible enforcement program, it is also important that penalties for contraventions outweigh any benefits to businesses and individuals arising from illegal activity. This is the operational experience of enforcement agencies such as the ACCC.

In April 2003, an independent review into the competition provisions of the then *Trade Practices Act 1974* (the Act) was published and recommended to the Australian Government, among other things, an increase in the civil pecuniary penalties available under the Act and the introduction of criminal sanctions

⁵ See ACCC press release, *Japan Airlines penalised \$5.5 million for price fixing*, 11 April 2011: <http://www.accc.gov.au/content/index.phtml/itemId/982436/fromItemId/2332>. This case involves contraventions which occurred before criminal sanctions for cartel conduct were introduced in Australia.

⁶ See ACCC press release, *Cabcharge penalised for misuse of market power*, 24 September 2011: <http://www.accc.gov.au/content/index.phtml/itemId/948779/fromItemId/622289>.

⁷ Parker, Christine and Braithwaite, John and Stepanenko, Natalie, *ACCC Enforcement and Compliance Project: Working Paper on ACCC Compliance Education & Liaison Strategies*, Canberra, 2004. The Paper is available at: <http://cccp.anu.edu.au/projects/compliancereportapril2004.pdf>.

⁸ Beaton-Wells, Caron, and Haines, Fiona and Parker, Christine and Platania-Phung, Chris, *The Cartel Project: Report on a Survey of the Australian Public regarding Anti-Cartel Law and Enforcement*, The University of Melbourne, see: <http://cartel.law.unimelb.edu.au/go/project-news/project-survey>. The survey found close to 80% of respondents had heard about the ACCC.

for serious, or hard-core, cartel behaviour.⁹ At the time of the review, the Act provided for civil pecuniary penalties for anti-competitive conduct of up to A\$10 million for corporations and A\$500,000 for individuals.

In February 2005, the Australian Government announced its acceptance of the Committee's recommendations and legislation was passed in January 2007 to substantially increase the level of penalties available for corporate contraventions of the Act, including cartel conduct. In addition to increased penalties, the Act was amended to empower the court to disqualify a person from managing corporations and to prevent corporations from indemnifying officers against a civil liability and legal costs in defending or resisting proceedings.¹⁰

In late 2007, the call for tougher penalties and individual responsibility was reiterated by Heerey J in the landmark case *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited (No 3)*¹¹ in which the Federal Court ordered the largest penalties for cartel conduct in Australia's history:¹²

The progressive increase in the maximum penalties mentioned above shows how gravely the legislature regards this kind of conduct. Price fixing and market sharing are not offences committed by accident, or in a fit of passion. The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin.

Critical to any anti-cartel regime is the level of penalty for individual contravenors. We tend to overlook the fact that corporations are constructs of the law; they only exist and possess rights and liabilities as a consequence of the law. Heavy penalties are indeed appropriate for corporations, but it is only individuals who can engage in the conduct which enables corporations to fix prices and share markets.

In early 2008, the Australian Government released an exposure draft bill *Criminal Penalties for Serious Cartel Conduct – Draft Legislation* for public comment.¹³

Australia's criminal cartel regime came into effect on 24 July 2009, bringing a new civil cartel prohibition and, for the first time, a criminal cartel offence.¹⁴ Under the criminal regime, individuals may

⁹ The Report is available here: <http://tpareview.treasury.gov.au/content/report.asp>. The Committee also recommended that the Act be amended to (i) raise the maximum pecuniary penalties available for corporations (ii) empower the court to exclude an individual implicated in a contravention from being a director of a corporation or involved in management and (iii) prohibit corporations from indemnifying officers, employees or agents for the imposition of a pecuniary penalty: see 164-165. A copy of the ACCC's submission to the review is available here: http://tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P2.pdf.

¹⁰ See sections 86E and 77A respectively of the Competition and Consumer Act: <http://www.comlaw.gov.au>.

¹¹ These penalties were made under the pre-2007 penalty regime; see *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited (No 3)* [2007] FCA 1617: http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/1617.html. See also ACCC media release, *ACCC welcomes record penalties against Visy: Calls for stronger cartel law*, 2 November 2007: <http://www.accc.gov.au/content/index.phtml/itemId/802635/>.

¹² Per Heerey, *ibid* at paras 307-308.

¹³ Available here: <http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1330>.

¹⁴ For more information about the new provisions see: <http://www.accc.gov.au/content/index.phtml/itemId/883986>. Certain exceptions exist to the new regime, including for conduct subject to a collective bargaining notice or

be imprisoned for up to ten years and subject to fines of up to A\$220,000 per contravention. For corporations, the criminal cartel offence is punishable by criminal fines up to the greater of:

- A\$10 million
- three times the total value of the benefits obtained by one or more persons reasonably attributable to the commission of the offence/act or omission in contravention of the civil prohibition, or
- if those benefits cannot be fully determined, 10 per cent of the corporate group's annual turnover in the 12-month period when the offence/contravention occurred.¹⁵

The ACCC is responsible for investigating all cartel conduct, and the Commonwealth Director of Public Prosecutions (CDPP) is responsible for prosecuting any criminal cartel offences.¹⁶ The ACCC takes the view that whenever possible, serious cartel conduct should be prosecuted criminally. The parallel criminal and civil regime for cartel conduct ensures that serious cartel conduct can be prosecuted criminally while less serious breaches can be pursued under the civil prohibition.

With tougher individual and corporate penalties available and a clear referral mechanism in place for serious cartel conduct to be prosecuted criminally, the costs of doing business in Australia have increased significantly for participants in hard-core cartels.

The operational experience of the ACCC, including feedback from businesses in the course of cartel awareness activities, suggests that in Australia the threat of imprisonment has elevated the awareness of cartel enforcement and greatly increased the awareness of the personal and commercial risks of contravening the cartel laws. The ACCC's experience in this respect is consistent with that of other jurisdictions, including the United Kingdom¹⁷ and the United States¹⁸.

Increased reporting of cartel activity in jurisdictions where there is a potential for imprisonment may well be consistent with imprisonment acting as an effective deterrent. In jurisdictions where the stakes for individuals are higher, immunity applicants may be expected to be more likely to report cartels to enforcement authorities.

authorisation. For more information see: <http://www.accc.gov.au/content/index.phtml/itemId/882118>. The existing civil regime under section 45 of the Competition and Consumer Act remains, and prohibits a contract, arrangement or understanding that contains an exclusionary provision or provisions that have the purpose, effect or likely effect of substantially lessening competition.

¹⁵ The court may also make a range of orders including disqualification from directing and/or managing corporations; compensatory orders; adverse publicity orders; and non-punitive orders such as community service, probation, and the adoption of a compliance and/or training program.

¹⁶ Information on the ACCC's approach to cartel investigations is available here: <http://www.accc.gov.au/content/index.phtml/itemId/891982>. A memorandum of understanding (MoU) between the ACCC and Commonwealth Director of Public Prosecutions (CDPP) in relation to serious cartel conduct sets out a number of matters which the ACCC will have regard to in deciding whether to refer a matter to the CDPP. A copy of the MoU is available here: <http://www.accc.gov.au/content/index.phtml/itemId/891982>.

¹⁷ See the UK Office of Fair Trading, *The Deterrent Effect of Competition Enforcement by the OFT*, OFT962 (November 2007), available at www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of962.pdf.

¹⁸ See Scott Hammond, *Cornerstones of an Effective Leniency Program*, Speech before the ICN Workshop on Leniency Programs, Sydney, 22-23 November 2004.

4. Appropriate investigative powers and revised immunity policy for cartel conduct

Under the new regime, investigative powers were strengthened including by making telephone interception and surveillance device warrants available for investigation of the criminal cartel offence. The ACCC can also use its search warrant powers to gather evidence in both civil and criminal investigations.

The ACCC's *Immunity Policy for Cartel Conduct*¹⁹ was also amended to reflect the new criminal environment. The Policy confers full amnesty from ACCC-initiated civil proceedings and penalty to the first eligible cartel participant to report its involvement in a cartel and cooperate with the ACCC's investigation and any subsequent action against other cartel participants. It provides that the ACCC will grant immunity from civil proceedings and the CDPP will grant immunity from criminal prosecution.²⁰

The Policy seeks to maximise the incentives for cartel participants to self-report their involvement in a cartel and to provide certainty for applicants about how the ACCC will deal with immunity applications.²¹ The ACCC currently receives between one and two immunity applications per month.

These measures build on and strengthen the ACCC's existing detection tools, some of which are discussed below.

5. Educating and informing consumers and businesses

One of the ACCC's functions under the Competition and Consumer Act is to inform consumers and those engaged in trade and commerce about their rights and responsibilities under the Act.²² As noted already, recognition of the importance of competition law and the role and successes of the ACCC are critical in building a culture of compliance within businesses and the economy.

The ACCC uses educational campaigns to provide information and advice to business to persuade them that compliance with the Competition and Consumer Act is a business imperative and makes good business sense. The ACCC also works hard to explain and provide guidance on legal rights and obligations under the Act through the use of publications and presentations at industry and legal forums. In addition, media communications such as press releases on compliance and enforcement outcomes assist the ACCC to maintain a high profile.

A key example of ACCC outreach activity is in the area of cartels. The ACCC has undertaken considerable work to raise public awareness about Australia's cartel laws and the harm cartels cause.²³ The ACCC has also sought to raise the corporate stigma associated with being involved in a cartel to indicate

¹⁹ Available here: <http://www.accc.gov.au/content/index.phtml/itemId/891982>.

²⁰ The CDPP will grant immunity on the basis set out in the annexure to the *Prosecution Policy of the Commonwealth*. The Prosecution Policy is available here: <http://intranet.accc.gov.au/content/index.phtml/itemId/706268>.

²¹ One way the Policy increases incentives is by creating a race for immunity between companies and their current and former employees in terms of who will be the first in under the Policy.

²² See section 28 of the Competition and Consumer Act: <http://www.comlaw.gov.au>.

²³ Specific education and information strategies include guidance materials directed at enhancing community understanding of cartel conduct and the ACCC's approach to cartel investigations. See for example *Cartels: a guide for consumers on cartel conduct*: <http://www.accc.gov.au/content/index.phtml/itemId/727610> and *Cartels: What you need to know: A guide for business* at <http://www.accc.gov.au/content/index.phtml/itemId/897448> and *ACCC's approach to cartel investigations*: <http://www.accc.gov.au/content/index.phtml/itemId/716990>.

that cartel conduct is not just another misdemeanour, but a very serious offence. Greater public awareness of the nature and severe consequences of cartel conduct may in turn increase detection and help drive the ACCC's deterrence message.

Evaluating the impact of this work can be difficult, but is an extremely important component in developing an effective education and information strategy.

In late 2010, as part of its Cartel Project, the Melbourne Law School, University of Melbourne, issued a report on the findings of a major survey undertaken in July 2010 into public attitudes in Australia towards the criminalisation of cartel conduct.²⁴ Some of the report's key findings include:

- the public supports substantial fines and public naming and shaming for cartel conduct
- less than half the public agrees that cartel conduct should be a crime and less than a quarter support jail time for cartel conduct
- there is low public support for immunity from sanctions for cartel conduct in return for being the first to report the conduct to authorities, and
- business people have a low degree of knowledge of cartel laws, especially of criminalisation and jail.

The findings are illuminating and have helped the ACCC to focus its compliance efforts. The ACCC has identified new areas for future work which include: ensuring external communications strategies are effective and engage the target audience; increasing public messaging around the morally reprehensible nature of cartel conduct; the importance of holding individuals to account through the potential for substantial individual penalties and imprisonment; increasing general awareness about the rationale and importance of immunity policies; and conducting outreach and compliance activities in areas susceptible to cartel conduct.

6. Corporate compliance programs

In the ACCC's experience, education and information are of little value if there is no internal commitment to compliance within a business. To help achieve this commitment, the ACCC advocates the use of corporate compliance programs. According to the ACCC, an effective compliance program will:

- identify and reduce the risk of breaching the Competition and Consumer Act – in particular, in those areas of the law that the firm is most exposed to
- rapidly and effectively remedy any breach that may occur, and
- inculcate a culture of compliance such that playing by the rules becomes business as usual.

A considered and well-documented compliance program is a valuable tool in reducing the risk of non-compliance. To assist in developing compliance programs, the ACCC prepared a series of compliance program template undertakings which provide firms both with an example of what the ACCC considers advisable in compliance programs implemented voluntarily, and with an indication of programs the ACCC

²⁴ See n 8.

is likely to accept as part of a s. 87B undertaking given in the context of resolving the investigation of a potential breach of the Competition and Consumer Act.²⁵

The ACCC has identified four principles which it considers underpin successful compliance programs: (i) commitment (ii) implementation (iii) monitoring and reporting and (iv) continual improvement.²⁶ The most important, and arguably the most challenging, is commitment. This principle requires the company's governing body and senior management to be *genuinely* committed to compliance, and this commitment must be dispersed throughout the organisation, such that there is a *genuine* corporate culture of compliance.

The courts in Australia have recognised for some time that an effective corporate compliance program may be a mitigating factor when assessing penalties in the event of a breach of the Competition and Consumer Act.²⁷ Further, the courts have made it very clear that merely having a compliance program is not sufficient – it must be meaningfully incorporated into the organisation's culture. As Heerey J said in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited*:²⁸

The corporate culture of Visy in relation to its obligations under the Trade Practices Act was non-existent. None of the most senior people hesitated for a moment before embarking on obviously unlawful conduct. There was in evidence a Visy document entitled "Trade Practices Compliance Manual" ... On the front cover it is said:

"This is an important document. It is essential that it be read and understood by you. Visy Industries requires strict compliance with its policy on the Trade Practices Act."

...The Visy Trade Practices Compliance Manual might have been written in Sanskrit for all the notice anybody took of it.

The ACCC has used this case and others to highlight the costs associated with breaching the competition law and failing to have an effective internal compliance culture.

7. Working with procurement officials

The ACCC works with a range of stakeholders to disseminate information about cartels and the harm they cause, and to acquire intelligence about where potential cartel activity may be occurring. One important stakeholder the ACCC has worked with is public procurement officials.²⁹

Since 2005 the ACCC has undertaken a pro-active compliance strategy relating to cartel awareness in public procurement. The ACCC has actively engaged with procurement officials across all levels of

²⁵ More information about the ACCC's approach to corporate compliance programs is available here: <http://www.accc.gov.au/content/index.phtml/itemId/841713>.

²⁶ For more information, see speech by Court, Sarah, ACCC Commissioner, Australasian Compliance Institute 13th Annual Conference, *Compliance makes good business*, 14 October 2009, Sydney: <http://intranet.accc.gov.au/content/index.phtml/itemId/1099856>.

²⁷ See for example *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* [1997] FCA 450 (30 May 1997): <http://www.austlii.edu.au/au/cases/cth/FCA/1997/450.html>.

²⁸ See n 11 at para 319.

²⁹ Australia has previously submitted papers to the OECD on the topic of public procurement. The most recent paper was submitted in June 2010 to Working Party No. 3 on Co-operation and Enforcement (DAF/COMP/WP3/WD(2010)69). This section repeats some of that paper.

government to alert them to the issues that may arise in relation to cartel conduct. In particular, the ACCC has focused on:

- risks for government
- the law in Australia
- procurement design
- detection tips
- deterrence tips, and
- do's and don'ts in public procurement.

As part of its program, the ACCC has consulted with a range of Commonwealth, state and local government procurement bodies, written to Commonwealth Government Ministers and the Premiers and Chief Ministers of Australia's states and territories and appointed an Outreach Officer to liaise with state and local government entities focusing on education and advocacy for procurement reform.

The ACCC has also issued guidance materials in the form of a multi-media CD-ROM and a publication *Cartels: deterrence and detection—a guide for government procurement officers* (revised in June 2011)³⁰. This publication assists procurement officials to better understand cartel behaviour and detect possible collusion amongst suppliers. It gives examples of cartels that have been detected, tips on when to report suspicious behaviour to the ACCC and guidance on how to draft anti-collusion clauses. The key role procurement officials play in deterring cartel conduct is described as follows:³¹

If potential cartelists are aware that you are vigilant, they will be far less likely to collude. For this reason, government procurement professionals are the first line of defence against the activities of cartels.

Awareness raising by the ACCC seeks to highlight and explain the harmful impact on victims of anti-competitive conduct whether they are consumers, businesses or procurement officials and to encourage them to take action and establish systems for deterring and detecting anti-competitive conduct. In this regard, for example, the ACCC encourages procurers to ask tenderers to warrant that they have not engaged in anti-competitive conduct and to disclose any prior anti-competitive conduct, prior to tendering. Procurers are also encouraged to reserve the right to exclude tenderers who have contravened the Competition and Consumer Act, or equivalent foreign laws, or who have failed to make full disclosure. Over time this approach has the potential to operate as a significant commercial deterrent to engaging in anti-competitive conduct.

Another example of the ACCC's targeted outreach to procurement officials is the Building the Education Revolution (BER) project. BER represented a A\$17 billion component of the "Nation Building and Jobs Plan" stimulus measure implemented by the Commonwealth Government in 2008/2009 in response to the global financial crisis. While no specific allegations of cartel conduct were received, the ACCC identified several risk factors which prompted it to undertake a pro-active compliance strategy in relation to the project. To implement the strategy, the ACCC took a number of steps including:

³⁰ The publication is available here: <http://intranet.accc.gov.au/content/index.phtml/itemId/1036508>.

³¹ Ibid at 5.

- writing to local authorities across the country requesting details of construction industry participants, alerting them to potential concerns, and providing them with information enabling the identification of cartel conduct
- writing to managing contractors across the country to provide information on cartel conduct, the ACCC's immunity policy and a contact point, and
- holding follow-up meetings with a sample of industry participants and requesting tender documents for analysis following meetings.

8. Conclusion

Over the past five years the Australian Government, courts and the ACCC have all called for increased penalties for breaches of the competition law on the basis that greater corporate penalties and individual responsibility for illegal conduct deter such conduct and promote compliance with the law. The Australian Parliament has responded to these calls.

Significantly, in July 2009 Australia's cartel regime joined some of the toughest in the world with large fines and imprisonment available for serious cartel conduct. With these penalties, and a raft of enhanced enforcement tools, the ACCC is better equipped than ever before to deter and detect cartel conduct.

Within this context, the ACCC employs a range of responses – both enforcement and non-enforcement based (depending on the circumstances) – to foster compliance with the law. The ACCC will continue to pursue a number of strategies targeted at raising community awareness, educating businesses about compliance, encouraging businesses to enforce compliance and working with key stakeholders to increase public understanding of the harm caused by cartels and how to detect cartel behaviour when it happens. The ACCC will also continue to investigate all credible allegations of cartel conduct as a priority. The ability to respond effectively and proportionately to breaches of the law is essential to stop, punish and deter cartel conduct.

CANADA

Introduction

The Canadian Competition Bureau (the “Bureau”), as an independent law enforcement agency, ensures that businesses and consumers prosper from a competitive and innovative marketplace. Headed by the Commissioner of Competition (the “Commissioner”), the Bureau is responsible for the administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.¹

This submission examines the various methods employed by the Bureau to promote compliance and foster a culture of compliance to help ensure that violations of the *Competition Act* (the “Act”) do not occur. This submission will also describe the Bureau’s Conformity Continuum Information Bulletin (the “Conformity Continuum”),² which provides the Bureau’s views regarding the instruments available to achieve compliance with the Act.

1. Conformity Continuum

Promoting compliance with competition laws can take many forms. In this regard, the Bureau has adopted a multifaceted approach to the administration and enforcement of the Act that is set out in the Conformity Continuum. While enforcement through litigation is sometime necessary, and always a possibility if a consensual resolution of Bureau concerns is not forthcoming, the Conformity Continuum is designed to provide clarity to stakeholders on the circumstances governing the selection and use of compliance instruments, and sets out some considerations that may, depending on the concerns, influence the Bureau’s decisions. It is developed based on the belief that most businesses and their managers prefer to comply with the law rather than become involved in enforcement proceedings under the Act.

The Conformity Continuum notes that the Bureau will consider using a range of tools, including education, voluntary compliance and contested proceedings, to address competition issues. These tools may be used individually or in combination to achieve the ultimate goal of compliance with the Act. The Conformity Continuum confirms that vigorous enforcement measures will be used when the Bureau considers it necessary to ensure conformity and compliance.

The Conformity Continuum further states that, when the Bureau becomes aware of alleged non-conformity, it will select the appropriate instrument from the range of available tools. When appropriate, the Bureau will use a blended approach, which involves the selection and use of more than one instrument. The Bureau’s choice will depend on the particular circumstances of the case. Typically, the Bureau will assess a variety of factors, which might vary depending on the case, including the gravity of the alleged

¹ The legislation is available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html.

² The Conformity Continuum (June 2000) is available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01750.html>.

infraction, previous anti-competitive conduct, and the willingness of the parties to resolve the matter. Generally, no one factor is determinative in and of itself.³

2. Promoting compliance

Promoting compliance through education can be achieved through various means, including communications efforts and publications by the Bureau. It has been a longstanding practice for the Bureau to issue various publications for consumers and businesses on its website. The Bureau engages the legal and business community by providing regular updates on the Bureau's priorities and enforcement action through speeches, news releases, information bulletins and enforcement guidelines.

The Bureau has devoted considerable resources to educational efforts to promote compliance since the recent amendments to the Act. In 2009, the Government of Canada passed amendments to the Act that constitute the most significant reform to Canada's competition laws since the mid 1980s.⁴ The amendments were intended to modernize the Act and better protect Canadians from the harm caused by anti-competitive conduct.

Among the suite of changes to the merger, civil and criminal provisions of Canada's competition framework law, Parliament repealed the criminal conspiracy provisions and replaced them with a new *per se* criminal offence prohibiting agreements between competitors to fix prices, allocate markets or restrict output; and a new civil provision for all other agreements between competitors that prevent or lessen competition substantially. These changes were designed to create a more effective criminal enforcement regime for the most egregious forms of cartel agreements, while at the same time not deterring legitimate beneficial collaborations between competitors.

The amendments also increased the maximum fine for violations of the criminal conspiracy provision from \$10 million to \$25 million and the maximum term of imprisonment from five years to 14 years. The maximum term of imprisonment for bid-rigging was also increased from five years to 14 years. Under the civil agreements provision, the Competition Tribunal (the "Tribunal") was provided with the power to prohibit any person from doing anything under an agreement, or require any person, with the consent of that person and the Commissioner, to take any other action. In addition, the Tribunal can now award administrative monetary penalties ("AMPS") of up to \$10 million for initial orders, and up to \$15 million on subsequent orders, for companies found to have abused a dominant position.

The amendments also introduced a two-stage merger review process to allow for the more efficient and effective review of mergers; decriminalized the price maintenance provisions; repealed the predatory pricing, price discrimination and promotional allowances provisions; increased the penalties for deceptive marketing practices, obstruction of justice and failure to comply with orders made under the Act; and empowered the courts to award restitution to victims of false or misleading representations.

To promote compliance with the amended Act, the Bureau prioritized its outreach efforts to include consultations with the Bar, the business community, and consumer groups. The guiding principle through this period was to offer maximum predictability and transparency. The Bureau also updated the relevant enforcement-related information and added a new amendment focussed section to its website. In addition, the Bureau held regular meetings with business and consumer groups across the country, hosted technical roundtables on draft guidelines, including the *Competitor Collaboration Guidelines* (the "CCGs"), that

³ See Appendix 1 for a list of instruments that the Bureau may consider when applying the Conformity Continuum.

⁴ These amendments were included in Bill C-10 (*Budget Implementation Act, 2009*).

discuss how the Bureau will assess collaborations between competitors under the amended provisions and exercise its enforcement discretion.⁵

The Bureau also developed an outreach strategy to increase awareness of the amendments. The outreach presentations delivered a strong anti-cartel enforcement message, making audiences aware of the amended provisions and the CCGs, and encouraged businesses to adopt or enhance their corporate compliance programs.⁶

The Bureau also provides practically focussed outreach efforts in the area of bid-rigging to support both detection and prevention. Outreach teaches organizations how to recognize the signs of bid-rigging and other cartel-related activity, and is the critical first step to enforcement. Since such schemes are covert, and detection is usually difficult, the Bureau often only becomes aware of potential cases through information provided by individuals, such as procurement officers who believe that a competitive process has been circumvented. A comprehensive bid-rigging awareness and prevention multimedia presentation can be found on the Bureau's website.⁷

3. Facilitating conformity

To facilitate voluntary compliance with the Act, companies were given an opportunity to apply for transitional advisory opinions at no cost, so as to determine whether existing agreements and arrangements were in violation of the new civil or criminal provisions. The Bureau provided six transitional opinions, three of which resulted in the applicants changing their existing agreements to ensure compliance with the Act.

The Bureau also encourages businesses to establish corporate compliance programs. In September 2010, the Bureau published an updated Corporate Compliance Programs Bulletin (the "Compliance Bulletin") that reflects public consultations and the 2009 amendments to the Act.⁸ The overall objective of any compliance program is to promote the importance of complying with the law. It is important that each compliance program be tailored to the needs of individual businesses, encourage structural flexibility and ensure senior management engagement. The updated Compliance Bulletin also notes steps that can be taken to minimize risk and detect possible contraventions of the Act.

A corporate compliance program does not immunize businesses or individuals from enforcement action by the Commissioner or from prosecution by the Director of Public Prosecutions ("DPP").⁹ In certain circumstances, a compliance program may influence the Bureau's choice of a compliance response. For example, the Commissioner and the DPP may give weight to the existence of a credible and effective compliance program when determining the most appropriate means to resolving a case that involves an offence where the exercise of due diligence is a factor. A credible and effective corporate compliance program may also assist a company in detecting competition offences early, and thereby allow the

⁵ The *Competitor Collaboration Guidelines* (December 2009) are available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>.

⁶ See section 4 for a more detailed description of corporate compliance programs.

⁷ The bid-rigging awareness and prevention multimedia presentation is available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02601.html>.

⁸ The Compliance Bulletin (September 2010) is available online at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf).

⁹ The DPP is responsible for the Public Prosecution Service of Canada ("PPSC"). The PPSC is a federal government organization, which fulfills the responsibilities of the Attorney General of Canada in the discharge of his criminal law mandate by prosecuting criminal offences under federal jurisdiction.

corporation to benefit from the advantages of being an early cooperating party through the Bureau's Immunity and Leniency Program.

4. Responses to non-conformity

Responses to non-conformity are grouped into three categories: suasion, consent, and adversarial instruments. Adversarial instruments are the logical choice in cases of serious or deliberate criminal conduct, or when resolution of civil or criminal matters on a consent basis is inappropriate, not timely, or uncertain. However, the Bureau's effort to promote compliance without the need for contested proceedings is supported by the availability of alternative case resolutions ("ARCs") in the form of both suasion and consent.

4.1 *Alternative case resolutions*

ACRs is simply a label for a range of approaches the Bureau may elect to use to promote compliance with the Act. ACRs can, where appropriate, allow the Bureau to resolve certain issues efficiently, without a full inquiry or judicial proceedings. ACRs take many forms, including, but not limited to warning letters, voluntary undertakings by companies and individuals to adopt certain measures to correct the impact of anti-competitive conduct, and prohibition orders. The Bureau is most likely to consider an ACR in cases where the actual or potential economic harm is minimal, and where there are no aggravating factors combined with significant mitigating factors.

4.2 *Consent agreements*

In the course of an examination or inquiry, when the Commissioner believes that anti-competitive conduct has taken place, she will generally afford involved parties the opportunity to respond to her concerns and propose an appropriate resolution to address these concerns. If a satisfactory resolution can be agreed upon, the approved remedy is generally embedded in a consent agreement and registered with the Tribunal. Once registered, a consent agreement has the same force and effect as an order made by the Tribunal. Consent agreements can be an effective method of resolving a matter without proceeding to litigation.

4.3 *Adversarial instruments*

Adversarial instruments include those that involve the Bureau or the DPP in contested court or Tribunal proceedings. These measures are used when the resolution of cases on a consensual basis cannot be reached or is considered inappropriate or insufficiently timely or certain.

The 2009 amendments included meaningful incentives to comply with the abuse of dominance provisions in the Act. These incentives permit the Tribunal, upon finding that a person has abused a dominant position in the marketplace, to award AMPs of up to \$10 million for initial orders and up to \$15 million for subsequent orders. AMPs are not intended to punish; rather, they are meant to promote compliance by functioning as a deterrent to abusing a dominant position. In addition, over the past year, the Commissioner has commenced litigated cases under the civil matters, mergers and fair business practices provisions of the Act in areas that are important to the Canadian public. These include in industries covering cell phones, hazardous waste disposal, credit cards and real estate.¹⁰

¹⁰ These cases include: (1) In November 2010, the Commissioner filed an application with the Tribunal against Rogers Communications Inc. for what she concluded was misleading advertising of its Chatr discount cell phone and text service. [<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03316.html>] (2) In January 2011, the Bureau made an application to the Tribunal for an order to

In criminal cases, the Bureau works closely with the DPP, who is responsible for prosecuting individuals and companies for violations of the criminal provisions under the Act, and to punish individuals for serious and deliberate misconduct. One of the objectives in prosecuting offences is to obtain penalties adequate to promote the policy goal of general and specific deterrence. In this regard, the amendments increased the maximum fine for violations of the criminal conspiracy provision from \$10 million to \$25 million and the maximum term of imprisonment from five years to 14 years. The maximum term of imprisonment for bid-rigging was also increased from five years to 14 years.

To increase public perception regarding the importance of anti-cartel enforcement, the Bureau is increasingly recommending that the DPP charge individuals and seek jail sentences, where warranted. In addition, pursuant to the Bureau's arrangement with the Royal Canadian Mounted Police, a record of individuals' charges and convictions is registered in the Canadian Police Information Centre ("CPIC") database. CPIC is responsible for the storage, retrieval and communication of shared operational police information to all accredited criminal justice and other agencies involved with the detection, investigation and prevention of crime. The registration of antitrust offenders in the CPIC database underscores the seriousness of such offences and heightens the personal consequences for those involved, appropriate for such unquestionably harmful conduct.

5. Conclusion

This submission provides an overview of the Bureau's approach to promoting compliance with the Act, highlighting the efforts by the Bureau to educate our stakeholders on the amendments to the Act and the Bureau's willingness, where the Commissioner considers it necessary, to engage in more formal consensual or adversarial proceedings, all with the objective of ensuring that Canadian businesses and consumers prosper from a competitive and innovative marketplace.

dissolve CCS Corporation's acquisition of Complete Environmental Inc. The Bureau believes that this purchase would prevent competition substantially in the market for secure hazardous waste disposal in Northeastern British Columbia. [<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03343.html>]

(3) In December 2010, the Bureau filed an application with the Tribunal to strike down restrictive and anti-competitive rules that Visa and MasterCard impose on merchants who accept their credit cards. The Bureau believes that these rules have effectively eliminated competition between Visa and MasterCard for merchants' acceptance of their credit cards, resulting in increased costs to businesses and, ultimately, consumers. [<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03325.html>] (4) In May 2011, the Bureau filed an application with the Tribunal seeking to prohibit anti-competitive practices by the Toronto Real Estate Board (TREB) that are denying consumer choice and the ability of real estate agents to introduce innovative real estate brokerage services through the Internet. [<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03379.html>]

APPENDIX 1 - CONFORMITY CONTINUUM

The following table outlines the range of instruments that the Bureau may consider when determining the best way to resolve a matter.¹

Conformity Through Education General Application²		
Publications	Communications	Advocacy
Information bulletins	Speeches	Interventions
Enforcement guidelines	Seminars	Representations
Annual report	Trade shows	Policy development
News release	Web site	Liaison
Discussion papers	Media Contacts	Partnerships
Reports	Videos	Research
Pamphlet series		

Facilitating Conformity	
General Application	Specific Application
Monitoring	Voluntary Compliance
Information centre	Advisory opinions
Prenotification	Pre-market assessment
Targeted inspections	Advance ruling certificates
Marketplace contacts	Corporate compliance programs
Practitioner contacts	Voluntary codes
Consultations	

Responses to Non-Conformity Specific Application		
Suasion	Consent	Adversarial
Information contacts	Negotiated settlements	Prosecutions
Information letters	Consent orders	Tribunal applications
Warning letters	Consent prohibition orders	Product seizures
Compliance meetings	Undertakings	Contested prohibition orders
	Corrective notices	Injunctions
	Voluntary product recalls	

¹ Conformity Continuum Information Bulletin, p. 4.

² General application instruments (e.g., the website or information bulletins) are primarily directed toward a broad audience and are typically used on an ongoing basis. Specific application instruments (e.g., prosecutions or advisory opinions (now referred to as written opinions)) are directed toward parties in specific circumstances and are characterized by the selection of appropriate instruments.

CHILE

1. Determinants of compliance with competition law: a broader view

There are good reasons to claim that society's commitment with competition as a driving force (competition as a value) and as a rule of the game in markets (a rule enforced by law) is political, historical, and socio-cultural specific.

First, political specific, because using competition law as an instrument in order to support the commitment to competition is interdependent to general political economy options that have shaped different industries of our economies as well as the economy as a whole. Degrees of harmony or dissonance of competition policy and law with the rest of economic policies vary depending on the level of commitment of those policies to a competitive market¹.

Second, historical. For a small and isolated economy such as Chile, our two century experience shows that trade openness to foreign products is crucial. But this seems to be just as important as the traditional path of political power and ownership structure in a country. As a Chilean scholar recently explained, in the 19th century, a relative small number of families had control over a big part of businesses in agriculture, mining, banking, commerce and the media and, at the same time, they were part of the political elite, serving as ministers and congressmen². It is a subject of historical controversy what such a political/ownership pattern meant in terms of economic outcomes, but the pattern existed. And over the years, it has changed in nuances but not in nature. Today, they are no longer just families; they are business groups, with -maybe less explicit but- not less influence in the political sphere³.

Third, socio-cultural specific. Political and historical frameworks generate institutions that shape community values and influence individual behaviour. Compliance with the rules of the game (and abidance to the law, by and large) is not obvious. Rational choice theory, conceiving an a-historical and a-contextual man tells us that compliance with a legal rule is depending on the cost-benefit calculus of the would-be violator. If this is true, talking about compliance is nonsense and we must talk just about sanctions and remedies⁴. If we care about compliance broadly, on the contrary, we believe that competition authorities and community members in general can contribute to influence the shaping of those community

¹ In May 2011, for instance, the Chilean government launched a program aimed at removing several barriers to competition, most of them requiring legal amendments. This is the case, for instance, of opening cabotage (maritime and air transportation between two national points) to foreign companies, so far reserved to Chilean companies. Members of the maritime industry in Chile rapidly opposed to the proposal. The issue shall be solved at a political level. Much more on this can be elaborated when one consider general perspectives regarding trade policies.

² Lüders, Rolf, "Sistemas Económicos, tecnología y acción oficial en defensa de la libre competencia: Chile 1810-2010" in "La Libre Competencia en el Chile del Bicentenario", TDLC and CLCUC (eds.), Thomson Reuters, Santiago, 2011.

³ Harvard's scholar Michael Porter, in a recent speech in Santiago about Chile, stated: "Big business groups still play a disproportionate role", *El Mercurio*, B10, May 15th, 2011.

⁴ Becker, Gary, "Crime and Punishment: An Economic Approach", 76 *Journal of Political Economy* 169 (1968).

cultural values and, in particular, to influence business community values. We are pretending to reach that grey area of business ethics. To be sure, if competition is not promoted by society from bottom up, but only be imposed by the government, we would be pretending that business community members will change a valid rule among their members (e.g., not to compete at all, limited competition, gentlemen agreements, and so on), by a rule imposed not by society at large, but only by a few government bureaucrats. Competition authorities are too weak for such a challenging task. Hence, involvement of society at large should be achieved.

Thus, compliance is political, historical and socio-cultural specific. The broader view presented above complements the traditional view which conceives compliance as a function of sanctions and risk of detection.

2. Determinants of compliance with competition law: the traditional view

A major case in competition law captured the attention of the media in 2009. Chilean competition agency, *Fiscalía Nacional Económica* (“the FNE”), filed a complaint against the three major retail pharmacy chains in Chile. Not long after the submission, one of the accused companies settled, confessing the involvement of some of its executives in irregular activities and paying USD 1m for social benefit.

This case, still before the Competition Tribunal (“TDLC”⁵) with the remaining accused parties, opened an intense debate about appropriate sanctions and remedies against hard-core cartel conduct. The discussion even justified the submission of a bill before Congress introducing a prison term as a sanction against cartel conduct. The bill is still in discussion. Is a prison conviction an effective determinant of compliance in the future? It is not clear and currently subject to debate in Chile. It is expected to have a clearer consensus on this issue in the following months.

Meanwhile, pecuniary sanctions are being imposed against companies and increasingly often against individuals. But pecuniary sanctions do not seem to be an effective deterrent and an actual determinant of compliance. Recidivism is not rare, even in cases of very well-known companies⁶.

The problem neither seems to be the lack of knowledge of the existence of competition law and institutions nor its content. If a company had doubts on whether its planned strategy may infringe

⁵ TDLC stands for *Tribunal de Defensa de la Libre Competencia*.

⁶ For instance, in Chile, the group *Movistar* (formerly *Telefónica*) was fined three times for dominance (exclusionary conduct) in a period shorter than 4 years. First, a company of the group contractually restrained the development of Voice on Internet Protocol services (TDLC, Ruling N° 45, October 26th, 2006, upheld in part by the Supreme Court. Fine: *circa* USD\$ 500.000). Second, a company of the group, by means of raising the price of an essential facility in the upstream market, blocked the development of the technology of converters (mobile boxes) in the downstream market (TDLC, Ruling N° 88, October 15th, 2009, upheld by the Supreme Court. Fine *circa* USD\$ 2.7 m). Third, the same company of the first case was sanctioned for tying and bundled discount of services with foreclosure effects for the development of Voice on Internet Protocol services (TDLC, Ruling N° 97, March 4th, 2010, upheld by Supreme Court. Fine: *circa* USD\$ 4.5 m). Another example could be taken from the retail industry, which in its strategy to increase financial services directly provided by the same retailers has tried to raise barriers to the entry of banking actors providing financing services for retail products. This happened for the first time during the Christmas 2002 season when the three largest retailer chains blocked the use of banking cards for paying product purchases from retailers in very favorable terms for consumers (Comisión Resolutiva, Ruling N° 704, August 20th, 2003, upheld by the Supreme Court. Fine: *circa* USD\$ 180.000 to each company). Two of these retailers were sanctioned again in 2008 accused of blocking a fair, organized by a major bank, for selling flat-panel TVs (TDLC, Ruling N° 63, April 10th, 2008, upheld by the Supreme Court. Fine: *circa* USD\$ 5m and 3m, correspondingly).

competition law, Chilean competition law provides for a non-adversarial procedure, consultative in character, which would help companies to dissipate their doubts. In a recent conference in Santiago, that joined professionals from the corporate governance and competition policy fields, an antitrust attorney explained that due to the costs associated to that consultative procedure and the relatively low fear of detection and prosecution, directors in general, instead of submitting a consultation, prefer to omit it, implement the strategy, wait and see, and pay the fine that may be imposed in the event of prosecution.

It seems that the model of man we use for approaching the discussion about compliance is determinant. If we adopt the *homo economicus* approach, sanctions is the only thing that matters. What are the best sanctions would be the sole issue. If we adopt the *homo sociologicus* approach, considerations are broader, and we should identify how to influence individual preferences regarding values.

Maybe both approaches can complement each other and trigger actions of competition authorities in both fields. Promoting compliance, by and large, seems to require both kinds of actions, competition law enforcement and competition value creation⁷. Effectiveness of competition authorities cannot rest just on one of those pillars. And if corporate compliance programs bring support to competition authorities' efforts, their effectiveness rest also in both pillars.

3. Corporate compliance programs

Corporate compliance programs have not been around for a long time in the public discussion about competition policy and law in Chile. In fact, competition authorities have not implemented any policy and not even issued a statement, neither on their content for ensuring effectiveness nor on their role as an aggravating, mitigating or neutral factor.

The FNE is currently in the process of evaluating what approach to take regarding these programs, so this Roundtable is very timely for supporting our decision making.

We have been able to identify that there are companies in Chile that do have such programs and others that do not. But so far we have not initiated activities aimed to identify neither what are the specific contents of these programs nor the reasons for their adoption. We have not identified if they are part of a general corporate compliance policy or if they are specific for competition issues. Thus, a potential next step on this issue could be to work closer with the companies having these programs, in order to identify their features, but we are not quiet convinced if the benefits of such initiative are worth the effort.

What seems clear for the FNE is that compliance programs should not have the power of exonerating the company from its antitrust liability.

A center on competition and regulation affiliated to Universidad Católica in Santiago has been active on competition corporate compliance programs for a while, disseminating the benefits of their adoption⁸.

Similar developments have been presented recently in a joint conference in the fields of corporate governance and competition⁹. A speaker made the proposal for certain companies to implement a committee of board members in charge of monitoring compliance on competition law issues. The main tasks of such a body would be to implement codes of conduct, to review periodically company's

⁷ Also known as increasing public awareness of the benefits of competition in markets, or creating a 'culture of competition'.

⁸ References available at: http://www.lcuc.cl/?page_id=564.

⁹ References available at: http://www.lcuc.cl/?page_id=2229.

commercial strategies and their regulatory risks, to assess risks of enforcement of competition law, to analyze competition law issues in which companies from the same industry/sector -or companies with which it interacts- might be involved and, if the company is subject to an order or injunction imposed by the Competition Tribunal, to evaluate it and monitor its compliance.

It is also worth to mention that professionals from the fields of ethics and compliance seem increasingly interested in getting training in competition law compliance¹⁰.

4. Final remarks

Competition law compliance should rest on two pillars: competition law enforcement and competition value creation. Determinants of compliance are not limited to sanctions. Factors influencing compliance are complex. An important effort competition authorities should deploy is trying to identify these factors.

Corporate compliance programs on competition law may be a useful tool for complementing competition authority efforts, but in order to fulfill their tasks with great degrees of effectiveness, these programs should also be built on the two pillars mentioned above. To be sure, executive compensation structures should be aligned with those pillars too.

Be too actively involved in the design and implementation of corporate compliance programs could turn in a very complex problem for competition authorities. Companies may pretend to have a free pass or certification once the authority has been involved in their corporate program, which cannot be, under any view, a reasonable conception.

¹⁰ A series of conferences on ethics and compliance hosted this year by an association of business people considers two sessions on competition law each of them led by competition authorities' heads. Reference available at: <http://www.generacionempresarial.cl/>.

ANNEX: RESPONSES TO A SHORT QUESTIONNAIRE

In order to have a rough idea of the state of affairs about compliance programs in competition law in Chile, we requested 4 big law firms with significant competition law practices in Santiago, randomly chosen, to answer a short questionnaire. The answers of three of them are summarized in the following paragraphs.

1. All the respondents said that promoting the design of corporate compliance programs in competition law was a service they had been providing for more than 2 years. At the same time, most of them explained that this service represented a small part of their competition law practice. Only one respondent said that their workload on compliance programs was significant.
2. Respondents identified general compliance with law and regulations -as an institutionalized corporate policy- as the most frequent and main determinant for adopting a corporate compliance program. A competition law enforcement action that had affected the company or another company in the industry was identified as another main determinant. One respondent explained that changes in control often trigger enhancements in corporate polices which give momentum for corporate compliance programs.
3. Describing the kind of activities they perform when promoting compliance with competition laws, they included training of higher executives and medium employees, drafting internal guidelines on compliance and even setting up internal reporting systems. Broader plans designed with the aim of adopting general changes in corporation's culture and structure are not common.
4. As to big firms, a great number of them (over 80%) are willing to adopt some kind of a promoting compliance initiative after the proposal by the law practice, for most of the respondents. The number is inferior for the other respondents who answered less than 40%. As to medium sized firms, the number is even lesser.
5. A final question aimed at getting the respondents' view on compliance of competition law by and large beyond corporate compliance programs. The main driver for compliance, according to two respondents was to implement a public-private partnership aimed at promoting cultural changes within corporations and industries. A change in the structure of sanctions was mentioned by another respondent. No respondent took into account the alternative of modifying compensation structure of higher executives and enhancing internal control systems aimed at deterring anticompetitive practices.

DENMARK

1. Introduction

Promoting compliance with the Competition Act is one of the main tasks of the Danish Competition and Consumer Authority. In relation to this the Danish government set up a committee in 2009, *The Committee to consider possible amendments to the Danish Competition Act*, with a mandate to assess:

- whether there is a need to strengthen the DCCA's information and guidance about the competition rules in order to ensure compliance and prevent breaches of the Competition Act,
- whether the different administrative procedures in competition cases can be organized more effectively and with the least inconvenience possible for the involved undertakings, and
- whether the possibility of custodial sanctions in cartel cases will strengthen the enforcement of the Competition Act

The committee will submit a report by the end of 2011. The committee will discuss many of the topics raised below and a number of the comments given by the DCCA below are preliminary and awaiting the committee's conclusions. Further, the consultancy firm London Economics prepared a report for the committee called "The Nature and Impact of Hardcore Cartels" for the DCCA in early 2011.¹ The Danish submission is on a number of dimensions inspired by the conclusions of this report.

2. **Determinants of compliance. What factors influence companies' decisions to comply or not comply with competition laws? Note that we are interested here only in the range of possible influences, not in identifying what factors are most influential (that will come later). The reluctance to face monetary sanctions, for example is a likely factor. Fear of a prison sentence is another. What other influences are there?**

Companies' compliance with the competition law is influenced by a number of factors of which some can be shaped by competition authorities and others are more general values of society and companies.

Compliance depends on general values and attitudes towards compliance with public law at large. With respect to competition laws, this in turn depends on the general legitimacy of competition laws among business' and the general public and of stakeholders having a positive view of competition authorities' specific actions and decisions and their effects on competition and also of the decision making process as such.

Compliance also depends on companies being well informed about competition laws. Further as cartel formation and abuse of dominance is often very beneficial to the involved firms, sanctions must also be effective. Competition authorities and politicians are thus able to have a direct effect on compliance by shaping the information to firms and the sanctioning regime.

¹ The report is available in English at <http://www.konkurrencestyrelsen.dk/index.php?id=29884>.

2.1 Well informed firms

It is detrimental to compliance, that the companies know the competition laws. Thus the DCCA actively informs and give advice to companies regarding the Competition Act in order to improve compliance.

The main source of *general* information is the website of the DCCA. The website contains press releases, information about decisions by the Danish Competition Council, Court rulings and various publications. Press releases regarding various cases and publications are an important information channel for the DCCA.

In addition, it is possible to have general guidance regarding the Danish Competition Act from the DCCA through a telephone hotline. And the DCCA will hold meetings with layers and business organisations when new regulation is implemented. The DCCA held 10 external information meetings when the new merger regulation was introduced in 2010 to inform about rules, process' etc.

The DCCA also focuses on a constructive and open dialogue with companies in pending cases and is continuously improving the dialogue. A recent improvement is that companies are formally informed at an earlier stage in competition cases about the DCCA's concrete competitive concerns.

In Denmark, it is still possible for firms to notify an agreement to the DCCA in order to get an assessment of whether the agreement is in conflict with the Competition Act.

A recent report by the DCCA survey data showed, that 80% of the Danish firms are aware of the Competition Act.² Equal results were found in Germany and the UK in the report. However, nearly 60% of all Danish firms state that the Danish Competition Act does not have practical importance for them. However, the survey does not make it possible to assess whether this result is due to lack of compliance.

2.2 Sanctioning

An optimal sanctioning regime comprises both monetary and non-monetary sanctions – focused on *both* individuals and corporations involved in cartel activity. Individual sanctions may include imprisonment, personal fines and Director Disqualification Orders, while corporate sanctions typically consist of fines. In addition to these sanctions, bad publicity associated with an antitrust infringement is an important factor.

The standard economic model of criminal activity is based on the assumption that potential criminals are rational and seek to maximise their utility in selecting between behaviours that both have expected costs and benefits. The economic theory of crime thus suggests that owners of companies have incentives to engage in anticompetitive practices if the expected profits from anticompetitive practices exceed the profits from other activities. The expected benefits associated with anticompetitive activity need to be considered in relation to the expected costs of participating in illegal activity, which can be characterised by the probability of detection and financial and non-financial sanctions if convicted.

One way to increase companies' incentives to comply with the Competition Act is thus to increase the probability of detecting criminal activity. This may be achieved through greater or more efficient policing. Further effective leniency arrangements can help to destabilise cartels.

² The report "Competition Culture" is available in English at: <http://www.konkurrencestyrelsen.dk/en/service-menu/publications/>.

Authorities may also improve compliance by increasing the severity of the punishments imposed upon detection and conviction. In terms of financial sanctions, economic theory suggests that the optimal fine equals the harm resulting from the cartel activity divided by the probability of detection. The financial penalty in this context includes all types of monetary sanctions, such as the fines imposed by courts, as well as private settlements. In addition to the financial sanctions there may be a loss of reputation.

When individual sanctions such as dismissal, director disqualification orders and imprisonment are available in cartel cases, the optimal fine level is lower than would otherwise be the case.

3. Recidivism. Why are there repeat offenders? Furthermore, why do some firms repeat while others do not? Why do certain sectors (e.g., construction) seem to have a chronic problem complying with competition laws, regardless of the number of times or the severity of the punishments imposed on them.

Recidivism is most likely affected by a number of factors, and it is difficult to establish which factors are decisive in each case. Overall, contributing factors may be the level of sanctions and risk of detection, norm and values within industries, i.e. the competitive culture in industries, personal attitudes of individual directors and industry participants, the overall competitive stance in the industry, e.g. from foreign competition.

As discussed above economic theory suggest that individuals and companies may be motivated to participate in Competition Act violations if the expected gain in terms of higher profits is greater than the expected costs associated with detection and punishment. Thus recidivism may simply reflect that it is profitable to engage in anticompetitive conduct.³ In a report by London Economics it is concluded that the level of both financial and non financial penalties imposed in relation to cartel activity in Denmark appear to be relatively low compared to those imposed for similar anticompetitive behaviour in other jurisdictions.

In Denmark there has been some repeated dominance cases in recently liberalized markets where the incumbent firm is either state owned (quasi-)monopolies or recently privatized monopolies. This may suggest that there is a challenge of achieving level playing fields and compliance with competition law during the liberalization process where the incumbent company must perform in a new environment of competition, often with owners interested in making profits, under anti trust rules.

Experience from other economic crimes seems to be that some individuals choose to infringe the law repeatedly despite discredit in the public and significant punishments. This may also be the situation in the case of cartel offenders, but there are no such examples in Denmark.

4. How can competition authorities drive better compliance?

In relation to the government *Committee to consider possible amendments to the Danish Competition Act* the DCCA is working on a new strategy to prevent antitrust infringements. One motivation for the new strategy is that a number of firms find it difficult to comply with the competition law. The strategy will focus on improving information regarding the competition act, while at the same time punish firms consistently that nonetheless violates the competition act.

As mentioned above, an optimal compliance regime compromises both effective sanctioning and well informed firms. It is, however, not possible to rank the different compliance tools, as they complement

³ This may also reflect that a violation is only liable to punishment in cases where the infringement has been committed with intent or gross negligence.

each other. A number of issues are relevant for discussing how competition authorities may drive better compliance, including:

- If there exists particular characteristics of firms engaging in anticompetitive conduct or characteristics of sectors most prone to anticompetitive conduct.
- The effectiveness of sanctioning for anticompetitive conduct
- The effectiveness of investigations of anticompetitive conduct
- Information regarding the competition act

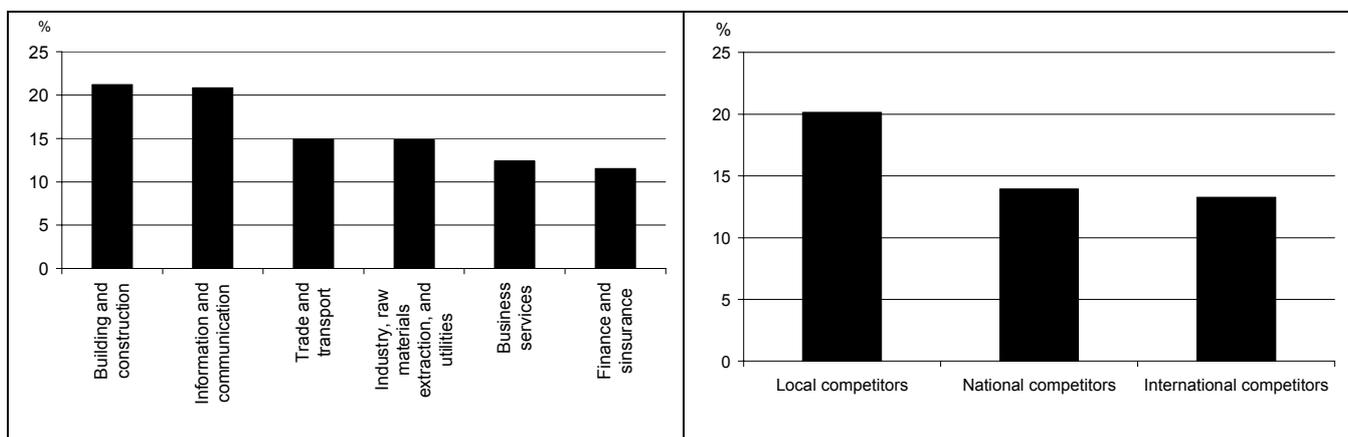
4.1 Which sectors, which types of firms within sectors, and which types of employees are causing the greatest problems?

The DCCA’s practical experience with enforcing the Competition Act does not give clear and general results as to in which sector or among which companies non-compliance risks are the largest. Some observations are indicative of where problems may arise more frequently.

As noted above, sectors with formerly state or public owned monopolies may face transitional challenges in adapting to competitive and level playing field markets.

Secondly, in a survey conducted by the DCCA, it was found that 15% of the firms state that they either ‘agree’ or ‘strongly agree’ that violations of the Competition Act occur among suppliers, customers or competitors. Within building and construction and information and communication industries, a good 20% of the firms ‘agree’ or ‘strongly agree’ that violations of the Competition Act occur among customers, suppliers or competitors, while within the finance and insurance and business service industries, the proportion is about 11-12%, see Figure 1, left panel.

Figure 1. Firms’ assessments of whether violations of the Competition Act occur.



Note: The firms were asked to what degree they agree that violations of the Competition Act occur in their industry (among suppliers, customers or competitors). The response value could be indicated on a scale from 1 through 7, where 1 is ‘strongly disagree’ and 7 ‘strongly agree’. The indicator measures the number of firms who have answered 6 or 7 as a proportion of all firms who have answered.

Source: Danish Competition Agency, Competition Culture, Competition Analysis 2010/1.

Especially firms located in the same regions as their most important competitors assess that the Competition Act is violated by customers, competitors or suppliers (20% ‘agree’ or ‘strongly agree’), see

Figure 1, right panel.⁴ In firms, whose most important competitors are non-local (e.g., from other parts of Denmark or from abroad), about 13% agree that the Competition Act is violated by customers, competitors or suppliers. Even though it is not possible to estimate neither the exact number nor the nature of actual violations of the Competition Act, the firms' own assessments indicate that violations occur to a significant degree.

These results indicate that infringements are more likely in the construction sector, information and communications sector, and/or sectors exposed mostly to local competition. These results should only be taken as very indicative.

Finally, theory suggests that the following market characteristics are likely to facilitate cartel activity:

- Frequent interaction between cartel members
- Low and stable demand
- Concentrated markets
- High entry barriers
- High degree of transparency
- Symmetric cost and quality
- Low buyer power

However, in practice these characteristics give only very limited guidance regarding *ex officio* cartel investigations. Compliance also depends on general values and attitudes towards compliance with competition law as discussed above. Finally, it may not be that all companies in a given sector fulfilling those characteristics participate in a cartel, for instance bid rigging may involve only some firms in an industry.

4.2 Effectiveness of sanctions for anticompetitive conduct

The empirical literature typically supports the concept in economic theory that there is a deterrent effect of punishment. Hence, policy makers wishing to reduce cartel activity can aim to reduce the incentives to engage in cartel activity by increasing the probability of detecting criminal activity. Further, an optimal penalty regime comprises both monetary and non-monetary sanctions – focused on both corporations and individuals involved in cartel activity.

In Denmark, sanctions for infringement of the Competition Act are imposed by the courts acting upon a charge brought by the Public Prosecutor for Serious Economic Crime. The DCCA can impose neither administrative fines nor any other penal sanction.

The Director General of the DCCA decides whether a case is suitable for being handed over to the Public Prosecutor for criminal enforcement. If the Public Prosecutor finds sufficient evidence against an undertaking (and possibly an individual) to prove gross negligence or intent to infringe one of the provisions in the Competition Act, the Public Prosecutor can bring charges and present a criminal case before the courts.

⁴ It should be noted that this latter result could be an image of the result for the construction sector, but may also cover other industries as well.

The guidelines on the level of fines introduced in 2002 state that the criteria for determining the fines are: a) the gravity of the infringement, b) the duration of the infringement, c) the annual turnover of the entity, and d) aggravating and attenuating circumstances.

When setting a fine, the basic amounts are:

- Less serious infringements: up to DKK 400.000 (EUR 55.000)
- Serious infringements: DKK 400.000 - 15 million (EUR 2 million)
- Very serious infringements: DKK 15 million and above

Moreover it is possible to impose fines on persons – i.e. the managing director or the board of directors. The highest fine ever imposed in a single undertaking in Denmark is DKK 5 million (less than one million euros). The highest fine ever imposed on an individual is DKK 25.000 (EUR 3.333).

In the report by London Economics it is concluded that the level of both financial and non financial penalties imposed in relation to cartel activity in Denmark appear to be relatively low compared to those imposed for similar anticompetitive behaviour in other jurisdictions. The relatively low level of sanctioning may be one of the explanations as to why the Danish leniency regime so far has not had much success.

Denmark does not sanction cartel activity with imprisonment. Whether the possibility of custodial sanctions in cartel cases will strengthen the enforcement of the Competition Act is currently a topic in the government “Committee to consider possible amendments to the Danish Competition Act” mentioned in the introduction.

4.3 *Effectiveness of investigations of anticompetitive conduct*

To unravel infringements of competition laws, it is paramount that authorities’ effort is focused and effective, especially in cartel investigations. During recent years, the DCCA has given the work of revealing and intervening cartels and other serious infringements of the Competition Act high priority. The DCCA established in 2011 a new unit called “Investigations and Cartels Division”, which – among others – is responsible for cartel investigation, leniency and cooperation with the Public Prosecutor for Serious Economic Crime, including methods development in the cartel area. The division is also responsible for the co-operation between the DCCA and competition authorities in other countries in cartel cases. Recently, the division has made a new investigation strategy, which focuses on the need of increasing the contact and co-operation with important agents in the markets in order to strengthen the DCCA’s information level about possible cartels.

4.4 *Information regarding the competition act*

Finally compliance may be improved by increasing the general awareness of the competition act. This could be the case if some of the observed violations of the competition act are due to firms with insufficient information regarding the competition act. The government “Committee to consider possible amendments to the Danish Competition Act”, mentioned in the introduction, is currently discussing this issue.

5. Corporate competition compliance programmes. How should corporate compliance programmes be viewed by competition agencies and courts?

In general compliance programmes serve as a mean to inform employees in the firm about the competition act, and improve companies' compliance with the competition act. The DCCA thus views compliance programs as an important way for companies to secure that employees have sufficient knowledge regarding the competition act.

The DCCA's starting position with respect to Competition Act infringements and compliance programmes is in general neutral. However compliance programmes may under certain conditions serve as an extenuating circumstance. This may be the case if the company through compliance programmes have made an effort and continues to work with securing that employees comply with the competition act. In this case it can be argued, that the infringement was conducted against the will of the firms management.

FRANCE (DGCCRF)

1. **Le dispositif de transaction et d'injonction en droit français: un instrument de diffusion de la culture du droit de la concurrence aux PME**

La table ronde « *comment promouvoir la conformité au droit de la concurrence* » a pour objectif de dresser un panorama des divers instruments les mieux à même de promouvoir la diffusion de la culture du droit de la concurrence aux entreprises.

En France, l'Ordonnance du 13 novembre 2008 (insérée dans le code de commerce à l'article L 464-9) a confié au Ministre un nouveau dispositif de transaction et d'injonction. Ce dispositif de « *transaction* » apporte une solution simple et rapide aux pratiques anticoncurrentielles qui affectent un marché de dimension locale.

Il poursuit un double objectif :

- Le premier objectif visé est de permettre un règlement effectif et accéléré des pratiques anticoncurrentielles locales.

Les instruments de lutte contre les pratiques anticoncurrentielles ont été élargis, pour organiser une police cohérente de l'ensemble des pratiques anticoncurrentielles incluant les pratiques de dimension locale, dont le règlement rapide constitue un enjeu sensible et concret.

D'une part, pour la victime, la pratique cesse rapidement. D'autre part, ce dispositif permet au contrevenant d'éviter une procédure contentieuse lourde et coûteuse.

- Le 2^{ème} objectif consiste à donner la faculté à l'Autorité de la concurrence de consacrer l'essentiel de son activité aux dossiers les plus complexes qui impliquent les entreprises de taille importante, ce qui suppose de lui permettre d'assurer ou non, à son libre choix, le traitement des affaires locales.

Le mécanisme de transaction/ injonction est un outil complémentaire de ceux utilisés par l'Autorité de la Concurrence (ci-après ADLC). Le champ de l'ensemble des pratiques anticoncurrentielles est ainsi couvert.

Le dispositif de transaction/injonction, qui existe depuis deux ans, concerne les pratiques anticoncurrentielles qui remplissent les trois conditions suivantes:

- les pratiques en cause affectent un ou plusieurs marchés de dimension locale. Les pratiques de portée nationale sont traitées par l'ADLC.
- ces pratiques ne portent pas sur des faits relevant des articles 101 et 102 du Traité sur le fonctionnement de l'UE,
- ces pratiques sont le fait d'entreprises dont le chiffre d'affaires n'excède pas 50 millions d'euros sur le plan individuel et 100 millions d'euros pour l'ensemble des entreprises en cause.

Dans ce cadre, lorsque la DGCCRF estime que les pratiques sont constituées, elle enjoint aux entreprises d'y mettre fin. En outre, si la gravité des comportements le justifie, la DGCCRF propose aux contrevenants une transaction financière dans la limite de 75000 € et de 5 % du chiffre d'affaires de l'entreprise concernée.

En pratique, la DGCCRF règle les pratiques de dimension locale, l'ADLC traite les pratiques nationales et communautaires. L'ADLC peut toutefois choisir, si elle le souhaite, de prendre en charge certaines pratiques de dimension locale.

La mise en œuvre de cette procédure de transaction/ injonction est réalisée dans le cadre d'un débat contradictoire. A l'issue de ce contradictoire, deux cas de figures sont possibles :

- soit l'entreprise accepte la mesure. Dans ce cas, l'exécution par l'entreprise des obligations résultant de la mesure prise éteint toute action devant l'Autorité de la concurrence pour les mêmes faits.
- soit l'entreprise refuse. Dans cette hypothèse, non rencontrée à ce jour, la DGCCRF – au nom du ministre chargé de l'économie – saisirait l'Autorité de la concurrence.

L'Autorité de la concurrence est systématiquement informée par la DGCCRF des mesures conclues.

Depuis la mise en place de ce dispositif en 2009, une dizaine de dossiers ont été réglés et plusieurs affaires sont en cours d'achèvement. Des rapports d'enquête effectués par la DGCCRF sont actuellement à l'étude et pourront donner lieu à ce type de mesures dans les mois à venir.

Ce dispositif de « transaction/injonction » a été institué pour régler les pratiques de portée locale. Il convient de préciser qu'une pratique de « dimension locale » n'est pas forcément « une petite affaire ». Un des premiers dossiers traité par la DGCCRF a donné lieu à une transaction pour une entente entre 8 entreprises du bâtiment qui s'étaient échangé des informations préalablement à des appels à la concurrence concernant des travaux de rénovation de façades d'immeubles.

L'enjeu de cette procédure n'est pas seulement d'aboutir à une transaction financière, d'un montant si possible élevé. Malgré des sanctions de niveau important, les cartels demeurent en effet un problème majeur, par leur nombre en augmentation dans certains secteurs, et il convient de se poser la question de savoir quels sont les facteurs, outre les sanctions pécuniaires, qui pourraient inciter les entreprises à respecter les règles de la concurrence.

Le dispositif français de « *transaction/injonction* » est un instrument d'encouragement au respect des règles de concurrence et de promotion de la culture de concurrence à destination des PME.

Les trois caractéristiques principales de ce dispositif sont les suivantes:

1. En premier lieu, l'injonction a des vertus pédagogiques. En effet, les entreprises ayant commis une pratique anticoncurrentielle se voient enjoindre non seulement de cesser la pratique litigieuse mais aussi d'adopter un comportement vertueux.

Cas de l'Armada de Rouen

L'Armada de Rouen est un rassemblement maritime dans le port de Rouen organisé tous les 5 ans qui donne lieu à la passation de contrats par l'association organisatrice de ce rassemblement avec divers fournisseurs pour alimenter les stands admis sur le site.

Il était fait grief à cet organisateur de passer des contrats d'exclusivité sans mise en concurrence préalable et de renouveler ces mêmes contrats tacitement.

La DGCCRF a donc demandé à l'organisateur en cause « de sélectionner les fournisseurs et les traiteurs qu'elle agréé pour les prochaines manifestations sur la base de critères objectifs préalablement définis. »

L'intérêt de cette affaire a été d'aider les opérateurs à mettre en place des contrats conformes au droit de la concurrence. Il existait d'ailleurs une vraie demande en ce sens de leur part. En effet, au delà même de l'injonction prononcé par la DGCCRF et acceptée par l'auteur des pratiques, la DGCCRF a donné aux opérateurs, des conseils sur les modalités de mise en concurrence pour les manifestations ultérieures.

2. En second lieu, la procédure de transaction/injonction est un instrument de promotion de la culture de concurrence dans la mesure où elle facilite l'acceptation des mesures par les professionnels. En effet, lors de la procédure contradictoire durant laquelle la société peut faire valoir ses arguments, la DGCCRF informe l'auteur de la pratique de la jurisprudence de l'Autorité de la concurrence dans des affaires comparables et explique aux professionnels de manière didactique quelle est la règle qu'ils n'ont pas respectée et quels sont les dommages causés par le non respect de cette règle.

En réalité, la plupart des affaires que traite la DGCCRF révèlent :

- soit une méconnaissance des règles de concurrence,
- soit l'existence de pratiques bien installées.

Un exemple : un groupement de sociétés de taxis avait passé des accords avec 4 sociétés de services aéroportuaires pour le transport de leurs personnels sur le trajet entre l'aéroport et le centre ville d'une agglomération du sud de la France.

Ce groupement de taxis contactait systématiquement des taxis stationnés en centre ville et facturait la course d'approche reliant la ville à l'aéroport, alors même que le bon de transport mentionnait l'aéroport comme lieu de prise en charge.

Cette entente entre les membres du groupement de taxis a eu pour effet de majorer artificiellement le prix des courses à destination du centre ville facturées aux sociétés de services aéroportuaires.

Lors de la phase contradictoire, le groupement de taxis en cause soutenait qu'il respectait la réglementation sur les taxis. La DGCCRF a alors expliqué qu'il n'était pas ici question d'une infraction à la réglementation sur l'exercice de la profession de taxi mais que le grief portait sur une entente sur la fixation des prix entre les membres du groupement, entente contraire aux règles de la concurrence.

3. En troisième lieu, l'outil transaction/injonction permet la diffusion de bonnes pratiques. En effet, la mesure étant pleinement comprise et acceptée par les PME, certaines vont au-delà de ce qui leur est demandé et s'imposent des obligations complémentaires à l'injonction proprement dite.

Une illustration concerne la corporation des peintres d'une partie de l'Est de la France. Cette corporation de peintres avait mis à la disposition de ses membres la série des prix de l'Académie d'architecture française.

Cette série de prix donne, en lecture directe, le chiffrage de 40 000 prix unitaires correspondant au coût des prestations techniques nécessaires à la réalisation de travaux du bâtiment.

Ce document se présente sous la forme de 5 tomes qui distinguent les travaux selon leur nature (gros œuvre, bois et métal, peinture, revêtements de sol, finitions...)¹.

Cette série de prix avait déjà posé problème dans le passé puisqu'en 1999, le Conseil de la concurrence avait interdit à l'Académie d'architecture d'en assurer la diffusion. Et cette décision du Conseil de la concurrence était connue dans le milieu des architectes mais aussi de la corporation des métiers du bâtiment.

L'enquête a révélé qu'un conseiller économique de la chambre des métiers locale apportait son aide à la corporation des peintres de la région et qu'à l'occasion de cette activité, il consignait dans les procès-verbaux des assemblées générales de la corporation les décisions d'utiliser cette série de prix. Il tenait même un registre que devaient émarger les adhérents lorsqu'ils empruntaient la série de prix !

La DGCCRF a enjoint à la corporation des peintres de ne plus diffuser la série de prix en cause et de ne plus préconiser son utilisation. La DGCCRF a également enjoint à la chambre des métiers de cesser d'apporter son concours à cette pratique.

La corporation des peintres a accepté la transaction financière que la DGCCRF lui a proposée².

Ce qui est remarquable dans cette affaire, c'est que outre le fait que les injonctions de cesser de diffuser et d'encourager à l'application de ce barème de prix ont été pleinement acceptées par les contrevenants, ceux-ci - la Chambre des métiers et la Corporation des peintres- ont pris l'initiative d'aller au-delà des injonctions en s'imposant des obligations supplémentaires.

Ainsi, le Président de la chambre des métiers et de l'artisanat du département concerné a rappelé les règles de concurrence sur son site internet et s'est engagé à publier début juillet 2011 un article sur cette affaire dans la revue « *Des hommes, des métiers* » adressée aux 15000 artisans du département.

Le Président de la corporation des peintres a, quant à lui, restitué de manière solennelle, la série des prix de l'Académie d'architecture dans les locaux de la DGCCRF le 14 juin 2011. Il s'est également engagé à récupérer auprès des adhérents les photocopies des séries de prix diffusées et à les transmettre à la DGCCRF dans un délai fixé. Il va également inviter les représentants locaux de la DGCCRF à la prochaine assemblée générale de la corporation afin qu'ils rappellent les règles de concurrence aux adhérents.

Ces mesures traduisent ainsi parfaitement la politique de la DGCCRF d'encouragement et d'adhésion aux règles de la concurrence.

¹ « Chaque prix unitaire est constitué de plusieurs éléments de coût de revient estimé à partir de valeurs forfaitaires : déboursé de main- d'œuvre, déboursé de fournitures ou de matériaux et frais divers intégrant les frais de chantier, les frais généraux et la marge globale forfaitaire. » (cf. décision n° 99-D-08 du 2 février 1999)

² 5000 euros.

Le dispositif concerne de petits opérateurs mais pour la mise en œuvre d'une politique de promotion de la conformité aux règles de la concurrence, il n'y a pas de petits et de grands opérateurs. Il est nécessaire d'atteindre toutes les catégories d'acteurs économiques.

L'important est de susciter chez les entreprises des comportements vertueux quel que soit l'enjeu, et par là même – tout en dissuadant – de contribuer par l'éducation et l'adhésion à la culture concurrence.

Le dispositif de transaction et d'injonction est un véritable vecteur de promotion de la culture du droit de la concurrence aux entreprises, de par ses vertus pédagogiques, son rôle facilitateur dans l'acceptation des mesures, la diffusion des bonnes pratiques et l'encouragement au respect des règles de concurrence.

Pour conclure, après deux ans de pratique, la DGCCRF a acquis une certaine expérience dans la mise en œuvre de cette procédure de « *transaction* ».

Ces deux années ayant permis d'asseoir le dispositif, la DGCCRF réfléchit maintenant au moyen de démultiplier son action pour étendre la culture de concurrence.

Il convient de communiquer davantage sur ce dispositif, ses enjeux et les résultats obtenus. Une des cibles est la représentation professionnelle et plus généralement l'information à destination des professionnels, notamment en faisant de la pédagogie sur les cas traités.

La pédagogie est en effet aussi utile qu'efficace pour la promotion de la culture de la concurrence.

GERMANY

1. Introduction

Over the last years, the Bundeskartellamt has stepped up its enforcement of the ban on cartels, often leading to heavy fines. This shift of focus to cartel enforcement has gone hand in hand with a heightened awareness within the business community for competition law compliance. This paper focuses on compliance issues in the area of cartel prohibition. Compliance, in this context, is to be understood as adherence to the relevant provisions of competition law. The paper will give an overview of the determinants of compliance (B.), will then turn to the options for a competition authority for promoting compliance (C.) and will finally touch upon corporate compliance programmes (D.).

2. Determinants of compliance

The decision of companies whether to comply with existing competition law may look like a simple choice of risk vs. reward. In reality the decision is much more complex, involving an array of factors that determine the degree of compliance of a company.

For companies and individuals, the following determinants may be the most influential: (1) Knowledge of the law, (2) Social motivation, (3) Risk/reward.

2.1 *Knowledge and awareness*

Compliance requires knowledge of the law and the rules to comply with. Rules on hardcore infringements of competition law tend to be known by all market participants concerned, and there is hardly any confusion about, e.g., price fixing being a serious infringement. However, knowledge about other hardcore infringements, e.g. some forms of information exchange, may be less widespread. Especially smaller companies without specialised law departments or resources to hire external experts on a constant basis, might have a knowledge deficit. This is where competition advocacy has an important role to play, as will be described in more detail below.

There may be a gap between the company's institutional knowledge of competition law and that of individuals within the firm, especially if the company's knowledge is kept within the legal department. Whether and to what extent the knowledge is spread within the company depends on the company culture and any corporate compliance programme. An efficient compliance programme, thus, needs to comprise the regular instruction of company representatives in critical areas, such as sales.

2.2 *Social motivation*

Compliance requires knowledge of the rules and the willingness to comply, in order to avoid any conflict with the law. Compliance may be further facilitated by an appropriate company culture that communicates abiding by the law as a cornerstone of company policy to the wider public. For example, after going through extensive corruption investigations which generated negative press coverage, several German companies have recently made substantial investments into their compliance policies and have actively advertised their new image to the public.

The nexus of the “culture of compliance” within a company with public opinion is not to be discounted. Compliance is likely to be high if public opinion judges infringements of competition law to be serious offences.

The social context is also an important factor for compliance in the behaviour of individuals. If infringing competition law entails social consequences, compliance is more likely. Social pressure imposed within the company is of particular importance. The management and stakeholders of a company are responsible for creating an environment in the company in which cartel infringements are not tolerated.

2.3 Risk/reward

From an economic point of view, companies following a profit-maximizing strategy will organize their activities based on a risk-reward-scheme to determine overall profits. The profits resulting from a cartel are determined by three main factors: expected cartel gains, consequences, esp. fines, in case of detection, and detection risk.

2.3.1 Expected cartel gain

From the point of the firm, the advantage to be expected from a cartel is an important determinant of compliance. The higher the expected gain, the more tempting it is to ignore competition law.

Although employees of the firm may not profit directly from a cartel offence, they may benefit from indirect or even unintended incentives a company sets, e.g. bonuses and promotions. Salary systems that operate with large bonus components for turnover / profit increases may inadvertently tempt managers or employees to infringe competition law. This is particularly problematic if those bonuses are not tied to the condition of compliance, i.e. cannot be recalled if it turns out later that the individual generated the extra profit by infringing competition law.

2.3.2 Sanctions and other negative consequences

Negative consequences for a company of not complying with competition law can be: Monetary sanctions/administrative fines; reputation loss; civil damage claims; and negative stock market reaction (often this may be a result of the three previous factors). Substantial fines for infringements may be necessary to make compliance with the law the best outcome of a company’s risk-reward-deliberation.

Consequences in case of detection for individuals may be external or internal in nature. “External” consequences include the sanctions imposed by the authorities, such as fines on the individual, but also loss of reputation. For example, managers having infringed competition law may in some cases not be seen as suitable to lead a company. “Internal“ consequences set by the corporation/employer may be the reclaim of relevant bonuses; civil damage claims by the employer; severe consequences for the career track; or the loss of reputation within the corporation.

2.3.3 Detection risk

The risk of detection is of key importance for compliance: the higher the detection risk, the greater the weight of the possible negative consequences of detection in the internal risk calculation of a firm weighing the pros and cons of participating in a cartel. Effective cartel prosecution by a competition authority is an important factor for raising the risk of detection.

Individuals face not only the “outside” detection risk (i.e. by competition authorities), but also an “inside” detection risk (i.e. by colleagues, superiors or the company’s own compliance officers). Whether

this inside detection risk is a serious threat depends largely on company culture and the implementation of an effective compliance programme.

3. Promoting compliance as a competition authority

The primary approach of a competition authority to increase compliance with the prohibition on cartels is arguably to step up prosecution to alter the risk- benefit calculation of the companies. While this is central other tools should not be neglected. Gaining a good understanding of critical markets, raising awareness among market participants for problematic structures in that market and working towards modifying them can play an important role.

Cartel-prone markets, in the experience of the Bundeskartellamt, are those with few participants and homogenous goods, such as certain construction materials. Some of these markets in Germany are characterized by numerous joint ventures which may have further facilitated stable collusion. The Bundeskartellamt pays close attention to structural conditions in these markets, e.g. via merger control, administrative cartel proceedings as well as sector inquiries. These may result in the cutting of ties between market players which might keep them from competing.

It remains unclear whether the increase in the number of cartels detected over the past years corresponds to an increased number of cartel agreements. It is possible that due to cartel prosecution becoming more effective, more cartels are uncovered while at the same time the number of undetected cartels becomes smaller. It is, however, safe to say that three elements are essential for the effective promotion of compliance: competition advocacy, deterrence in the form of severe sanctions and high detection rates.

3.1 *Competition advocacy: Awareness and guidance*

Competition advocacy is an essential part of promoting compliance and involves creating awareness and giving guidance to the public. Competition advocacy increases the knowledge of the stakeholders of competition law and strengthens the competition culture. Furthermore, it helps increase awareness among the public and promotes public support for the work and task of the competition authority.

Competition advocacy is multifaceted. The Bundeskartellamt strives to reach out not only to lawyers and economic experts but also to employees and citizens.

Besides the key tools of general advocacy (e.g., guidance on the law; publications on cases; press relations), the following measures may be of particular relevance for advocacy in fighting cartels:

- Providing a hotline and a mailbox for citizens' complaints;
- Publication of sector studies;
- Close cooperation with other public institutions (e.g. ministries, courts, state prosecutors).

3.2 *Deterrence*

From a theoretical point of view, effective deterrence requires that the “sanctions and other negative consequences” multiplied with the “detection risk” exceed the “expected cartel gain”.

In Germany the fines imposed on companies convicted of a cartel offence are based upon the relevant legal provision¹ and the Bundeskartellamt's fining guidelines.² The amount of a fine imposed on a company for a cartel offense can reach up to 10 per cent of the company's total turnover. In practice, the fine for a hardcore offense usually corresponds to 15-30% of the cartelised product turnover of the cartel member.

Individuals directly or indirectly (i.e. via a breach of the duty to supervise their employees) involved in the cartel may be fined up to 1 million euros. Criminal sanctions are only relevant for individuals involved in bid rigging (usually fines, not jail sentences).

Press relations are crucial for competition advocacy, and also play a role in deterrence. Companies are aware of the risk of loss of reputation if the public learns of a cartel infringement. Publicity from a cartel case may also raise the awareness of potential civil damage claimants.

The duration of a cartel proceeding is relevant in its own right. In Germany, the length of the proceeding is a mitigating factor when it comes to calculating the appropriate fines. Lengthy proceedings bind resources of the enforcement authorities which might be used for other cases. Therefore shorter proceedings allow for higher fines and more proceedings, resulting in more deterrence.

The Bundeskartellamt tries to identify factors influencing the duration of a proceeding:

- According to former German law the maximum amount of a fine for a cartel infringement of a company was three times the illicit gain of the cartel offence. Due to the high standards of the courts the proof of the illicit gain and therefore the calculation of the fine required time-consuming investigations with respect to the necessary data and complex calculations of economic experts. These results were often disputed, even when the cartel offence itself was obvious. The German law has since been adjusted to the current fining standard based on company turnover bringing it into line with European fining rules.³ This promises to reduce the scope of arduous and time-consuming discussions over illicit gains.
- Settlements can avoid lengthy court proceedings and free resources for other cases. The Bundeskartellamt is therefore open to settlements and has further streamlined its settlement proceedings in recent years.⁴ Since the beginning of 2007 the Bundeskartellamt has reached settlement decisions in circa 80% of its proceedings (with at least one cartel member), with circa 65% of the companies fined since 2007 and in respect of circa 40% of the total amount of the fines imposed on companies since 2007.

3.3 *Effective detection instruments*

The Bundeskartellamt has a wide array of detection instruments and mechanisms at hand to increase the detection risk of companies and thus foster compliance. Detection in this respect not only comprises uncovering a cartel, but also uncovering and collecting all evidence necessary to prove the infringement:

¹ Section 81 Act Against Restraints of Competition (ARC). An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

² http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf.

³ http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf.

⁴ C.f.: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B11-018-08-Kafferoester_engl.pdf?navid=31.

- Leniency programmes: Leniency programmes have become a centre piece among the Bundeskartellamt's detection instruments. In 2010, the Bundeskartellamt received 56 applications concerning 25 different cases.
- Other sources: A significant number of cases⁵ are detected on the basis of sources other than leniency applications such as complaints and hints from other market participants, (ex)employees of cartel members and information from other cases (e.g. merger control cases) which are often combined with market observations e.g. via internet research or sector inquiries.
- International cooperation: Working closely together with other competition authorities can help uncover cartels. Sometimes parallel cartels are formed in different countries, so information about the cartel investigations in the neighbouring countries can be helpful.
- Cooperation with non-competition authorities: In addition to international cooperation between competition authorities, the Bundeskartellamt has cooperated with various non-competition authorities, such as state prosecutors or financial authorities.
- Dawn raids: Dawn raids are one of the Bundeskartellamt's most important tools for finding and securing detailed information about a cartel. In 2010 the Bundeskartellamt conducted dawn raids in 15 cases. In the Bundeskartellamt, a Special Unit for Combating Cartels organises these dawn raids, keeps contact with police and state prosecutors and secures an efficient procedure.
- Witness interviews: Witness interviews serve to secure and prepare material for assessing whether there has been an offense, and for proving it in authority proceedings and in court. The Bundeskartellamt has significantly strengthened its expertise in conducting witness interviews by working with police and public prosecution experts.
- IT search and evaluation: IT evidence is becoming more and more important. The Bundeskartellamt has therefore created a specialist unit for securing and preparing IT evidence with the aim of uncovering incriminating evidence and proving the alleged cartel.

4. Corporate compliance programmes

Corporate compliance programmes can be very conducive to overall compliance. Ideally every company should have a compliance policy that minimizes the risk of its managers or employees participating in cartel agreements.

It is the task of the companies to develop compliance programmes that are effective in the special context of their business. The Bundeskartellamt refrains from providing any kind of check list that automatically qualifies a programme as effective, since this might actually be counter-productive. The Bundeskartellamt is aware of the risk that, based on such a check list proposals in formal terms while not enforcing them in practice. Compliance programmes should contain the same elements as the policies of the competition authorities when promoting compliance with competition law: guidance, detection and sanctions. These elements can be tailored by the companies to their particular industry and their own specific needs.

The company is best placed to get the message of compliance across to its employees and managers, e.g. by making sure that the sanctions for infringing competition law or for tolerating an infringement by others exceed the incentives to commit offences. The company is also well placed to detect any infringements, e.g., by regular due diligence, internal whistleblower hotlines or unannounced controls.

⁵ Of the cases fined in 2010: three out of eight.

However, the mere existence of a corporate compliance programme is a neutral factor for determining the amount of fines and does not warrant reductions. Compliance is a legal obligation of undertakings – company law requires firms to make compliance efforts - and there can be no reward for not observing the law.

Nonetheless, effective corporate compliance programmes bring large rewards for the undertakings. The rewards increase with the efficiency of the programme. They can be summarized as follows:

- Well-designed and implemented compliance programmes will prevent infringements before they take place. This will save the company fines, the compensation of civil damage claims and reputation losses.
- Compliance programmes will not always prevent infringement. But if they are effective they will at least help to uncover the infringement faster than the competitors. According to the German leniency programme⁶ which is based on the ECN Leniency Model Programme, this allows the company to attain first place in the leniency queue and therewith a 100% reduction of the fine.
- Even after a dawn raid an efficient compliance programme can help to obtain a substantial reduction of the fine for providing information and applying for leniency. The faster the company can gather the necessary information internally with the help of the compliance programme, the higher the reduction can be (up to 50%).
- Finally, a settlement is probably easier to achieve for the company because the company will know its current situation and thus its bargaining position due to the internal compliance investigations rather well.
- When it comes to a possible breach of supervisory duties, compliance programmes can be very helpful, too. An effective, “non-sham” compliance programme can fulfil of these very same duties and hence prevent fines resulting from the violation of supervisory duties.

⁶

<http://www.bundeskartellamt.de/wEnglisch/FurtherInfo/leniencyW3DnavidW2629.php>.

JAPAN

1. Introduction

To prevent violations of the AMA, Japan has strengthened sanctions against violations in various ways, such as through an increase in the surcharge rate, the introduction of a leniency program, and an increase in the amount of criminal fines as well as the maximum term of criminal sentences. On the other hand, not only stronger sanctions, but also improvement of corporate compliance is indispensable to prevent violations. Efforts in raising awareness of the importance of corporate compliance are essential for encouraging corporations to enhance it.

The JFTC has been promoting support for corporations to improve compliance with the AMA as one of its important policies. In this regard, it has conducted questionnaire surveys, etc., on companies listed on the first section of the Tokyo Stock Exchange or those affiliated with foreign capital, and compiled survey results as reports and recommendations. Moreover, to facilitate further promotion of competition policies effectively and properly, the JFTC has been seeking to enhance the understanding of competition policies by the general public, including elementary and junior high school students, through providing information to and hearing opinions/requests from them.

In the following, we introduce the current status of corporate compliance in Japan as well as successful cases of the JFTC in promoting corporate compliance, recommended practices for businesses to implement effective corporate compliance, etc.

2. Analyses in past reports on compliance

The JFTC has conducted five surveys in the past on efforts to promote compliance with the AMA. In the following, we introduce some of the issues, such as sectors and company size, as well as the current status and the causes of recidivism that are considered to be factors affecting compliance.

2.1 Analyses by industry

“Corporate Compliance System – the Present Status and Issues of Corporate Compliance Mainly with the Antimonopoly Act¹” (Japan Fair Trade Commission, 2006, hereinafter referred to as the “2006 report”), which surveyed the companies listed on the first section of the Tokyo Stock Exchange and analyzed the results, as below.

2.1.1 Construction industry

The ratio of companies is high for those which consider industry-wide efforts would be important as the most effective measure for full compliance with the AMA, etc. On the other hand, the ratio of the companies that consider themselves unlikely to violate the AMA is low. The ratio of the companies that have reviewed their compliance manuals in response to the revision of the AMA in 2005 is high.

¹ Available at <http://www.jftc.go.jp/en/pressreleases/uploads/2006-May-24.pdf> (English version).

2.1.2. *Transportation and information-communication industry*

The ratio of the companies that consider it important to establish a monitoring system for legal compliance by the employees is high.

2.1.3. *Real estate industry*

The ratio of the companies which evaluate their current compliance systems as inadequate both in form and in substance is high. On the other hand, the ratio of the companies which consider themselves unlikely to violate the AMA is high.

2.1.4. *Service industry*

The ratio of the companies which evaluate their current compliance systems as inadequate in form but adequate in substantive function is high.

2.1.5. *Financial and insurance industry*

The ratio of companies is high for those which have prepared compliance manuals and developed them at an earlier time. The ratio of the companies that consider themselves unlikely to violate the AMA is low.

2.2 *Analyses by company size*

In 2007, the JFTC compiled surveys to make a report titled “Current Status of Corporate Compliance System in the Construction Industry – From the Viewpoint of the Antimonopoly Act-²” (hereinafter referred to as the “Construction Industry Report”). This report focused on both general-contractors which are operating their businesses nationwide and “regional-based” general -contractors, etc. Below are the analyses in the “Construction Industry Report”.

First, the table below shows the result of the analyses by company size in capital stock for the percentage of construction businesses which have formulated compliance manuals for the AMA or have established a certain department or staff in charge of compliance.

(Unit: %)

Company Size by Capital Stock	Department/Staff in Charge of Compliance	Formulation of Compliance Manual for the AMA
Less than 500 million JPY	39.4	13.4
More than 500 million JPY to less than 5 billion JPY	90.9	45.2
More than 5 billion JPY	100	80.0

In consideration of the circumstances shown above, analyses on each company size were concluded as follows.

In large-scale companies, developments of a system to promote compliance, such as the creation of compliance manuals or the establishment of a department in charge of compliance, etc., were observed. On the other hand, these companies lack awareness of the risks of violating the AMA and their efforts for internal audit, etc., seem to be insufficient. Therefore, promotion of compliance in substance is a major challenge for these companies.

² Available at http://www.jftc.go.jp/pressrelease/07_may/070516-hontai.pdf (Japanese version only).

In small and medium-sized enterprises, both development of a compliance system and substantive efforts to promote compliance are significantly insufficient. This seems to be due to the recognition of the burdensome work to develop a system to promote compliance. However, positive responses can be expected for less burdensome efforts such as developing compliance manuals or designating staff for compliance. In addition, these companies should avail themselves of additional measures, such as taking advantage of training courses, etc., on compliance held by external organizations.

2.3 *Current status of recidivism and its causes*

With regard to the status of recidivism, the following analyses were provided in the 2006 report.

From the sample of 3,801 companies which were subject to the surcharge payment orders for the decade from 1995 to 2004, the number of repetitive violators was 77 (2.0% of total). Since surcharge payment orders were issued to a wide variety of companies, the ratio itself is not very high. However, for 123 companies which were subject to surcharge payment orders among those listed on the first section of the Tokyo Stock Exchange (TSE), 17 companies (13.8%) were regarded as repeat offenders. The reason why there are so many repetitive violators among the listed companies on the first section of the TSE can be attributable to the fact that they develop their businesses widely in geography, have many divisions, and have a significant impact on the markets.

Furthermore, a survey on the track record of repeated violation was made with regard to the 45 companies (of which 24 companies were listed on the first section of the TSE) that had received recommendations concerning a recent major bid rigging case related to an order by the Japan Highway Public Corporation. Nine companies (20%) were found to have repeated violations in the past 10 years. Three companies (7%) out of the nine had received recommendations three times. These nine companies are all large and listed on the first section of the TSE, which means repetitive violators account for 38% of 24 companies listed on the first section of the TSE that were involved in the case. The fact there are repeat offenders, although most of them have already been equipped with adequate compliance systems, is deemed to indicate that corporate compliance remains perfunctory. Efforts are required to substantiate its purposes³.

Furthermore, the “Construction Industry report” analyzes, as follows, the causes of recidivism in the construction industry where bid-rigging, including those initiated by government officials, occurs frequently.

About the causes of bid-rigging, the percentage of businesses pointing out longtime business practices in the construction industry was the highest. The percentage of businesses which point out the structure of the construction industry that suffered from excessive supply and decline in demand was the second highest. The third highest was the percentage of those pointing out the bidding system which is prone to bid-rigging. On the other hand, the percentage of businesses referring to insufficient deterrence against bid-rigging was the lowest.

In addition, with regard to effective efforts for preventing bid-rigging, while quite a few businesses consider industry-wide efforts important, many among the ordering parties think that it is important to improve corporate compliance by businesses and strengthen sanctions against bid-rigging. This means that there is a wide gap between the recognition of businesses and that of ordering parties.

³ A revision of surcharge payment system was implemented in the revision of the AMA in 2005. The surcharge calculation rate against recidivists was raised in this revision.

3. Promoting better compliance

3.1 *Best practices of promoting compliance*

With regard to the JFTC's assistance to improve corporate compliance, etc., concerning the AMA, the results of the "2006 report" and the "Survey on Current Status of Corporate Compliance System - Status after Revision of the AMA in January 2006" (Japan Fair Trade Commission, 2009, hereinafter referred to as the "2009 report") were compared for the purpose of analyzing their effectiveness.

As a result, improvements were found in all items. The reasons were analyzed as follows.

The leniency system, etc., introduced by the amendment of the AMA in 2005 have enhanced risk awareness of businesses regarding compliance with the AMA. In addition, the following activities are considered to have effectively contributed to the improvements:

1. Survey on the actual status and problems of corporate compliance systems, etc., issue of reports about the survey results as part of the support to promote corporate compliance with the AMA after 2006, and in particular distribution of the reports to companies surveyed such as those listed on the first section of the Tokyo Stock Exchange, etc.
2. Development of cooperative relationships⁴ with the Japan Competition Law Forum⁵.
3. Introduction of the results of the surveys and activities of awareness campaigns for compliance with the AMA at a meeting of a cooperation council concerning antimonopoly policy⁶, meetings with local key figures⁷, meetings with chambers of commerce, etc.
4. Some media coverage of the reports

Table: Comparison of survey results (Extraction) (Unit: %)

	1. Have formulated rules concerning compliance with the AMA.	2. Top management alerts staff on the importance of compliance.	3. Awareness of the risks of violating the AMA.	4. Consideration of the use of the leniency system.
2006 report	81	71	51	23
2009 report	86	74	72	43

3.2 *Public relations/Public hearings activities and a self-evaluation on these activities*

The JFTC is engaged in prevention of violations against the AMA and effective/proper promotion of competition policy by enhancing public understanding of the AMA through widely providing the public with information on the content of the AMA and its own activities, in addition to gathering opinions/requests from the public in the course of communications with them. Specifically, the JFTC issues press releases, prepares and distributes a wide variety of PR (public relations) documents, disseminates/edifies activities through school education, gathers opinions and provides information from/to the general public.

⁴ A voluntary organization consisting of lawyers with knowledge and experiences about the AMA.

⁵ The JFTC has developed cooperative relationships with the Japan Competition Law Forum through lectures, hearing of opinions and so on.

⁶ The council was set up for the promotion of understanding of competition policies and the facilitation of implementing policy to meet the actual situation of regional economy and society.

⁷ Consist of representatives from businesses, academics, media, consumer organization, etc. in each region.

Furthermore, the JFTC conducted a self-evaluation from the viewpoint of necessity/effectiveness for the purpose of improving these activities and promoting corporate compliance more effectively. In this evaluation, the above activities were evaluated as necessary and effective, while strategies for enhancing public awareness and implementing easily understandable public relations were pointed out as necessary. In addition, it also revealed the following issues: 1. continuously enhancing policies on public relations by identifying needs for improvement from the general public through conducting questionnaire surveys, etc; 2. explaining the policy that is strongly demanded by the public and is highly effective through actively providing related parties with relevant information, and 3. expanding the size of public relations/public hearing activities by increasing the frequency of related events.

4. Toward achievement of effective compliance with the AMA

4.1 Opinions from lawyers

The JFTC conducted hearings from lawyers with expertise in the AMA in the “Survey on the current status of efforts made to enhance compliance in foreign companies and corporate compliance from the viewpoint of attorneys - focusing on compliance with the Antimonopoly Act -⁸” in 2008. The following opinions⁹ were gathered as “issues to be kept in mind for the effective functioning of compliance with the AMA, etc.”

- “For the compliance department/staff to gain credibility within the company, it is necessary to (1) have top management show their intention explicitly, and (2) repeatedly advocate that the compliance activities are functioning based on the intention of top management. In fact, companies where compliance functions well have good coordination between the above and can achieve results with the cooperation of lawyers.”
- “Although we emphasize the importance of compliance with the AMA when talking to the relevant staff in the companies, it seems difficult to change the minds of sales staff. Training courses on compliance do not seem to make sense for them. It seems that a drastic increase in surcharges and stricter crackdowns on cartels by more use of leniency (“carrot and stick” policy) are indispensable for expecting real change of awareness of the sales staff.”
- “Cartels have pervaded the Japanese economy and the culture of sales activity. It seems to be very difficult to achieve effective compliance without drastic reform of awareness by the top management or without getting into danger by crackdowns.”
- “It is definitely important to construct a system where it inevitably comes to light within the company if an employee violates the AMA. A system should be constructed where each employee conceives the concept of “Violation of the rule comes to light inevitably. This is detrimental to me. Therefore, I should not violate the rule.”
- “The number of cases where the whole company is involved in the violation has declined drastically. On the other hand, there are still cases where employees secretly participate in violations. To plan measures to deal with these cases systematically and implement them under the leadership of top management are really tough challenges.”

⁸ Available at http://www.jftc.go.jp/pressrelease/08_may/08050901tenpu.pdf (Japanese version only).

⁹ The number of obtained answers is limited; therefore, it does not mean that these answers properly represent the views of Japanese attorneys as a whole. Note that the answers are personal views of the attorneys answering the questions.

4.2 *To enhance effective compliance*

In the past survey conducted by the JFTC which focused on the actual status of efforts for promotion of compliance with the AMA, issues such as “effective operation of the compliance system” and “making the compliance system more specific and suitable for the actual status” were pointed out as challenges.

In response to this, “Survey on the situation of the corporate compliance system with the AMA - Measures for Enhancing the Effectiveness of Compliance-¹⁰⁾” (Japan Fair Trade Commission, 2010) focused on efforts to enhance the effectiveness of compliance with the AMA.

The survey focused on (1) Efforts to prevent violations of the AMA, (2) Efforts for early detection of violations of the AMA, and (3) Responses to information regarding violations of the AMA.

Results of the survey suggested that ongoing efforts in the following points are desirable for effective compliance with the AMA. In addition, on each point, it was recommended that the importance of both initiatives and involvement of top management need to be recognized and efforts need to be initiated by the top management.

1. Enhancing efforts by the department of legal affairs/compliance
 - The department of legal affairs/compliance should appoint staff for the AMA and make them engaged in compliance with the AMA expertly and intensively.
 - Staff for legal affairs/compliance should actively and constantly engage in compliance activities which include not only passive ones, such as the provision of consultations, but also periodic information exchange with sales departments and involvement in negotiation processes regarding trading terms, etc.
2. Enhancing efforts for delivering messages from top management on emphasizing the importance of compliance
 - Top management itself should directly, repeatedly, and explicitly deliver messages stressing the importance of compliance to employees by taking advantage of a variety of opportunities such as training courses.
3. Improving training courses for management executives
 - Improvement of training courses for management executives who play considerable roles in corporate compliance, internal control, application for leniency, etc., to become more knowledgeable about the AMA.
4. Active involvement of parent company in compliance by group companies with the AMA
 - Enhance engagement in foreign affiliated companies in which the parent company is less involved compared with domestic affiliated companies.
 - Regardless of whether affiliated companies are domestic or foreign, sharing information and collaboration between the parent company and affiliated companies is necessary on the assumption that the leniency programs is jointly applied within the company groups

¹⁰ Available at http://www.jftc.go.jp/pressrelease/10_june/10063002honbun.pdf (Japanese version only).

5. Development of a rule regarding contacts with peer companies in the same sector and compliance with the rule
 - Because contacts with peer companies in the same sector, especially those among sales staff, will include high risks of violation of the AMA, it is necessary to develop a specific rule and inform the employees about the rule. In addition, the department of legal affairs/compliance should substantively engage in checking the status of compliance with the developed rule in an objective and integrated manner.
6. Conduct an in-house investigation in response to information regarding violation of the AMA
 - In response to information concerning violation of the AMA, not only should such information be promptly reported to top management, but also an in-house investigation should be conducted with the help of related employees, through reduction of internal sanctions, etc., based on the decision of top management so that in-house investigations can be effectively conducted.

APPENDIX

1. Past compliance reports

2006	Corporate Compliance System - The present status and issues of corporate compliance mainly with the Antimonopoly Act - Available at http://www.jftc.go.jp/en/pressreleases/uploads/2006-May-24.pdf (English version)
2007	Current Status of Corporate Compliance System in the Construction Industry - From the Viewpoint of the Antimonopoly Act - Available at http://www.jftc.go.jp/pressrelease/07.may/070516-hontai.pdf (Japanese version only)
2008	Survey on Current Status of Efforts Made to Enhance Compliance in Foreign Companies and Corporate Compliance from the Viewpoint of Attorneys - Focusing on Compliance with the Antimonopoly Act - Available at http://www.jftc.go.jp/pressrelease/08.may/08050901tenpu.pdf (Japanese version only)
2009	Survey on Current Status of Corporate Compliance System - Status After Revision of the AMA in January 2006 - Available at http://www.jftc.go.jp/pressrelease/09.march/09031801-hokokusho.pdf (Japanese version only)
2010	Survey on the Situation of the Corporate Compliance System with the AMA - Measures for Enhancing the Effectiveness of Compliance - Available at http://www.jftc.go.jp/pressrelease/10.june/10063002honbun.pdf (Japanese version only)

2. Films related to PR activities

- For kids: “Dokkinn!! Please teach me the AMA!”

Available at <http://www.jftc.go.jp/kids/index.html> (Japanese version only)

Note: “Dokkinn” is the character for the PR activities. Its name comes from the abbreviation of the Antimonopoly Act (“Dokkin-hou” in Japanese) and the sound of the pulse of the heart (“Dokkin”) in Japanese.

- For adults: “Towards Fair and Free Competition”

Available at <http://www.jftc.go.jp/douga/100212index.html> (English version)

KOREA

1. Introduction: Importance of compliance with competition law in market economy

Market economy is an economic systems in which resources are distributed efficiently by an “invisible hand” when producers and consumers behave in a way that maximizes their profits and utility based on price signals. Under the market economy, free and fair competition in business activities is essential to enhancing consumer welfare and thereby achieving the balanced growth of the national economy. The environment for free and fair competition, however, can be created and maintained only when there are certain rules in place regulating the system, since there is a possibility for market failures associated problems that cannot be self-corrected such as monopolistic/oligopolistic market structure, external effect or public goods. Here, the rule that plays such role for the market economy is competition law. In this context, compliance with the competition law serves as an important means to enhance efficiency of the market economy and consumer welfare.

Despite that, cartel, market dominance abuse and other anticompetitive behavior often occur in the market economy. For this reason, in-depth discussion is needed on determinants of compliance to deter violation of competition law and promote compliance with competition law. Generally, companies are deterred from infringing competition law for fear of massive amount of surcharges and deterioration of corporate image from social criticism. In other words, companies could have incentives to violate competition law if benefits from law violation outweigh the expected loss incurred by sanctions or the consequent damaged image, which is why infringement of competition law continues to occur.

In this context, to promote compliance with competition law, a competition authority needs to; a) impose tough penalty - surcharges or corrective measures - on violations of competition law; b) provide incentives for companies to voluntarily comply with competition law by making it possible for them to increase their profits with compliance with the law; and c) improve monopolistic/oligopolistic market structure or ease regulations which cause repeated violation of competition law and undermine the effectiveness of policy measures aimed to promote strong compliance.

The following will discuss various means to ensure strict compliance with competition law - sanctions like surcharges or corrective measures, efforts toward voluntary compliance with competition law and the KFTC’s efforts to improve monopolistic/oligopolistic market structure and ease regulations to raise effectiveness of the compliance policy.

2. Strict law enforcement to promote compliance with competition law

The basic means to promote companies’ compliance with competition law is imposing strict surcharges or corrective measures on their violations. Compared to other determinants of compliance, imposition of surcharges aims to deter companies from engaging in law violations out of concerns about being detected, monetarily sanctioned and consequently damaged in their reputation.

Surcharge is administrative fines imposed by relevant laws against a company who breaches or fails to fulfill its duty provided in the administrative law. It was first introduced with a purpose to have an effect of indirectly forcing the fulfillment of duty by depriving those in violation of their duty prescribed in the economic law of illicit gains from the violations. The surcharge imposition was introduced in the Article 6

of the Monopoly Regulation and Fair Trade Act (MRFTA), Korea's general competition law, from its enactment in 1980. In the early days of the MRFTA, surcharges were imposed only on the abuse of market dominance but later extended to various types of violations, and also showed a steady increase in the amount. Here is how antitrust sanctions such as surcharge imposition and corrective measures have changed as the means to promote compliance with competition law.

First, in response to the significant increase in harms from cartel conduct, the MRFTA was revised in 1986 to impose surcharges on cartel conduct not exceeding 1% of the relevant turnover recorded during the cartel period. Surcharges started to be imposed on violations of the cross share holding rule and the ceiling on total equity investment in 1990 and on the debt guarantee rule in 1992. In 1994, the law was revised to extend the surcharge imposition to non-price market dominance abuse not exceeding 3% of the relevant turnover and to unfair business practices with the maximum amount being set at 2% of the relevant turnover during the violation period, and increase the maximum surcharge on cartel to 5%.

In 1999, accepting the criticism that deterrence effect of surcharges on illegal internal transaction - unfair and excessive support for affiliates - was weak, the KFTC increased the maximum surcharge against such behavior to 5% of the relevant turnover. In 2004, it made improvements in the standards and process of calculating and imposing surcharges to offer more objectiveness and transparency, and reflected such improvements in the Enforcement Decree and Notification of the MRFTA.

In 2005, to ensure effectiveness of corrective measures, the KFTC revised the "Guidelines on Operation of Corrective Measures" to enable imposition of various measures including the order to conduct certain behavior (by, for example, compelling the use of certain products or service, launch of transaction, cancelation of agreement or separate the tying and tied goods) and the ancillary order (by, for example, compelling the notice to counterparties on sanctions, the report to the government and staff education) in addition to the existing measure to prohibit certain behavior.

3. Promotion of voluntary compliance of competition law

Since the enactment of the MRFTA in 1981, the KFTC has tried to promote compliance with competition law by strengthening sanctions such as surcharges or corrective measures. However, as the economic environment rapidly changed with the information-based and globalized world, more and more people think that providing incentives for companies to voluntarily comply with competition law, going beyond the *ex post* law enforcement by competition authorities, is more effective to promote compliance with competition law. Accordingly, the KFTC adopted policy measures for voluntary compliance such as Compliance Program (the most widely used among such measures), Leniency Program, Prior Case Review System, Informant Reward Program and various education and awareness-raising campaigns on competition law.

3.1 Compliance program

The KFTC recognized that *ex post* law enforcement had clear limitations to ensure free and fair competition, and started to explore various ways to establish the sound competition order based on companies' voluntary cooperation. In 2001, it launched a project to introduce and spread the Compliance Program ("CP") under which companies make voluntary efforts to stay away from law violations by creating the culture of voluntary compliance. The KFTC found that the CP would bring win-win results to both the government and companies as the corporate culture for voluntary compliance created as result of the successful CP would reduce costs incurred from law enforcement activities and boost corporate image. Based on this recognition, in March, 2001, Committee on Voluntary Compliance with Competition Law was set up comprising 13 representatives from the business, academia, business associations and legal sector, and in July that year the Committee established "Code of Conduct for Fair Trade", best practices for

the CP operation, and recommended that companies adopt it in their day-to-day business operation. The KFTC decided to provide various incentives like surcharge reduction for companies which faithfully implemented the CP and established the Secretariat in the Fair Competition Federation to encourage and support introduction of the CP.

The CP, which serves as an internal compliance monitoring system introduced and operated by companies themselves, is carried out through 3 stages - establishment of a system to implement the program, promotion of voluntary compliance and evaluation on the CP operation. It is tailored to companies' specific demands and characteristics of the industry they belong to in principle, but should satisfy 7 essential requirements. The 7 requirements are; a) affirmation by a CEO on his/her willingness for voluntary compliance with competition law; b) appointment of a staff in charge of the CP operation; c) production of a CP manual; d) compliance education; e) establishment of internal monitoring system; f) introduction of sanctions on law violations; and g) systematic management of relevant documents. Starting with 13 companies which first adopted the CP in 2001, the number of companies introducing the CP saw the steady increase every year until 2008 when the momentum somewhat slowed down., and as of 2010, 372 companies were operating the CP.

However, in 2005, the CP faced criticism on its effectiveness, because some companies unfaithfully operated the CP merely for the benefit of surcharge reduction and violation of competition law continued to occur despite companies' CP operation. In response, the KFTC introduced the CP evaluation program to provide grades based on evaluation of the CP performance in 2006. Until 2009 the KFTC commissioned the Fair Competition Federation to conduct the evaluation. However, faced with the comments on the need for a more neutral organization to perform the evaluation, in 2010, it transferred the evaluation work to the Korea Fair Trade Mediation Agency, a government-funded agency under the KFTC. Moreover, it revised the "Rules on Operation of Compliance Program and Provision of Incentives" in October 2008 to give the benefits of surcharge reduction and exemption from the *ex officio* investigation only to companies which get Grade A or above in the CP evaluation to address the criticism that the rewarding companies just for adopting the CP was overly generous.

The CP contributed to creating the corporate culture for voluntary compliance going beyond compulsory law enforcement. The program is all the more significant in that it sparked the "market-friendly" efforts to prevent a problem before it occurs based on the soft law, which gave birth to various programs like the CCMS (Consumer Complaint Management System)¹ and the Shared Growth Pact².

3.2 *Leniency program*

The Leniency Program was designed to encourage cartelists to report their cartel conduct before the launch of an investigation or offer cooperation in the course of an investigation by providing them with reduction in or exemption from sanctions such as surcharges or corrective measures. This program, introduced in 1996 by revising the MRFTA and implemented starting from 1997, has served as an effective means to promote compliance with competition law by providing incentives for companies to detect and report law violations at an early stage.

¹ Under the CCMS, companies which caused consumer damage voluntarily work to prevent the recurrence of consumer damage, and manage consumer complaints by, for example, setting up a team dedicated to such work, compiling and implementing guidelines on consumer complaint management or providing staff education on consumer-related matters.

² The Shared Growth Pact is a cooperative program of small and large companies and the government aimed to spread fair business practices. Under this program, large companies make a commitment to fair trade practices and efforts for shared growth in transactions with their suppliers, usually small businesses, get evaluated by the KFTC on their implementation of such commitment a year later, and, if the evaluation result is above certain level, are provided with rewards such as exemption from an *ex officio* investigation.

In early days of the Leniency Program, leniency was provide only for those who came forward with cartel information earlier than others before the launch of an investigation, but in 2001 leniency benefits were extended to those who filed a leniency application after the launch of an investigation or offered cooperation in the course of an investigation. And in 2005 the “Notification on Operation of Leniency Program” was established to prescribe detailed operational process of the program and standards for providing leniency benefits. In 2007, the ceiling on surcharge mitigation for the 2nd applicant, who files for leniency after the earliest applicant, was raised from 30% to 50%. In 2009, various improvements were made in the Leniency Program to enhance capability to uncover cartel schemes and offer higher transparency and predictability in cartel enforcement. For instance, the Enforcement Decree of the MRFTA was revised to allow joint leniency application if certain requirements are met, amendments were made in the “Notification on Operation of Leniency Program” to prescribe requirements and detailed process of joint leniency application, and the time that leniency applicants are required to stop concerned cartel conduct was clarified to “right after the filing for leniency”.

The Leniency Program has now been established as the most important and effective means to detect cartel schemes. The number of cases uncovered through the use of the Leniency Program was a mere one on annual average before 2005, but showed the significant increase to 13 in 2009 thanks to the improvements made in the program for higher predictability and transparency. Among the total of 240 cartel cases resulting in surcharge imposition from 1999 (when the Leniency Program was first used) until 2010, cartel cases using the Leniency Program accounted for 31.6% (76 cases). During the period of 2005-2010 when leniency application surged, cases where leniency programs was used (72 cases) represented 44.2% of the total number of cartel cases resulting in surcharge imposition (163 cases), and the share has been on the rise every year.

Number of Cartel Cases Using Leniency Program (Unit: Case)

Year	99	00	01	02	03	04	05	06	07	08	09	10	Total
Cases of Surcharge Imposition	15	15	8	14	11	14	23	27	24	43	21	25	240
Cases Using Leniency Program	1	1	-	1	1	-	6	6	10	20	13	17	76
%	6.7	6.7	0	7.1	9.1	0	26.1	22.2	41.7	46.5	61.9	68.0	31.6

3.3 *Prior case review system*

Prior Case Review System aims to heighten transparency in law enforcement, enhance the effectiveness of efforts to prevent law violation by companies and minimize social costs from enforcement activities by reviewing potential illegality of business plans at the request of companies. Under this system, companies or business associations intending to launch a new business project can request a review on whether certain aspects of the project would have potentials to violate competition law, and the KFTC is required to respond to the request within the designated period.

In 2009 the KFTC amended the “Guidelines on Operation of Prior Case Review System”, a relevant notification of this program, to develop the system reflecting comments and opinions it received since the introduction of the system in 2004. The amendments, which took effect in May 20, 2009, are as follows;

- The scope of applicable laws was expanded from the previous four including the MRFTA to include Act on the Consumer Protection in the Electronic Commerce Transaction, etc. and Door-to-Door Sales, etc. Act to better respond to demands by companies and prevent consumer damage in electronic commerce, distance selling, door-to-door sales, telemarketing sales, multi-level marketing, specified continuous service offers, business offer solicitation sales transaction, etc.;

- To improve utility of the system, requirements for requesting the prior review are relaxed so that business plans which have yet to be confirmed can be reviewed if those plans are specific and separable enough, changing from the previous course of limiting the review only to the plans confirmed;
- The process of filing request was improved to enhance convenience of users by allowing the online filing of a request (through the KFTC's website: <http://www.ftc.go.kr>), which was previously done only in writing or by email; and
- Rules on response period was clarified by allowing the maximum 30-day extension when the review takes a considerable amount of time, and excluding the period of supplementing documents from the response period. Previously, rules on response period - within 30 days after the receipt of a request - were unclear, and when there was a request for additional documents by the KFTC the response period would be newly calculated from the day when all the requested documents were received.

These amendments were designed to provide users with practical help by expanding the scope of request and relaxing the requirements to make the Prior Case Review System more user-friendly. In this context, the changes in the system are expected to enhance the utility of the system and satisfaction of users, and consequently, promote compliance with the competition law.

3.4 Informant reward program (Bounty System)

The Informant Reward Program was introduced in 2002 to provide monetary rewards based on certain rules and process for those who report or provide information on certain violations of competition law with supporting evidence. Here, certain violations of competition law include cartel, abuse of business position by large retailers, illegal support for affiliates, business associations' anticompetitive behavior or behavior restraining business operation and unfair business practices in the newspaper industry, which occur in a very secretive way, hence hard to investigate or obtain evidence, or on which the concerned companies engaging in such behavior are hard to come forward because of special relationship with their counterparty in the transactions. This program has an effect of promoting compliance with competition law in that it helps uncover and redress law violations early on by encouraging people's participation and providing incentives for companies to strengthen its efforts to prevent law violations.

3.5 PR activities and education on competition law

The KFTC has been working very hard in raising the public awareness on enforcement of competition law to create the market environment for free and fair competition. Particularly, it is reflecting changes in the social environment in its public relations (PR) efforts by using new communications means like blogs, smart phones and multimedia contents like UCCs to enhance public understanding on competition policy. For instance, for the first time as a government agency in Korea, it set up a blog for PR efforts in July 2005, which is followed by many other government agencies. It also introduced the monitoring agent program, under which a selected group of people from the general public reports on illegal activities around them and suggests opinions on competition policy. This allows the KFTC to detect and take measures against law violations in a timely manner.

One of the most essential factors in the efforts to ensure effective operation of competition law is raising awareness of the public on the importance of competition law and consequently creating the corporate culture for voluntarily compliance. That way, law violations can be prevented. In the early days of antitrust enforcement, however, the importance of competition law was not widely understood due to the government-driven economic development strategy prevalent across the Korean economy. For instance,

most of the companies saw competition law as another layer of regulation added to the existing economic legal system rather than the means to promote sound market function which could lead to stronger fundamentals of companies. On the other hand, consumers did not fully understand that results of stronger competition could lead to further protection for consumer benefits, since they saw competition law as a mere regulation governing the relationship between the business and the government. To address such lack of understanding, the KFTC has been conducting awareness campaign with various education efforts and promoting compliance with competition law to prevent law violations in a manner specifically tailored to each area such as the subcontracting or franchise transaction.

As part of the efforts, the KFTC launched the “Moot Korea Fair Trade Commission” event in 2001 marking the 20th anniversary of the KFTC to spread the competitive culture in Korean society, and has made it an annual occasion in 2003. The competition contributes to creating consensus on the importance of competition law and the market economy among students as well as the business and general public.

4. Improvement of market structure and deregulation efforts

Various policy measures to ensure compliance with competition law mentioned above will not be fully effective without efforts to prevent habitual law violations caused by structural problems such as monopolistic/oligopolistic market structure or anticompetitive regulation. Therefore, efforts for structural improvement of the market and deregulation are essential to creation of the competitive market environment and strong compliance with competition law.

4.1 Improvement of monopolistic / oligopolistic market

With this in mind the KFTC launched efforts to introduce more competition into monopolistic/oligopolistic markets. In December, 1996, the KFTC revised the MRFTA to create legal grounds (Article 3. (1) ~ (2)) for implementing measures to improve the monopolistic/oligopolistic market structure and suggesting opinions to relevant administrative agencies on such measures. Then, it initiated the project which lasted until 1999 by selecting 26 items among those designated as long-term market dominating goods to make immediate improvement efforts. The KFTC improved monopolistic/oligopolistic market structure by, first, identifying anticompetitive components in each stage of a transaction, from the supply of raw materials to the final consumption, and then making improvements to relevant laws and regulations through consultation with relevant agencies.

With abolishment of the prior designation of the market dominating business in 1999, the KFTC needed a new way to identify industries with perpetuated monopoly/oligopoly and analyze the state of competition in the market. In response, the KFTC established legal grounds (Article 3. (3) ~ (5) of the MRFTA) for an inquiry into the market structure in February 1999, and conducted 7 rounds of the market structure inquiry between 1999 and 2010 and released the results. The market inquiry aims to calculate the level of market concentration and analyze industries with long perpetuated monopolistic/oligopolistic structure based on Statistics on the Mining and Manufacturing Industries by the Statistics Korea.

In 2001, the KFTC’s efforts to improve monopolistic/oligopolistic market structure developed into the Clean Market Project (CMP), comprehensive market improvement efforts. The CMP was designed to come up with comprehensive improvement measures to provide fundamental solution to prevent recurrence of law violations by shifting the case handling approach from the case-by-case-based to the industry-/market-based. The KFTC first selected highly concentrated industries closely related to the people’s livelihood to comprehensively analyze the market state of such industries and take measures accordingly. Starting with 6 sectors including the private education, mobile communications and health care/pharmaceutical markets, the CMP covered 33 areas until 2005.

From 2008, the KFTC has been carrying out the Market Study for monopolized/oligopolized industries where the principles of competition or market economy do not function well to find the reasons of such problems and take measures accordingly. The Market Study aims to hammer out appropriate measures for certain industries based on a close analysis on the fundamental cause of restrained competition or market distortion, and explore the best possible method for law enforcement. For the effective use of the Market Study, the KFTC compiles the “Competition Policy Report” based on the results of the Market Study. The Competition Policy Report, first released in 2008 on air transportation and web portal, covered non-life insurance, movie, oil and pharmaceutical industries in 2009 and 9 industrial areas such as gas and alcoholic beverage in 2010, and is now distributed to and widely consulted by other policy-making agencies such as relevant authorities and the National Assembly.

The efforts to improve monopolistic/oligopolistic markets are a significant policy measure that overcomes limitation of the traditional method of controlling harmful law violations based on the case-handling. The efforts are also helpful to prevent the economic loss from monopoly/oligopoly with active identification and improvement of problems in industries with long-sustained monopoly/oligopoly.

4.2 Deregulation efforts

The KFTC has been endeavoring to relax regulations that restrain the market competition. Here is the chronological history of the KFTC’s deregulation efforts.

In 1990, the government set up the Committee for Relaxing Administrative Regulations, under which were two working-level sub-committees in charge of economic administrative regulations and general administrative regulations. Accordingly, deregulation work previously performed by the KFTC was transferred to the sub-committee on economic administrative regulations.

In 1994, the KFTC implemented the task of easing regulations related to business associations and groups as part of the deregulation initiative composed of 22 tasks launched by the sub-committee on economic administrative regulations.

In 1995, it reviewed anticompetitive aspects in economic laws such as license-based market entry, and undertook 36 improvement tasks on 30 laws. As a result of the effort, the KFTC a) lifted restrictions regarding contracting in the construction, electric construction and telecommunications work businesses, regarding sales territory in the customs clearance, traveling, electric construction and telecommunications work businesses and regarding contracting, volume, standard in farm produce and aquatic products designated for export, and abolished the license system of the real estate brokerage business, and b) regarding 16 business associations, improved regulations on the foundation and the mandated joining of such associations.

In 1996, it promoted competition in the construction, communications and energy sectors by abolishing or relaxing entry regulations. In the mean time, with the restructuring of regulatory reform work launched in April 1997, the authority of coordinating regulatory reform effort was transferred from the Ministry of Finance and Economy to the KFTC. In response to the newly added authority, the Economic Regulatory Reform Committee and the Regulatory Reform Team, the working-level body, were set up in the KFTC.

In 1997, it eased regulations on the business start-up and plant location, streamlined various review processes in the construction business, integrated the evaluation process of the environment, transportation and disaster management, abolished the license system for the LNG export and import business, introduced competition into the retail electricity market, eased restrictions on the entry by the logistics facility business into an industrial site, relaxed restrictions on the building coverage and floor area ratio of

warehouse facility in a green belt, scrapped a provision that mandated the foundation, joining and payment of the membership fee of business associations and lifted the limit on the volume of corporate bond issuance.

During 1998, the KFTC devised reform measures on 11 areas including the information and communications, construction and professional service areas. And in March of that year, the Regulatory Reform Committee was set up under the President to integrate regulatory reform efforts. The KFTC whose Chairman serves as an *ex officio* member is participating in the operation of the Committee by devising and suggesting reform measures to the Committee.

In 2003, the KFTC monitored anticompetitive regulations and behavior in 15 areas including spring water, auto repair and rental, electricity and the construction of commercial & residential complex, and identified 24 improvement tasks.

In 2004, it launched an initiative to improve anticompetitive regulations in laws regarding restrictions on price, entry to market and unfair business activities, and reached an agreement with relevant agencies to abolish or improve 56 regulations.

Its effort in 2005 involved anticompetitive regulations in subsidiary laws such as established rules and notifications. As part of the effort, it identified 136 anticompetitive regulations in 9 industries such as broadcasting, communications, finance, healthcare and construction, induced participation by relevant agencies and the interested parties in the process and came to an agreement to scrap or relax 51 anticompetitive regulations.

Since 2009, it has been improving entry regulations that undermine market competition and consumer welfare in each industry. In September, as the 1st stage of improving entry regulations, it reached agreements with relevant agencies to implement a) 12 tasks to scale down the public monopoly and expand private business areas by, for example, expanding the scope of LNG station operators, b) 3 tasks to break the long-sustained monopolistic structure and introduce competition, including the increase in the number of manufacturers of liquor bottle tax cork, c) 11 tasks to relax unreasonable entry regulations and promote the entry to market by, for example, easing restriction on entry by large-scale consignors into the shipping industry.

And in April, 2010, as the 2nd stage of the entry regulation improvement, the KFTC arrived at agreements with relevant agencies to implement a) 13 tasks to reduce barriers to entry in the service industry with significant effect of job creation by, for example, relaxing requirements for LPG import business registration, and b) 7 tasks to reduce the public monopoly and expand the private business area by, for example, expanding the number of accurate safety inspectors, and submitted such reform plans to the Presidential Council on National Competitiveness.

As mentioned above, the KFTC has been making continuous efforts to reduce anticompetitive regulations so that the competitive market environment stands on the solid footing. Its recent effort to ease competition-lessening entry regulations is particularly helpful for strengthening national competitiveness and consumer welfare by promoting the entry to market and creating the sound market environment that enables strong price and service competition.

5. Conclusion

The KFTC has been promoting compliance with competition law with various policy measures including provision of incentives for voluntary compliance as well as strict law enforcement. In this fast changing society, the traditional law enforcement of uncovering and correcting anticompetitive behavior has clear limitations in spreading the competitive culture across society. In this context, the role of

competition advocacy - persuading other authorities to change to pro-competitive regulations and raising the public awareness on benefits of competition – has been positioned as an important means to promote the compliance with competition law.

The ultimate goal of competition advocacy is to create social consensus on the importance of competition. Going beyond the government-led compliance efforts with various incentives and rewards, now it is time for the business itself to recognize the importance of competition and develop efforts for the competitive market environment. Competition advocacy should extend to the interested parties such as lawmakers and the media to change their perception on competition and also to sectoral authorities in charge of enforcing industry-related laws and policies. It might take a long time until such effort pays off, but a competition agency should remain patient and put aggressive efforts into competition advocacy with firm belief on its meaningful role in antitrust enforcement.

MEXICO

1. Introduction

Compliance programs are an increasingly important component of competition policy in Mexico. The idea of explicitly promoting the development and adoption of compliance programs stems from the need to increase understanding of the competition law, and to promote preventive measures and the culture of competition in general. Efforts so far have been centered on business associations, firms involved in ongoing cartel investigations and the private bar.

2. Determinants of compliance

Assuming firms are familiar with the competition law, compliance is basically a function of the expected benefit for firms of incurring in anticompetitive practices (profits from anticompetitive conduct, minus the expected penalties weighted the probability of being caught and found guilty). Compliance can also be enhanced by ensuring that the reach of the law is effectively known by all relevant parties (firms, associations, executives, employees, press, different areas of government, etc.). Fines, prison terms, negative publicity, and extent of knowledge of the law, both within the private and public sectors stand out as being the most relevant factors.

3. Recidivism

Cases of recidivism fit broadly into two categories. The first is abuse of dominance cases, in which a firm with substantial market power incurs in repeated violations of the competition law. This may be due to a conscious effort to exclude competitors from the market, through foreclosing access to essential inputs or distribution networks or other practices, a relatively low estimated probability of the practice being detected and punished, or uncertainty regarding the boundaries of anticompetitive conduct in the absence of clear guidelines on the subject. The particular challenge in rule of reason cases relates to the weighing of anticompetitive effects versus potential offsetting efficiencies that may derive from the practice. The second category includes anticompetitive agreements between competitors (price-fixing, market segmentation, bid-rigging, boycotts, etc.). In this case recidivism seems to be fuelled by: (i) the fact that companies may incur in multimarket cartel agreements that may be discovered at different times; (ii) by the involvement of business associations or professional organizations in which members come into frequent contact with each other to resolve common issues (which can easily extend into the commercial sphere); and (iii) the existence of heavy-handed regulation or excessive intervention by authorities that seek to minimize “friction” by erecting entry barriers or promoting agreements among competitors to avoid confrontation (or because of the existence of regulatory capture).

4. Promoting better compliance

4.1 *Reasons for the increase in cartel cases*

Mexico has experienced strong increase in cartel cases in the past few years due to the creation of its leniency program (2007), and most recently with the introduction of the power to conduct dawn-raids, fines of up to 10% of turnover, and prison sentences (2011). The increase in the number of cartel prosecutions is an essential dissuasive component of competition policy. Firms must be aware that it is

possible (even probable) that they will get caught in order for them to have higher incentives to comply. A relevant number of cases still involve agreements among competitors that did not fully understand the reach of the competition law. So Mexico seems to be in a transition where companies are adjusting to the increased effectiveness of competition policy, on the one hand, and an increased awareness of what constitutes anticompetitive conduct, on the other. This has led to the increase in the number of cartel cases.

4.2 *Identification of the greatest risks of non-compliance*

Aside from the traditional risk factors for collusive activity (small number of competitors, symmetry, ease of communication, homogeneous products, frequency of contacts, observability of firm behavior, etc.), many cartel cases in Mexico stem from the involvement of business associations and regulatory authorities that are still accustomed to a consensual approach in dealing with business sector concerns, and giving precedence to the concerns of market incumbents over those of potential challengers. This generally occurs in sectors that traditionally have been heavily regulated such as infrastructure industries or the professions. Bid-rigging in public procurement contracts is another high risk area, where repeated interactions between sellers and the sometimes dampened cost-cutting incentives in the public sector combine to generate a high number of such cases.

4.3 *Increasing compliance through better enforcement*

Increasing fines to at least cover the expected benefits derived from anticompetitive conduct is essential to increasing compliance. If fines do not achieve this level, a rational actor could arrive at the conclusion that incurring in the violation makes economic sense. Jail terms and public opprobrium can also serve as important additional deterrents for companies and executives. Because compliance is directly linked to the perceived risk of getting caught, it is also important for the competition authority to increase the visibility, frequency and magnitude of the fines it imposes. Cases involving high fines are generally complex and may involve several years of investigation and court proceedings, while some smaller cases may be processed more quickly, but can still mark important precedents or criteria. Generally speaking, it is advantageous to have a diversified portfolio of cases that addresses the different sort of violations to the competition law that are of concern, that ensure a steady stream of enforcement actions, and that are representative of the sectors in which competition risks are highest. Publicity and explanation of cases to the press and the general public are also important to maximize the dissuasive effect of enforcement actions.

4.4 *Effective compliance tools*

Apart from improving enforcement, guidelines for trade and professional associations were published in 2010 in order to explain the sort of conduct and information exchanges that should be avoided. Also, the CFC has worked with firms and business associations that have been fined or are under investigation for anticompetitive conduct, in order to secure internal control mechanisms that promote compliance with the competition law. These mechanisms include amending internal rules on information exchanges, issuing guidance for members or employees, providing training and information in coordination with the CFC, and naming personnel in charge of compliance within the organizations. The CFC has also worked with the ministry of public administration, the social security institute and several states in promoting better public procurement procedures to reduce the probability of bid-rigging in public tenders. Some of this work has been carried out with the participation of the OECD and the dissemination of the OECD Guidelines for Fighting Bid Rigging in Public Procurement. Finally, the reforms to the competition law in 2011 mandate the development of guidelines in the areas market definition, substantial market power, and abuse of dominance, among others. The publication of the guidelines should significantly help firms understand the reach of the law in rule of reason cases.

4.5 *Other potentially helpful strategies*

The CFC has looked into the possibility of enhancing its leniency program with monetary rewards in order to provide cartelists with stronger incentives to come forward. However, there are legal impediments that impede the implementation of this type of strategy.

4.6 *Reaching a wider audience*

The guidelines for trade associations and the leniency program have been widely distributed among business chambers and practitioners. The CFC also conducts periodic seminars with the press and academic institutions in which the guidelines are distributed and explained. A national competition network has been set up by a respected think tank based in Mexico City. This organization also holds seminars and develops videos on competition issues, which are then published on its web page and on video-sharing sites. The CFC also works with the consumer protection authority and the regional offices of the economy ministry in distributing material and holding video conferences in order to reach wider areas of the country. In 2010, the CFC also published a searchable database of all its enforcement actions since its creation in 1993. This database and its public interface have been widely heralded as an important step in providing user-friendly access to CFC cases and in enhancing the transparency and accountability of the CFC, as it is a very useful source of information and administrative jurisprudence for the specialized and general public alike.

4.7 *Issues relating to guidelines*

While the CFC has issued guidelines in a number of areas, it has yet to publish information on how it processes and analyses abuse of dominance cases. The competition law and implementing rules provide general rules on how to determine relevant markets and market power, so the CFC has not engaged in determining the specifics of how exclusionary conduct is identified and characterized. Certain fears relating to reducing the discretion of the CFC have been expressed over the years, but the 2011 reforms to the competition law now mandate the publication of such guidelines, and the CFC will probably publish these by the end of the year. It is hoped that guidance on rule of reason cases will assist in pre-empting certain types of anticompetitive conduct and in giving greater legal certainty. The CFC's online searchable database is currently the best source of information on the criteria applied by the CFC in its enforcement actions, and is being used increasingly by practitioners and the public at-large.

4.8 *Participation of the private sector in combating anticompetitive conduct*

Since trade and professional associations have traditionally been a source of anticompetitive conduct, they are also among the best channels for distributing information on compliance with the competition law. The CFC has therefore begun to work closely with several associations and business chambers in this regard. The private bar and the association of corporate lawyers have also been keen on helping the CFC broadcast its message to the private sector. In fact, one of the current priorities of the competition section of the Mexican bar is the promotion of compliance programs. Of course, the leniency program is also of vital importance for providing an avenue for the firms and executives to come forth and assist in the enforcement of the competition law. A large proportion of cartel cases are now initiated through leniency applications.

4.9 *Incentives for implementing compliance programs*

Compliance programs have only recently become relevant in Mexico, thanks in large part to greater fines and enforcement activity. The leniency program and the recent addition of on-site inspection powers and criminal penalties have also raised awareness within the private sector. In the past, firms simply didn't see the need to implement compliance programs because of the low probability of detection of

anticompetitive activity. As this probability, the level of penalties, and the profile of competition issues have significantly increased, Mexico is beginning to see much more compliance activity.

4.10 *Executives v. staff in compliance issues*

The CFC has over the past few years begun to impose penalties not just on firms, but also on executives and employees. The design and implementation of compliance programs can help insulate executive decision makers from scrutiny when anticompetitive conduct is being carried out by lower-level commercial staff. An explicit policy of adherence to the competition law not only improves enforcement by promoting knowledge of what is and what is not permitted under the law by all staff, but also by ensuring that top staff work directly on ensuring compliance and helping them prove that they have been actively involved in trying to avoid anticompetitive conduct. The fact that executives and employees can be directly prosecuted also aids in preventing anticompetitive corporate policies. Estranged employees, in particular, have high incentives to present evidence of violation to the competition law to the CFC, and this can serve as an important deterrent.

5. Corporate competition compliance programs

5.1 *Compliance programs as mitigating or aggravating factors*

Mexico's CFC generally treats compliance programs in a neutral way. They may serve as attenuating factors if the organization and its executives can demonstrate that they have been actively involved in promoting compliance within the organization and that any infringement of the competition law that may have occurred was not adopted as a matter of corporate policy.

5.2 *Assessment of compliance programs*

It may be quite difficult to distinguish genuine programs from shams in the beginning. However, because compliance programs are usually adopted by organizations that are at highest risk of incurring in anticompetitive activity, the effectiveness of the program usually can be determined by the effects on the organization's activity over time. The frequency of consultations directed to the CFC by the people in charge of implementing the program, the existence of complaints from competitors or consumers, the transparency and public availability of documents and information on the compliance programs are fairly good indicators of whether or not a program is functioning effectively.

5.3 *Factors that influence compliance program effectiveness*

The existence of manuals, seminars, training programs, certifications and of specific responsibilities for implementation of the program are all important elements of effective compliance programs. The CFC also offers specific assistance for companies or associations interested in designing and implementing programs. Thinking of the background and specific issues pertaining to the company, association or sector, is important to make the compliance programs relevant for day to day operations. Citing the specific information that should not be shared in dealings with competitors can help clarify compliance procedures for executives and staff. An active compliance officer (that contacts the CFC when necessary) can also help not just in general orientation issues, but also in helping staff understand how the compliance program specifically relates to daily activity.

NEW ZEALAND

Summary

To promote compliance, competition agencies need to understand the attitudes of business to compliance, and to use a wide range of tools including education, outreach and prosecution.

A large number of factors affect the level of compliance, but they can be broken down into three categories: the probability of detection, the costs of non-compliance, and business culture. Factors that influence the probability of detection include a good leniency policy and levels of awareness of competition law. Factors that influence the costs of non-compliance include reputational damage, director disqualification, the level of monetary penalties, costs of investigation and prosecution and the possibility of third party action. Factors that affect business culture include levels of awareness of competition law and ethics.

In order to combat recidivism it is important to understand the reason for the problem. If it is ignorance, compliance can be improved through education. If it is simply that the benefits of non-compliance outweigh the costs, compliance can be improved by increasing the costs.

Including criminal sanctions in the toolkit may be one way to increase compliance and combat recidivism.

Compliance programmes can assist individuals and businesses to comply, but to be effective they must be regularly reviewed and be supported by senior management.

1. Introduction

This paper sets out the New Zealand Commerce Commission (Commission)'s views on how best to promote compliance with competition law.

The question of how best to promote compliance with competition law is a timely one in New Zealand as the Government considers whether or not to introduce criminal sanctions for cartel conduct.

In recent years, the Commission has put increasing focus on education and engagement strategies in order to encourage voluntary compliance. While the Commission will exercise its enforcement powers where necessary in order to stop unlawful conduct or remedy the damage that such conduct causes, it prefers the "carrot" method of a co-operative, consent-based approach to the "stick" of intrusive enforcement activities.

The Commission operates on the basis that most businesses and individuals prefer to comply with the law, and that for that majority the key to compliance is knowledge and understanding of competition laws. This understanding can be achieved primarily through education and outreach strategies.

However, there will always be those who perceive the benefits of non-compliance to outweigh the costs. It is important therefore to have access to a stick, and to use it from time to time. The question

currently facing New Zealand competition policy makers is whether in the case of cartels, that stick should include criminal prosecution.

This paper considers the question of compliance under the suggested headings:

- Determinants of compliance
- Recidivism
- Promoting better compliance
- Corporate compliance programmes

When discussing how to promote better compliance, we set out some of the issues currently being debated in cartel criminalisation. Many of these issues are relevant to the wider issue of compliance with competition law generally.

2. Determinants of compliance

What factors influence companies' decisions to comply or not comply with competition laws? Note that we are interested here only in the range of possible influences, not in identifying what factors are most influential. The reluctance to face monetary sanctions, for example, is a likely factor. Fear of a prison sentence is another. What other influences are there?

The determinants of compliance fall broadly under three different categories:

- the probability of detection;
- the costs; and
- business culture.

2.1 Probability of detection

If detection rates are perceived to be low, then the fear of being caught is unlikely to act as much of a deterrent. A potential lawbreaker may simply factor in the probability of detection as a cost of doing business. A robust leniency policy, a vigorous enforcement programme, and publicity of the Commission's enforcement successes can increase the probability of detection and improve perception, leading to better levels of compliance.

2.2 Costs

In addition to monetary penalties and the fear of imprisonment, the following cost factors will influence a business' decision to comply:

- The potential for harm to reputation – the impact of negative publicity about a business is an important deterrent to breaches of competition law, as this can have an effect on future profits. Individuals may also be concerned for their own personal reputation and any effect on future career prospects. Research carried out in New Zealand into the non-residential construction sector suggests that a fear of reputational damage is the key driver of compliance.

- The possibility of director disqualification or similar – in New Zealand the Courts can order that an individual be banned from being a company director or from taking part in the management of a business. This can have a significant impact on an individual's career prospects and earning ability.
- The cost of compliance – a business is more likely to comply if the cost of compliance is low and the cost of non-compliance (the cost of being investigated together with the cost of any enforcement action and penalty) is high.
- The possibility of third party action – a business may be more likely to comply if it knows that non-compliance could lead to Court action by third parties, as well as by the Commission.

The level of any monetary penalty is important. Fines should have a sufficient deterrent effect, which means they need to far exceed the commercial gain of non-compliance. In New Zealand the fines that the Courts are able to impose do not match the level of those in some other jurisdictions. The possible penalties must not exceed the greater of \$NZ10,000,000 (approx \$US8 million) or, either 3 times the value of any commercial gain (where that is readily ascertainable), or 10% of turnover. It can be very difficult to calculate commercial gain. There may be a perception that financial gains from, for example, the operation of a cartel, may exceed the amount of a potential fine.

2.3 *Business awareness and culture*

The level of knowledge and understanding of the law will influence the level of compliance. A business that wants to comply is more likely to comply if it knows what the law permits, and what is prohibited. A business that is ambivalent about complying may be more likely to comply if it understands why the behaviour in question is illegal and what harm such behaviour causes to society.

Business ethics and the desire to comply with the law generally can also influence the level of compliance. This is something over which competition agencies can have little control, but a business may be more likely to comply with competition law if it feels engaged with the relevant agency.

These observations are based on the Commission's own experience, and its understanding of international experience. We note that other competition agencies have carried out research to find out what drives compliance, and regard such research as very valuable.

3. **Recidivism**

Why are there repeat offenders? Furthermore why do some firms repeat while others do not? Why do certain sectors (eg construction) seem to have a chronic problem complying with competition laws, regardless of the number or severity of punishments imposed on them?

Repeat offenders are likely to take the view that the expected benefits of their illegal conduct outweigh the expected costs. The expected costs depend on the probability of detection and the level of penalties.

A repeat offender may believe that the risk of detection is low. This can best be dealt with by a robust leniency policy, and by publishing the outcome of investigations to remind potential offenders that detection is a real threat.

A repeat offender may believe that, even if detected, the cost of being investigated and punished does not exceed the gains to be achieved. In a civil regime the best way to prevent re-offending is to impose penalties at a level exceeding the profits. However, this is not a straight forward matter as commercial gain can be difficult to ascertain, leaving Courts bound by maximum penalty provisions. Further, there is often judicial reluctance to set fines at the maximum level as this could lead to insolvency for some firms.

This raises the question whether there is a better punishment than large fines to deter recidivism? One tool may be management banning orders. The individuals involved may be reluctant to re-offend if it could have a serious impact on their career prospects. Another possibility is criminal conviction and/or imprisonment. This is discussed further below.

The same arguments can be made for sectors with chronic problems. That is, offenders must consider that the risk of detection is low and/or that the potential gains from non-compliance outweigh the costs. It may be that in an industry with a chronic problem the existence of a leniency policy is of less concern to offenders, as the offending is so endemic that there is little concern a competitor will “blow the whistle”.

Alternatively, the reason for chronic offending may be a lack of knowledge and/or understanding of competition law. On the basis of a significant number of overseas cases, the Commission identified the non-residential construction sector as a sector that could be at risk of collusive behaviour. Anonymous research carried out by an independent research company showed that sector participants have a poor knowledge of the relevant legislation, and in many cases failed to understand that the legislation applies to them and their business. The research also showed that sector participants were not aware of the level of potential penalties they could face for non-compliance. The Commission has started a targeted outreach programme in the sector to improve compliance by increasing levels of awareness of competition law.

4. Promoting better compliance

How can competition authorities drive better compliance?

The Commission is placing increased emphasis on education, engagement and voluntary compliance. We believe using a range of tools is the best way to increase compliance with competition law.

The Commission believes that most businesses wish to comply with the law, and that some breaches are inadvertent. Accordingly, the best way to drive compliance for the majority of businesses is through education.

However, we recognise that an education strategy alone is unlikely to modify the behaviour of a repeat offender who has wilfully disregarded the law, and for those offenders Court proceedings remain an available tool. The occasional use of the “stick” of Court proceedings in appropriate cases reinforces to those considering contravening or continuing to contravene that detection and punishment is a real possibility.

The size of that “stick” may have an impact on compliance. As noted above, New Zealand is currently considering introducing criminal sanctions for cartel conduct. This is discussed further below.

4.1 Education

The Commission’s focus on education has included:

- publishing guidelines for trade associations and on how to recognise and deter bid-rigging;
- publishing a series of fact sheets on various aspects of competition law;
- commencing a programme of speaking engagements to trade associations, industry and other groups;
- meeting large procurers of goods and services such as Government departments; and
- identifying sectors for targeted education programmes (for example, the non-residential construction sector).

Fact sheets and guidelines play a key role in the Commission's outreach as they help businesses understand how to comply with competition law. Legislation can be complicated and inaccessible to businesses, particularly those without their own legal staff. Businesses may also not be aware of Court decisions interpreting the legislation. Guidelines and fact sheets therefore have a crucial role to play in increasing clarity of competition law.

The Commission has received positive feedback about our renewed focus on outreach and education, and specifically about our guidelines and presentations. In particular, we have received feedback that using real life examples is a good way to truly engage with businesses. The use of examples generally helps businesses to understand the law and how it could be applied. The fact that they are real life examples brings home the fact that investigation and punishment of anti-competitive conduct is a reality and could happen to them.

Measuring the impact that education has on compliance is difficult but important. In the construction sector, the Commission carried out a survey before starting its outreach initiatives. We intend to carry out a further survey to gauge if there has been an increase in levels of knowledge and understanding of competition laws in that sector. We have received anecdotal evidence that businesses in the construction sector are questioning whether certain practices are anti-competitive. This may be as a result of the Commission's outreach in that sector.

4.2 *External engagement*

Together with education, the Commission's increased focus on external engagement plays an important role in increasing compliance. External engagement improves the relationship between the Commission and businesses, and helps the Commission to better understand the environment in which it operates.

In the quest for compliance both businesses and competition agencies need to understand each other's motivations. In particular, competition agencies need to understand that there are a variety of reasons that may lead to a business being non-compliant, and it may not be simply because that business is wayward. On the other hand businesses need to understand that the agency is not in existence merely to disrupt their business, and that compliance is in the best interests of the business as well as the economy.

The Commission is aware that other agencies are using technology and social media to raise awareness of competition law and issues. We are very interested in feedback from other agencies on whether these initiatives have been successful.

4.3 *The size of the "stick"- the possibility of more severe penalties*

Increasing the maximum fines payable for a breach of competition law may increase compliance by increasing the potential cost to an offender. But if the risk of detection is low then even the possibility of a large fine is unlikely to deter many potential offenders.

Further, as noted at paragraph 16 above, Courts may not set fines at the optimal level, in part as this may lead to businesses becoming insolvent (which would have the unusual consequence for an antitrust case of a reduction in competition). There must also be proportionality between the crime and the punishment.

Although businesses provide the structure and opportunities for non-compliance, the actual conduct is carried out by individuals. Larger fines for individuals may not be the most effective deterrent for the reasons outlined above. And in reality the business may end up bearing the cost of that fine. Even where direct indemnification is not permitted a business may instead increase salary payments or bonuses.

For individuals, a stronger incentive to comply may be the threat of a criminal conviction and imprisonment. The New Zealand government is currently considering introducing criminal sanctions for cartel conduct. Some of the issues under discussion are of general interest in considering the issue of compliance with competition laws, and we will summarise these below.

4.3.1 *Criminalisation*

The Ministry for Economic Development (the Ministry), which has responsibility for competition policy in New Zealand, is concerned that a civil penalty regime may not be effective at deterring cartel behaviour.

In a Discussion Document entitled “Cartel Criminalisation” released in January 2010, the Ministry expressed the view that the single intervention most likely to have a significant impact on deterrence is the possibility of imprisonment. This view is based in part on the understanding that jurisdictions with greater penalties, including imprisonment, are more successful at detecting cartels, particularly through leniency applications.

The difficulty is that the increased detection of cartels suggests that a large number of businesses are not complying with competition laws despite the existence of criminal sanctions. So greater penalties may not be encouraging greater compliance. However, it is not possible to establish whether the number of undetected cartels has decreased.

What we do know is that in the course of cartel investigations the Commission has been advised by a number of cartelists that their cartel did not operate in countries that have criminal sanctions, for fear of individuals going to jail in those countries. In other words, businesses are complying with competition laws in those countries with criminal sanctions, and not complying in those that do not.

The Ministry acknowledges the possibility that New Zealand has a lower incidence of cartels than larger economies. However, it considers that the lack of detection of domestic cartels is more likely due to the fact that “the marginal social costs of cartel behaviour in New Zealand exceed the marginal social benefits of current deterrence measures.” To deal with this problem New Zealand needs to consider how to better deter hard-core cartel conduct. There are two ways to achieve this: increase the risk of detection, and/or increase the cost to a cartelist if the cartel is detected.

The Ministry suggests that the risk of detection could be increased by:

- Increasing Commission funding - the effect of increased funding is uncertain. The Commission already prioritises cartel investigations and focuses on the strongest cases and so it is not clear that having more resources would lead to an increase in detection.
- Improving the leniency policy – the Commission has a well functioning policy. It was recently updated (for example, to allow for the possibility of leniency in respect of a cartel that has already been detected), so it is unlikely that there are further amendments that would have a large impact on deterrence.
- Rewarding whistleblowers – the Ministry concludes that this is unlikely to have a large impact on deterrence. We agree with this view, and also note that, on principle, offenders should not be permitted to profit from their crimes. Further, a reward programme could lead to allegations of witnesses providing false testimony in order to receive a monetary or other benefit.
- Granting investigators covert surveillance powers – as reasonable suspicion would be required for Courts to grant warrants, this option is unlikely to improve detection of offences.

- Improving cooperation with enforcement agencies in other jurisdictions – the Commission has good relationships with its overseas counterparts, but a lack of criminal penalties in New Zealand is a barrier to developing cooperation agreements with some jurisdictions.

The Ministry also considers that the cost to the cartel, if detected, could be increased by:

- Increasing the level of financial penalties – this is likely to increase deterrence (and therefore compliance) for individuals, and particularly for the small group for whom the current maximum penalty is not a deterrent. However, it is not without difficulties as detailed at paragraphs 31-33 above.
- Extending the use of other forms of penalty such as management banning orders – the Ministry believes that this would be a good deterrent, and such orders are viewed as probably being quite effective in preventing recidivism. We note, however, there is a risk that such orders could be circumvented, for example by appointing a banned individual as a consultant to the board.
- Using adverse publicity orders requiring a business to communicate information specified by the Court to the public, such as a public admission of wrongdoing – the Ministry considers that it is difficult to quantify the effect that these would have on deterrence, although we note that if reputation is important, as we believe it is, these could have some positive impact on compliance. However, such orders are ordinarily used in conjunction with other penalties.
- Imprisonment – this is likely to have a general deterrence effect, particularly in the case of white collar crimes, because of the associated social stigma, greater opportunity cost (through lost income), reduced opportunities for future employment, and the possibility of travel restrictions to certain destinations. On the other hand, the criminal burden of proof will require a prosecutor to prove the cartel conduct and appropriate mens rea “beyond reasonable doubt”. This higher burden of proof may make proving cases problematic, and this in turn could mean that deterrence levels are not raised by as much as would otherwise be expected.
- Increasing the possibility of private enforcement – private actions can significantly increase the cost of participating in a cartel. Private actions are possible in New Zealand, as are awards of exemplary damages, but there have been no such awards for cartel conduct in New Zealand to date.

The discussion and debate of these issues continues in New Zealand. The Ministry will shortly release a draft Bill for public consultation proposing criminal sanctions. It remains to be seen whether the New Zealand Government will adopt the Bill and give the Commission the stick of criminalisation. We expect a decision later this year.

5. Corporate compliance programmes

How should corporate compliance programmes be viewed by competition agencies and Courts?

The existence of a competition law compliance programme could be either an aggravating or a mitigating factor for competition agencies or Courts considering breaches of competition law. Consider a situation where an employee, without management’s knowledge or consent, enters into an anti-competitive agreement with a competitor. In that case, the existence of an up to date and available compliance programme may be regarded as a mitigating factor for the business, but an aggravating factor for that individual.

The Commission has, as an enforcement outcome, the option to enter into an administrative settlement with any party. The terms of settlement will usually require that party to admit breaching the relevant legislation. Recently, in appropriate cases the Commission has also made the development of a compliance programme, or the auditing of an existing programme, a requirement of such settlements.

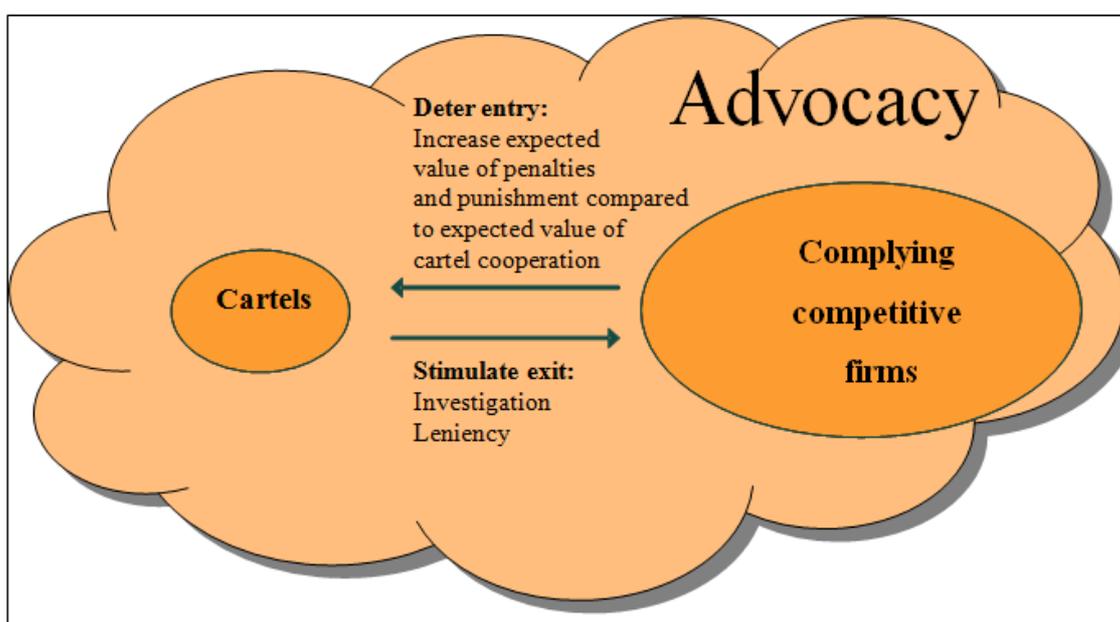
The key to the success of a corporate compliance programme is the support of senior management. Further, policies and procedures should be clearly drafted and easily accessible, so that all staff are aware of the requirements of the relevant legislation and understand how it affects the day-to-day dealings of the organisation. The compliance programme should be regularly reviewed to ensure it is up to date. Steps should be taken to identify any compliance risks and develop strategies to help staff deal with and mitigate these risks.

As part of a focus on education and outreach, competition agencies should help businesses to develop compliance programmes. In particular, agencies can provide information such as guidelines and fact sheets, and give presentations to businesses or trade associations. Although the Commission does not offer legal advice, we are happy to discuss general principles and to provide information that may help businesses to comply.

NORWAY

1. Background

Behind the theory of optimal deterrence in antitrust law enforcement lays an assumption that when undertakings decide not to comply with competition law and instead form or join an existing cartel this is based on a cost-benefit framework, where expected benefits are compared to expected costs. The same can be said regarding the decision to leave the cartel.



First of all, the antitrust laws must provide a credible threat of stiff sanctions for those who participate or consider participating in hardcore cartel activity. Secondly, antitrust authorities must be perceived as an enforcement environment in which business executives perceive a significant risk of detection if they either enter into, or continue to engage in, cartel activity. Finally, to stimulate exit, antitrust authorities must provide transparency, to the greatest extent possible, so that prospective cooperating parties with a high degree of certainty can predict the treatment and outcome following cooperation when seeking leniency.

Accordingly, in recent years, competition authorities have basically followed four different angles of attack against cartel activity. Firstly, they seek to increase the *probability* of being caught through allocating increased resources to investigation in combination with using elaborate economic methods for screening markets and prices. Secondly, we have also witnessed attempts to *increase the costs* of being caught. In addition to substantial corporate fines, the prosecutors in some jurisdictions may also claim imprisonment in the most severe hard core cartel cases. Thirdly, competition authorities in many jurisdictions have introduced *leniency rules* so that an undertaking participating in cartel activity can come forward and report on its cartel activity and the other cartel members without risking punishment.

Finally, competition law advocacy can play an important role for the effective adoption of a competition culture in the economy. Important in this context is to create public awareness and promote education vis-à-vis competition law and the importance of competition, i.e. a socialization of the law. This would include dissemination of information on competition law to undertakings and trade unions, thus stimulating the introduction of compliance rules and practices in firms, as well as to consumers.

Thus, we can say that there are four major cornerstones of a successful enforcement program that promote compliance with competition law:

- competition law *advocacy*, promoting knowledge and compliance
- stiff potential *penalties*,
- high perceived risk of *detection*,
- *leniency* and a transparent enforcement policy.

These four cornerstones are also the main elements of the Norwegian Competition Authority's (the NCA hereafter) work to promote compliance with the Norwegian competition law. These are the tools over which we have a direct control. The first of these four will be described in section II below. Our work with regard to the next three will be described in section III below under the section heading "Efficient sanctions".

However, the competition authorities' resources are scarce, and new and innovative approaches may provide valuable contributions. Thus, the NCA have considered alternative approaches to promote compliance, of which our experience and some reflections will be elaborated somewhat in the last part of this contribution.

2. Promote knowledge and compliance through advocacy

Norway adopted a Competition Act in 2004, which inter alia, introduced a leniency program. However, a survey conducted in 2008 revealed surprisingly little knowledge of the leniency program, particularly among small and medium sized enterprises.

Consequently, the NCA has in the last few years worked systematically to increase awareness of the Competition Act among the Norwegian business community, especially among management of small and medium sized enterprises. Seminars and information campaigns constitute important parts of this work, in addition to newsletters and high quality online information, media relations and participation in the public debate.

2.1 *Seminars on competition law*

The NCA has for instance established cooperation with the Confederation of Norwegian Enterprise (NHO) to promote compliance with the competition law. NHO is Norway's major organisation for employers and the leading business lobby, and the NCA participated at seminars hosted by the NHO to inform about NCA's work in the field of competition law and enforcement.

2.2 *Information campaign on leniency*

An information film about illegal cooperation and leniency was shown on the Oslo Airport Express Train between downtown Oslo and the main airport during the period 2 February - 1 March 2009. The primary aim of this campaign was to increase awareness of the leniency program among company managers and trade organisations and to encourage more people to report illegal activities.

430,000 people travelled on the Airport Express Train during the period when the Competition Authority's cartel film was being shown on the Train's screens. According to the Train's sales agent, around half of these - 215,000 - could be defined as business travellers. The primary target group for the film was managers of small and medium-sized companies.

This campaign and the fight against cartels received good coverage on news broadcast in the major commercial broadcaster in Norway. The message contained in the film shown on the Airport Express Train about competition crime and the leniency program also featured in 10 other local, regional and trade media.

2.3 *Online information*

The Competition Authority's website is an important source of information for the public, business community and media. News and press releases from the Authority are posted on www.kt.no every week, whereas the most important news are sent out also by email. The mailing list has currently close to 3000 email subscribers.

As well as being a source of news, the website allows people to learn about the competition rules, read the Authority's decisions, accounts of restrictive effects and reports, and download or order publications. Information on any company merger dealt with by the Competition Authority is posted once notification of a merger is received so that information is available on all mergers and acquisitions processed by the Authority at any one time.

2.4 *Newsletter*

In November 2010 Konkurransenytt (Competition News) was relaunched as an electronic publication after the paper edition was wound up in 2008. Konkurransenytt is sent out by email and posted on www.konkurransetilsynet.no. The magazine contains brief news items, consumer material, commentaries on matters of current interest and information on important issues that the Authority is working on.

2.5 *Media work*

Media coverage is important when it comes to communicating information about the Authority's activities. In general the Competition Authority attracts a great deal of media attention, and 2010 saw an increase in the number of media mentions compared with 2009. Many of these mentions were in media with broad coverage and readers who represent key target groups for the Authority.

2.6 *Public debate*

The Competition Authority has employees with in-depth knowledge of how different markets work. In order to increase awareness of the competition rules and competition policy, and ensure that the voice of competition experts is heard in the public debate, the Authority encourages its employees to write articles and feature articles.

3. *Efficient sanctions*

The undertakings have a clear responsibility to know the competition law, and to act in compliance with the law. However, undertakings obviously differ with respect to their legal capacity. Thus, the competition authorities have an important task to promote compliance through increased awareness using different channels, of which some of those the NCA considers to be the most important have been described above.

In addition to informing the business community about laws and prohibition rules, as well as the leniency program, the promotion of compliance with competition law must be complemented by sanctions for non-compliance. To what extent the sanctions are efficient (or optimal) is the result of a combination of the probability of detection and the consequences of detection. The NCA's work in this regard is briefly described below.

3.1 *Probability of detection and conviction*

The detection of cartels, including illegal collusive tendering or bid-rigging, has had the highest priority at the Competition Authority in recent years. The NCA received extra funding from the Ministry in 2008 and 2009 to support this prioritization.

One part of this effort has been to improve investigator competence. The NCA has wide powers when it comes to securing evidence. To realize the potential of these powers, in 2010, for instance, competence development was provided in the form of participation in external inspection courses and internal training for new employees. In addition, the NCA has invested heavily i.a. in a datalab with sophisticated equipment for analyses of seized computer equipment, allowing us to search efficiently for traces of electronic evidence etc.

The substantial strengthening of the investigation unit in combination with more systematic surveillance and analysis of market conditions increases the perceived probability of being caught.

3.2 *A checklist to help public purchasers detect illegal collusive tendering*

A checklist to help public purchasers detect illegal collusive tendering is the result of international cooperation under the auspices of the OECD. The checklist is on the Authority's website and was mediated at a series of meetings with purchasers organized by the Norwegian Association of Local and Regional Authorities (KS), the Norwegian Complaints Board for Public Procurement (KOFA), various private purchasing forums and managers with purchasing and tendering responsibility for large municipalities and projects, among others. This work was a continuation of activities started by the Authority in 2009.

The efforts have produced results. There is evidence to indicate that purchasers have become more conscious of purchasing routines and ways to identify illegal collusion. Purchasers refer to meetings and contact with the Authority when providing information and tip-offs. It can also be mentioned that the City of Oslo has incorporated a reference to the Competition Authority and the checklist in its purchasing rules.

The probability of detection can also be increased through a working leniency program.

3.3 *Leniency*

As mentioned above, leniency was introduced with the new Competition Act of 2004. The Competition Act has a dual track system, allowing for both administrative and penal sanctions. Leniency however only applies to administrative sanctions. Undertakings can apply for leniency for administrative fines. In cartel cases, individuals may be convicted to imprisonment of up to 6 years and/or fines. NCA reports the criminal offences to the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM).

Only two applications for leniency had been received by 2009. One explanation for this lack of success was believed to be a lack of knowledge in the business community of the possibility to get leniency. Thus, an information campaign was launched, as alluded to above.

It has also taken relatively long time to establish confidence in the program amongst lawyers and the business community. Thus, another reason for lack of success could be an insufficient degree of predictability with regard to the applicability of leniency to both tracks of sanctions. The leniency program is only applicable to administrative fines that may be imposed on the company in cartel cases, not to the potential criminal sanctions for individuals. Prosecuting criminal offences is the responsibility of the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM).

To alleviate this problem, a public statement was prepared and made available on the NCA website early 2008. The purpose of the statement was to create a greater degree of predictability that the company seeking leniency, and individuals in this undertaking, will not be prosecuted if it meets conditions for leniency for violations of the Competition Act §10 (corresponding to Article 101 TFEU). The statement says that if an entity applies for leniency for fines and the conditions for being granted leniency are present, the NCA will on its part not review this company for possible criminal sanctions, nor bring charges against individuals employed in the company. The statement also says that the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) will on its part not open an investigation until the NCA has assessed or investigated the case. In addition, the statement also makes it clear that in practice, neither the ØKOKRIM nor the police have initiated investigation in cases where the NCA has expressed the position that investigation is not desirable. It is added that the NCA will not consider it desirable to criminally prosecute persons employed in companies fulfilling the terms for leniency.

It can also be added that by the end of 2010, a committee was appointed with the mandate to consider the need for revisions of the Competition Act. Leniency and the relation to criminal sanctions is one of the issues the committee will consider.

3.4 *Fining level*

There is an expressed intention in the framework of the Competition law to harmonize fining levels according to EU/EEA guidelines. Adhering to the new guidelines implies a substantial increase in expected fines. In addition, if an infringement of the Competition Act §10 is made under severely aggravating circumstances, imprisonment of up to six years may be imposed.

When the intention to harmonize fining levels is reflected in imposed fines, as it has for the last few years - and these are confirmed by the courts - the NCA believe this will increase incentives for compliance even more.

As a concluding remark to this section, it appears that the combined effect of the measures and initiatives mentioned above is starting to pay off. The two applications for leniency that had been received until 2009 had by the end of 2010 risen to 11. That year, the Competition Authority secured evidence in four cases at 19 different locations involving a total of 11 companies. A total of 32 formal statements were taken in connection with investigations into six different cases. Three of these were the result of leniency applications. Six leniency applications were received in 2010. The cases have also generated a lot of media attention, which in itself has generated new leniency applications - and greater awareness of competition law.

As a final note, it can be mentioned that the NCA will receive the results of our reputation survey analysing, inter alia, awareness of competition law in general and leniency in particular in the last part of June 2011.

4. New approaches to promote compliance

The competition authorities' resources are scarce, and new and innovative approaches may provide valuable contributions to promote compliance.

Convincing the ethics committees of the major ethical investment funds and indices that competition crime is irreconcilable with ethical investment could represent such a contribution. An interesting example in that regard is presented in the following. In addition, issues like blacklisting and incentives for compliance programs are briefly discussed.

4.1 Ethical funds and indices

Ethical or socially responsible investment (SRI) aims to integrate personal values with investment decisions. Many investors want their investment holdings to reflect their values, and only invest in companies that behave in ways they consider appropriate or responsible, i.e. in accordance with globally approved ethical business practice standards.

Thus, in recent years we have witnessed increased importance of ethical investment; i.e. ethical funds and indices. This can be considered to be part of an investment movement where investors accept that the financial bottom line is not the only criterion for measuring investment success. Investing ethically means that environmental, social and economic consequences should be considered as parts of the investment assessment process, i.e. a 'triple bottom line'.

An example of an ethical fund is the Norwegian Government Pension Fund - Global (formerly The Government Petroleum Fund). An example of an ethical index is the FTS4Good. Both have ethical criteria for inclusion and delist companies for non-compliance with the ethical criteria.

However, surprisingly few ethical funds and indexes exclude companies convicted for competition crime. This is a paradox. Stating the obvious, competition crime and cartel activity is not reconcilable with running businesses on sound ethical principles and good standards of corporate responsibility. Companies involved in cartel activity impose huge costs on society, and lead to less economic growth and innovation. The companies' defraud their customers, and consequently, hard core cartel activity represents criminal activity ultimately punishable by prison in some jurisdictions.

Nevertheless, the criteria used by the different ethical funds and indices are under constant, but slow, development. Criteria relating to countering bribery and corruption seem to be more and more common. The same applies to environmental performance. Alas, with a few exceptions, competition crime does not seem to be a common criterion for exclusion among the different major funds and indices.

The NCA has i.a. approached the ethics council of the Norwegian Government Pension Fund and the media arguing that the ethical criteria should be extended to include cartel activity and competition crime. The argument that ethical investment is irreconcilable with competition crime is in the NCA's view irrefutable. But succeeding in convincing the ethics committee of the ethical funds and indices can also prove very valuable in promoting compliance with competition law.

A highly interesting and relevant case in this respect relates to the Swedish pension fund - AP7, and its exclusion of SAS after cartel cooperation with Maersk Air in 2001. In the wake of this case, SAS was excluded by the Swedish government AP7 -fund because of unethical business methods. The Fund's blacklisting normally lasts for five years, unless the company can prove significant improvements relating to practices causing exclusion. However, SAS was not reincluded in the portfolio until 2006, after having introducing a verified detailed legal framework and a legal compliance program that included a comprehensive training scheme relating to i.a. competition law and regulations.

Striving to comply with ethical criteria and to reduce the risk of removal promote compliance in more than one way. In addition to the negative effect on shareholder value of exclusion based on ethical failures comes, of course, the loss of company reputation. Companies strive to comply with the criteria set by the different ethical indexes and funds, and inclusion becomes an important part of their *branding strategy* – i.e. is perceived and used as a quality label. If companies convicted for hardcore cartel activities are blacklisted from the index or an ethical investment fund, this will increase the effective penalty through a loss in shareholder value and a loss of reputation as a company managed based on ethical principles. This can be named the *divestment effect*.

Removal from the index or the fund because the undertaking has participated in cartel activity will significantly increase the cost of being discovered, well beyond what the fines and penalties the authorities' reaction represents.

It is reasonable to expect that this will spur increased focus from major shareholders and the board of directors on the management to ensure effective compliance with competition law at all levels of the organization. This can be called *the shareholder activism effect*.

Finally, if the criteria for inclusion by the ethical fund or index are extended so that an effective compliance program is required, this will give an additional benefit (*the screening effect*). That *reinclusion* requires documented compliance practices, adds to these positive effects.

All in all, the result may be a significant reduction in the incentives to participate in harmful cartels and to promote compliance with competition law. To not undermine a leniency program, the criteria can include provisions so that with an accepted leniency application, the undertaking can avoid exclusion.

Despite the obvious paradox and irreconcilability with ethical criteria, the NCA has so far not succeed in our efforts to convince any ethics committee that the criteria should be extended to include competition crime. We do, however, believe that if we do succeed, this could actually represent a valuable contribution to the competition authorities in their fight against cartels, and to promote compliance.

4.2 Incentives to promote active compliance programs through fining levels

An issue that obviously can be discussed is whether there should be incentives to promote compliance through a “bonus” in the level of fines if the company had a working and active compliance program. It can be mentioned that in the present regulations on the stipulation of administrative fines it is stated that, “*whether the undertaking through guidelines, instruction, training, supervision or other actions could have prevented the infringement*”, is an element to consider in calculation of the fine.

In the Norwegian regulations, we can find some further guidance to the different sections in the regulations. Relating to the part quoted above, it is added that if the company could not have prevented the infringement, it is doubtful if the basis for imposing a fine is present. Further, in any case it is a mitigating circumstance if the company has made an effort in this regard. On the other hand, if the company has lax routines, this will be considered an aggravating circumstance.

In the preparations for the current Norwegian competition law, it is stated that the law as far as possible should be harmonized with EEA/EU competition law. This also applies to the guidelines on the method for setting fines. The current regulations on the stipulation of administrative referred to above is linked to the previous EEA Guidelines and the corresponding EU guidelines from 1998 (98/C 9/03).

However, the link is not 1:1. The above mentioned part of the regulations on the stipulation of administrative fines is based on the Norwegian General Civil Penal Code, where it in section 28 c is stated that “*whether the undertaking through guidelines, instruction, training, supervision or other actions could*

have prevented the infringement” is one of the circumstances to take into consideration when determining whether to impose a penalty upon the company.

As mentioned above, the NCA will in its fining practice seek to harmonize it with current EU/EEA guidelines, and the NCA has also proposed to the ministry that the regulations is updated to reflect the current guidelines. Thus, the incentives to promote compliance through a ‘bonus’ in fining levels for an active compliance program will supposedly disappear when the regulations is fully harmonized with the current EU/EEA guidelines.

4.3 Blacklisting

Blacklisting is not in the toolbox of the NCA. However, the NCA has been approached by major public purchasers in Norway to discuss the issue of blacklisting of undertakings that are caught for e.g. bid rigging. Blacklisting is a powerful form of sanction. It is, however, also a two-edged sword. On the one hand it adds to the consequences of being caught for competition crime, thus promoting compliance *ex ante*. On the other hand, blacklisting will inevitably reduce competition in future tenders, and increase the expected costs of the tender. This will in particular be felt in markets with few prospective bidders from the outset. In addition, the risk of blacklisting can also reduce the efficiency of a leniency program.

5. Concluding remarks

This contribution has described the experiences and challenges the NCA has met related to the four major cornerstones we follow to promote compliance with competition law and implement a successful enforcement program, i.e. competition law *advocacy*, high and deterrent *penalties*, high perceived risk of *detection*, combined with a working *leniency* program and a transparent enforcement policy. An important point is that a successful strategy to promote compliance with competition law must include efforts along all four dimensions.

In addition, the background for our initiatives to convince the ethics committees of the major ethical funds and indices that competition crime is irreconcilable with ethical investment is described. We believe that success in that regard will be a valuable contribution to promote compliance.

POLAND

Introduction

Promoting compliance with competition law among market players is a major preoccupation of the Polish Office of Competition and Consumer Protection (UOKiK). In order to achieve its objective, UOKiK multiplies advocacy efforts.

In 2009, UOKiK carried out a survey on Polish businesses' knowledge of competition protection law and the principles of granting state aid¹. The report showed that 85% of questioned undertakings, mostly small and medium enterprises, had little knowledge of competition regulations. That is why UOKiK accords due importance to information and educational activities, believing that it is the best way to encourage compliance on a wide scale. Considering that increasing transparency and thus ensuring a better understanding of competition protection regulations among undertakings will result in less infringements, UOKiK published guidelines on *inter alia* setting fines² and leniency applications³. Moreover, UOKiK aims at raising market players' awareness of competition rules by organizing conferences, seminars, conducting publishing and media projects.

However, these initiatives are not sufficient to eradicate recidivism. This notion transposed from criminal to competition law describes a behavior consisting in repeatedly infringing competition law after having been previously sanctioned by a decision having final effect. Recidivism constitutes a challenge for most competition protection authorities since it may be perceived as a failure of existing enforcement policies.

The ambition of this paper is not to provide exhaustive solutions to this issue. It is rather to briefly present UOKiK's experience with recidivism and focus mostly on the tools employed by the Office with the aim to ensure deterrence. Therefore, the analysis will concentrate on the fining structure established in the Polish competition protection system and on the relationship between leniency programs and deterrence.

1. UOKiK's experience

So far, UOKiK has dealt with several cases involving recidivism. Many concerned unilateral practices in highly concentrated markets. Affected sectors included *inter alia* energy, railway transport, collective rights management and waste disposal. Undertakings repeatedly infringing competition law had dominant positions on the relevant markets or even operated in a quasi-monopoly situation.

¹ Survey of Polish Businesses' Knowledge of Competition Protection Law and the Principles of Granting State Aid, June 2009, available in English at <http://www.uokik.gov.pl/download.php?plik=8979>.

² Guidelines on setting fines for competition-restricting practices, 1 January 2009, available in English at <http://www.uokik.gov.pl/download.php?plik=6751>.

³ Guidelines on the leniency program, available in Polish at <http://www.uokik.gov.pl/download.php?plik=6379>.

The energy company EnergiaPro can serve as a good example, since it was fined four times for abuse of dominant position⁴.

As regards the railway transport sector, the President of UOKiK has repeatedly sanctioned PKP Cargo, an undertaking dominant on the market of railway freight transport, for engaging in anticompetitive practices. The most recently delivered decision fined PKP Cargo for abuse of dominance⁵. When determining the amount of the fine to be imposed on the undertaking, previous infringements of competition law were taken into account, independently of their nature. Two previous decisions in question concerned abuse of dominant position⁶ and one involved a competition restricting agreement⁷. It therefore appears that the definition of recidivism in Polish law is rather large.

Cases involving the Authors' Association ZaiKS, specialized in management of collective intellectual property rights, lead to the same conclusion. The Association was sanctioned four times by the President of UOKiK for abuse of dominant position⁸ and once for participating in an anticompetitive agreement⁹. Most recent proceedings against ZAiKS concerned unilateral practices and lead to a commitments decision¹⁰.

Finally, recidivists can also be found on the markets for household waste disposal where abuses of dominant position are very frequent¹¹.

Apart from the most commonly invoked cause of recidivism consisting in under-deterrent sanctions, it seems necessary to take into consideration the market context and the business culture in which recidivists operate, as well as the undertakings' internal incentives to repeatedly infringe competition law in order to increase profits. It is also crucial to take into account managerial characteristics when examining an undertaking's tendency to violate competition regulations.

2. Deterrence through sanctions

Sanction policies in most jurisdictions pursue a double objective – to punish undertakings for their anticompetitive conduct and to deter such behavior in the future by making the costs of an infringement outweigh the benefits. Ideally, the established fining structure would eliminate the need for further sanctions by effectively discouraging market players from infringing competition law.

Deterrence enters into play at two different stages. *Ex ante* or general deterrence may be achieved by determining sanctions sufficiently intimidating to prevent undertakings from violating antitrust regulations.

⁴ Decision of 14 February 2005, RWR-10/2005; Decision of 23 October 2006, RWR-40/2006; Decision of 22 February 2010, RWR-2/2010; and Decision of 19 July 2010, RKT-17/2010.

⁵ Decision of 7 July 2009, DOK-3/2009.

⁶ Decision of 31 December 2004, DOK-50/2004 and of 21 December 2005, DOK-142/2004.

⁷ Decision of 27 July 2007, DOK-172/2005.

⁸ Decision of 16 July 2004, RWA-21/2004; Decision of 24 June 2008, RWA-19/2008; Decision of 21 July 2009, RWA-10/2009; and Decision of 25 September 2002, DDI-82/2002.

⁹ Decision of 29 August 2008, DOK-6/2008.

¹⁰ Decision of 24 August 2010, DOK-7/2010.

¹¹ Decisions of 10 February 2005, RLU-5/2005 and of 31 December 2008, RLU-63/2008; Decisions 26 March 2004, RKT-16/2004 and of 9 September 2008, RKT-46/2008; and Decisions of 2 April 2003, RWR-6/2003 and of 13 December 2004, RWR-38/2004.

Thus, the Polish Act on competition and consumer protection¹² provides that anticompetitive agreements and abuse of dominant position may be sanctioned with fines amounting up to 10% of the revenue earned in the accounting year preceding the year within which the fine is imposed¹³. Obviously, some undertakings do not feel threatened enough by this perspective to restrain from repeatedly engaging in unlawful practices. That is when *ex post* or specific deterrence becomes crucial. A consensus exists among competition protection authorities that it is necessary to impose increased fines on undertakings already sanctioned for a competition law infringement in the past. The abovementioned Act reflects that reasoning by specifying that previous infringements should be taken into account when fixing the amount of fines. Moreover, the Guidelines on setting fines enumerate past infringements to the prohibition of anticompetitive conduct among aggravating circumstances. The amount of the calculated fine to be imposed on a recidivist may therefore be increased by up to 50%.

These provisions do not specify any limitation period for recidivism. It is interesting to notice that the Act stipulates that infringements of the previous Act on competition and consumer protection¹⁴ shall be taken into account when determining the amount of the fine. Therefore, what is certain now is that the President of UOKiK is empowered and even obliged to consider infringements committed since 2001. The Act of 15 December 2000 contained a similar provision regarding violations of the Act of 24 February 1990. However, the requirement to consider the infringements in question was limited to a period of five years following the entry into force of the Act of 15 December 2000, i.e. it was binding until 21 April 2006. Currently applicable provisions are therefore more liberal as to the assessment of the impact of past infringements on the amount of the fine.

The Act is however silent on the issue of similarity of the past and currently sanctioned infringement. UOKiK's position in this regard has recently changed. In two decisions, delivered respectively in 2008¹⁵ and 2009¹⁶, it was affirmed that provisions applicable to recidivism did not require that the past and current anticompetitive behavior violate the same or similar provisions of the Act. Further, past infringements of procedural rules or commitment decisions could be taken into account when determining the amount of the fine imposed for a later established competition restricting conduct. This broad scope of the recidivism notion was subsequently limited by the application of the Guidelines on setting fines. In a decision issued in December 2010¹⁷, it was stated *expressis verbis* that "aggravating circumstances when determining the level of fine for engaging in practices restricting competition should consist in the fact of previous infringement of the prohibition of practices restricting competition, not in any previous infringement of the provisions of the Act". Thus, it was not taken into account that in the past, one of the undertakings about to be sanctioned was fined for refusing to comply with a request for information received from the President of UOKiK.

There is however no doubt that the previous infringement should be established in a decision having final effect in order to be considered as an aggravating circumstance. Therefore, parallel proceedings concerning another infringement conducted before the President of UOKiK or the Court cannot have any impact on the amount of the fine. Furthermore, since commitment decisions do not establish the existence

¹² Act of 16 February 2007 on competition and consumer protection (Journal of Laws of 2007, No. 50, item 331).

¹³ Another example of a sanction meant to be generally deterrent is the fine of up to 50 000 000 EUR, that UOKiK may impose on an undertaking for *inter alia* refusing to comply with a request for information.

¹⁴ Act of 15 December 2000 on competition and consumer protection (Journal of Laws of 2005 No. 244, item 2080 and of 2006 No. 157, item 1119, No. 170, item 1217 and No. 249, item 1834).

¹⁵ Decision of 29 August 2008, DOK-6/2008.

¹⁶ Decision of 7 July 2009, DOK-3/2009.

¹⁷ Decision of 31 December 2010, DOK-12/2010.

of an infringement, but only state its plausibility, their consideration is also excluded when assessing aggravating circumstances in the framework of the fine setting process.

Although it is widely accepted that fines imposed on undertakings constitute a key element in ensuring deterrence, some argue that it would be more effective to sanction individuals. “Individuals can certainly have a propensity to commit offences, usually of a particular kind (e.g. the serial rapist, the professional burglar). But corporations as such do not have propensities”¹⁸. In order to achieve a higher degree of deterrence, it would therefore seem more adequate to impose fines on members of the management corps of the undertaking¹⁹. However, executives can be easily indemnified by the company if they acted in its interest. The same argument could apply to the solution practiced in the UK and consisting in preventing executives involved in an infringement to act as company director for a determined period of time. That leads us to consider the option of imposing heavier individual sanctions, such as imprisonment. The criminalization of competition law for most serious infringements, as it is the case in the US, could produce more deterrent effects²⁰. Nevertheless, it is not an easy policy choice to make and it would also render enforcement more complicated and costly. It is unlikely that the legislator would initiate such dramatic changes in the Polish sanction structure any time soon.

3. Deterrence through leniency programs

Leniency policy is relatively young in Poland since it was introduced in 2004. To a great extent it reflects EU solutions in that matter. One of the main divergences consists in the fact that Polish leniency regulations apply not only to cartels, as it is the case at EU level, but to horizontal and vertical agreements in general. UOKiK considers the leniency program as a success, as it significantly increases the probability of cartel detection. Since it has been launched, 28 applications were submitted to the Office.

Year	2004	2005	2006	2007	2008	2009	2010
Number of leniency applications submitted to UOKiK	0	2	3	6	3	6	8

Evoking leniency in the context of deterrence might however be problematic. On one hand, leniency programs may increase deterrence by preventing the formation of anticompetitive agreements or destabilizing an already existing one. Undertakings might feel discouraged from concluding or continuing to participate in such agreements in an environment where the degree of trust between participants is lessened by the existence of a leniency program. Here, the deterrence degree rises in parallel with the probability of detection.²¹

On the other hand, one might argue that leniency programs may produce pro-collusive effects, since they could encourage undertakings to engage in profitable anticompetitive conduct knowing that in the end

¹⁸ Jeremy Lever, *Opinion: Whether and if so how, the EC Commission's 2006 guidelines on setting fines for infringements of Arts. 81 and 82 of the EC are fairly subject to serious criticism*, §18, German Employers' Association (BDI): Law and Public Procurement series (2009).

¹⁹ The President of UOKiK may impose fines of up to fifty-fold the average salary on a person holding a managerial post or being a member of a managing authority of the undertaking. However, these fines cannot be imposed for competition restricting practices, but for procedural infringements.

²⁰ See Wouter Wils, *Is Criminalization of EU Competition Law the Answer?*, 28 *World Competition: Law and Economics Review* (2005).

²¹ However, a successful leniency policy requires the existence of sufficiently deterrent sanctions of competition restricting conduct. Otherwise undertakings will not be encouraged to submit leniency applications for immunity or fine reduction.

they might pay a reduced fine or even no fine at all²². UOKiK's experience so far cannot confirm this statement. However, Castorama cases show that leniency programs, even if they do not generate such pro-collusive effects themselves, do not necessarily discourage undertakings from violating competition law either.

Castorama owns multiple DIY stores all over Poland. It has applied for leniency on four occasions between 2005 and 2007, each time in the framework of proceedings conducted by the President of UOKiK concerning price fixing agreements in the paints and varnishes market involving different suppliers.

Castorama applied for leniency for the first time in 2005, subsequently to an inquiry having been launched into a price fixing agreement between Polifarb Cieszyn and the retailers of its products. In its decision²³, the President of UOKiK established the existence of a competition restricting agreement and imposed a symbolic fine on Castorama for having participated in the collusion for several months. At that time, Castorama was involved in three other price fixing schemes.

The proceedings in these three remaining cases were instituted in parallel in December 2006. In January 2007, Castorama was the first undertaking to submit a leniency application within the framework of each of these proceedings.

In the ICI case²⁴, the anticompetitive agreement lasted four years, precisely between 2004 and 2008. One of the reasons for refusing to grant Castorama a fine reduction was namely the fact that the competition restricting practice continued after Castorama applied for leniency.

Castorama's application submitted within proceedings involving Tikkurila as supplier allowed the undertaking to avoid financial sanctions for participating in a collusion between 2000 and 2006²⁵.

Finally, in the Akzo Nobel case²⁶, Castorama applied for leniency for taking part in a price fixing agreement between 2003 and 2006. It was granted full immunity from the fine.

A few remarks can be made here to summarize the above. When Castorama filed its first leniency application in 2005, it was already involved in three previously initiated price fixing schemes. The remaining three applications were not submitted until the institution of respective antimonopoly proceedings by the President of UOKiK. Although in the Tikkurila and Akzo Nobel cases, Castorama ceased to participate in the collusion shortly before applying for leniency, its involvement in the price fixing agreement with ICI continued. It would be rather difficult to conclude that the existence of a leniency program had an overall deterrent effect on Castorama. On the contrary, it appears that the undertaking instrumentalized leniency regulations, waiting to apply until the threat of financial sanctions became more probable in each case. Castorama might be tempted to have recourse to this strategy in the future, since obviously, benefitting from leniency is not precluded by former competition law infringements. Therefore it may seem more suitable to consider leniency programs mainly as what they were initially meant to be, a powerful tool used to detect and break cartels, not a weapon against recidivism.

This does not however mean that the leniency policy will not have a deterrent effect on other undertakings involved in the abovementioned agreements. The pattern applied by Castorama might

²² See Massimo Motta and Michele Polo, *Leniency Programs and Cartel Prosecution*, 21 International Journal of Industrial Organisation 347 (2003).

²³ Decision of 18 September 2006, DOK 107/2006.

²⁴ Decision of 7 April 2008, DOK-1/2008.

²⁵ Decision of 24 May 2010, DOK-4/2010.

²⁶ Decision of 31 December 2010, DOK-12/2010.

convince them that it is not a trustworthy partner in crime and discourage them from engaging in competition restricting practices with the leniency applicant in the future.

Conclusion

The main tool at UOKiK's disposal to encourage recidivist undertakings to comply with competition law is the sanctioning system. Leniency can also be perceived as producing some deterrent effects by increasing the probability of detection of competition restricting agreements. However, UOKiK is aware of the fact that the currently applicable solutions meant to ensure deterrence have little impact on certain market players. One of UOKiK's preoccupations is therefore to identify the causes of repeat infringements in order to efficiently detect future violations and above all to prevent them.

SWEDEN

In this contribution, the Swedish Competition Authority (SCA) focuses on the use of complementary strategies to promote compliance, which may be used alongside law enforcement. In this context, the note discusses the SCA's campaign to raise awareness of competition law among trade associations, which included the development of a web-based, interactive tool aimed at assisting trade associations and their members to self-assess their practices.

1. Introduction

Trade associations are commonplace in Sweden and count a very large number of companies among their members. Their practices therefore have a considerable impact on the economy. Trade associations perform a number of important functions which benefit the market and, ultimately, the consumer. For instance, they can provide support to SMEs, help to educate and update businesses on applicable rules and regulations, or enhance consumer protection by developing standard terms and conditions, product safety standards or technical norms, etc.

However, there are also inherent risks in the operation of trade associations since, by their nature, they bring together a number of – in some cases even all – competitors in a particular sector. They can therefore provide a forum for horizontal coordination which may be detrimental to consumers and infringe the prohibition against anti-competitive agreements in the Swedish Competition Act¹ as well as Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Some forms of cooperation within trade associations are almost invariably prohibited; most notably price recommendations and price lists. However, whether or not other types of practice are caught by the competition rules will often depend on the circumstances in each specific case, such as the structure and the level of concentration of the relevant market. The SCA has discovered that many trade associations operate in this grey area, where they must self-assess their practices' compliance with the competition rules.²

In order to offer guidance to trade associations, and to raise awareness of the competition rules as they apply to trade associations, the SCA launched a campaign including a web-based interactive guidance tool and a series of advocacy lectures at trade association meetings. This note describes the SCA's work on the campaign.

2. SCA report on trade associations 2008

In 2006 the SCA distributed a questionnaire to 880 trade associations active in Sweden.³ The purpose of the study was to increase the SCA's understanding of the number of trade associations in Sweden; their

¹ Chapter 2, Article 1, SFS 2008:579

² Since the entry into force, on 1 May 2004, of Council Regulation (EC) No 1/2003 which abolished the notification system previously in place, companies are referred to make their own assessment whether an agreement is in accordance with Swedish and EU competition law or not.

³ Of the responses received, 479 were from associations the purpose and activities of which were relevant to the study. These 479 responses form the basis for the results presented in the final report. Responses from,

membership; their activities; the services they offer to members; and the extent to which those activities and services comply with competition laws.

The questionnaire focused on three types of trade association activity, which may raise competition law concerns:

- price recommendations (also including standard price lists and price adjustment recommendations in response to changes in common costs);
- costing and pricing support (for instance by providing members with calculation templates with common costs pre-completed); and
- information sharing.

The SCA published the results of its study in 2008.⁴ The report indicated that approximately one third of the trade associations surveyed engage in one or more of the three activities identified above, and therefore find themselves in a grey area with respect to Article 101 TFEU.

The report concluded that there is a need to increase awareness among trade associations about how their practices may be caught by the competition rules. The European Commission's Horizontal Guidelines⁵ and the case law of the Swedish and EU courts provide important guidance; however the report identified a clear need for practical and accessible additional guidance aimed at trade associations and their members.

3. Web-based interactive tool

In response to the findings of the 2008 report, the SCA developed a web-based interactive tool which helps trade associations and member companies to self-assess their practices. The tool, accessed on the SCA's website,⁶ is named *Kör på grönt* ("Green is for 'Go'"). It is based on a "traffic light" system of assessment, where practices are categorised as "green" (compliant), "amber" (potentially non-compliant) and "red" (non-compliant).⁷

The tool is constructed as a flowchart, where the start page lists a range of types of practice, all categorised as either green, amber or red. The user can then click on the type of practice which they think applies to them, and is then taken through a number of questions designed to gauge the circumstances in the specific case, and whether they are likely to give rise to competition law concerns.

The green category includes practices such as education and training, information gathering, general lobbying, development of standard terms and condition (without pricing elements) and legal advice. These practices are described as being compliant with the competition rules. They are simply listed and not discussed further in the flowchart.

inter alia, small local associations with no relevant activities and professional bodies were thus excluded from the study.

⁴ *Samarbeten inom branschorganisationer*, Konkurrensverkets rapportserie: 2008:1, April 2008.

⁵ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01.

⁶ Available (in Swedish only) at: http://www.konkurrensverket.se/t/Page_4560.aspx

⁷ A traffic light system had previously been used by the Danish Competition Authority (DCA) as a way of explaining the competition rules to trade associations, as explained in the DCA's 2007 Competition Report and in its contribution to a previous roundtable of the OECD Competition Committee, autumn 2007.

The red category includes price coordination, price recommendations, output or sales limitations and market sharing. Each of these activities link to a page where the anti-competitive nature of the relevant practice is explained further. In the case of price recommendations, there are further links providing examples of Swedish and EU case law on the issue, with brief descriptions of the facts.⁸ All of these practices are described as clear competition law infringements.

Naturally, the amber category is the most important, and therefore most detailed, part of the guidance. This category includes costing and pricing support and information sharing.

As regards costing and pricing support, the interactive questions focus on the extent to which the support template offered to members includes present or recommended prices, costs, margins, etc. Depending on the answers, the user will ultimately be shown a green or a red light. In the latter case, a description is given of the anti-competitive effects of the practice, along with examples from case law.⁹ The user can also click through to further information regarding the *de minimis* exception¹⁰ and the statutory exception, in Chapter 2, Article 2 of the Swedish Competition Act or Article 101.3 TFEU.

In the case of information sharing, the questions relate to whether the information shared is current or historic, individual or aggregated/anonymous, and whether it is publicly available. The user will either be shown a green or an amber light. In the latter case, the web page gives a fuller description of the various parameters which will affect whether an information exchange is compliant or not. It also includes links to some examples of cases in this area¹¹ and to the European Commission's Horizontal Guidelines. Again, the user can click through to further information about *de minimis* and the statutory exception.

Importantly, the introductory page of the web tool emphasises that this guidance is intended simply to raise awareness of competition law within trade associations and to flag issues of potential concern. It is no substitute for legal advice.

4. Advocacy lectures

In addition to the *Kör på grönt* interactive tool, the SCA has actively sought opportunities to visit trade associations to speak about competition law as it applies to trade associations and their members. Since 2008, we have delivered a purpose-built presentation at approximately 20 trade association meetings.

5. Results

Since the launch of the *Kör på grönt* tool on the SCA website on 20 April 2009, it has been visited 6,220 times.¹² Use of the interactive test is completely anonymous, and no test results are stored by the

⁸ The European Commission's *FENEX* (COMP/34983, 5 June 1996) and *Belgian Architects* (COMP/38.549, 24 June 2004) decisions and the Swedish Market Court's *VVS-installatörerna* decision (MD 2005:5, 9 February 2005).

⁹ The European Commission's *BDS* decision (80/257/ECSC, 8 February 1980) and the Swedish Market Court's *Vivo* decision (MD 1997:11, 10 June 1997).

¹⁰ See the SCA's guidance, *Konkurrensverkets allmänna råd om avtal av mindre betydelse (bagatellavtal) som inte omfattas av förbudet i 2 kap. 1 § konkurrenslagen (2008:579)*, KKVFS 2009:1, 28 January 2009.

¹¹ The European Commission's *UK Tractor* (COMP/31.370 and COMP/31.446, 17 February 1992), *Cobelpa/VNP* (COMP/312-366, 8 September 1977) and *CEPI/Cartonboard* (COMP/34.936/E1, 19 October 1996) decisions.

¹² Statistics as at 31 May 2011. The launch was advertised in the trade press, and the first week alone over 1,000 users visited the *Kör på grönt* webpage.

SCA. Therefore, it cannot be used to measure compliance, but simply as a means to raise awareness and increase businesses' knowledge of the competition rules.

Likewise, the main thrust of the advocacy lectures is to raise awareness.

So, are there signs of increasing competition law awareness among trade associations? For the past 18 years, the SCA has commissioned an annual survey charting the level of awareness of competition laws among various stakeholders on the market (company executives, in-house lawyers, trade association executives, etc.), as well as their attitude towards competition law and the SCA. The latest survey, conducted in 2010, indicated a significant rise in awareness of competition law and knowledge of the rules among trade association executives/officials, as compared with previous years. For instance, in 2010, 90 per cent of respondents said they were aware that competition law infringements could result in fines (compared to 72 per cent in 2009) and 54 per cent of respondents said they were aware of the SCA's leniency programme (compared to 36 per cent in 2009).

There was also significant improvement in the survey results as regards trade associations' knowledge and appreciation of the SCA.¹³ For instance, in 2010, 75 per cent of respondents knew that the SCA is the body responsible for the enforcement of the Swedish competition rules (compared to 37 per cent in 2009), and 61 per cent of respondents indicated they had confidence in the SCA (up from 42 per cent in 2009).

¹³

The following are examples of the survey results in the trade association segment: (i) in 2010, 75 per cent of respondents knew that Konkurrensverket (the Swedish Competition Authority) is responsible for the enforcement of the Swedish competition rules (up from 37 per cent in 2009); (ii) in 2010, 45 per cent of respondents were of the view that Konkurrensverket is an open and transparent authority with good service (up from 30 per cent in 2009); (iii) in 2010, 61 per cent of respondents indicated they had confidence in Konkurrensverket (up from 42 per cent in 2009).

TURKEY

This contribution is intended to give brief information on the roundtable topic entitled *Promoting Compliance with Competition Law* especially by citing the recent initiatives from the Turkish Competition Authority (TCA).

In Turkey, the Act No. 4054 on the Protection of Competition (the Competition Act) provides for the basic substantive and procedural legal framework of competition rules applicable to anti-competitive conduct. The legal framework enables the TCA to carry out examinations, preliminary inquiries and investigations to detect and prohibit anti-competitive conduct and impose necessary interim measures, behavioural and structural remedies, and turnover-based monetary fines. Moreover, the Competition Act provides for rules on compensation by three fold of the material damage incurred or of the profits gained by those who caused the damage. However, private enforcement of competition rules is not well developed in Turkey and therefore public enforcement of competition rules by the TCA is the main element of the enforcement.

It can be argued that public enforcement of competition rules by the TCA and compliance with those rules in Turkey are highly dependent on the monetary fine that may be imposed up to 10% of the turnover of the relevant undertaking or association of undertakings, and the fine applicable for the managers or employees up to 5% of the fine imposed on the relevant undertaking or association of undertakings. The Competition Act includes provisions on corporate and individual leniency for those cooperating actively with the TCA and an implementing regulation was issued in 2009 on procedures and principles on leniency; nevertheless, for the time being the number of leniency applications remains relatively low.

The TCA is well aware that its enforcement activities will not be adequate to ensure compliance with competition rules and that the conduct by the undertakings to raise awareness of its personnel of competition rules and to take institutional steps to comply with them is as important as the decisions and activities of the TCA. The TCA is of the opinion that activities by the undertakings, association of undertakings and their executives and employees to comply with competition rules will not only contribute to institutionalisation of a competitive system but also avoid heavy sanctions foreseen in the Competition Act that may complicate the activities of undertakings and association of undertakings and damage their reputation. In this context the most comprehensive work to ensure compliance with the competition rules is thought to be the compliance programmes. Such programmes are important tools enabling undertakings and associations of undertakings to self assess and self monitor their conduct. As such programmes are not widespread in Turkey, the TCA has aimed to draw attention to, encourage and popularize them.

Within this framework, in a letter issued by the President of the TCA in 2011, the importance of compliance programmes is emphasised and the undertakings, associations of undertakings and their executives are encouraged to adopt such programmes. The TCA considers that adoption of compliance programmes will increase awareness of executives and employees of competition rules, and enable prevention, early detection and termination of violations of competition rules. Spread of compliance programmes may probably be more effective in emergence and institutionalisation of a competitive environment compared to public enforcement activities of the TCA.

After the emphasis of compliance programmes, the President in its letter of 2011 informs the undertakings about the factors that affect the success of compliance programmes. Moreover, the letter,

which has been posted on the website¹ of the TCA and sent to relevant stakeholders such as undertakings and associations of undertakings, briefly explains how to formulate these factors, offers advice for implementation as well as a checklist to help undertakings and associations of undertakings self assess their compliance with competition rules (See section IV of the 2011 Competition Letter as Annex I).

Following the President's letter, a more thorough text on compliance with competition rules in the form of a booklet, which includes basic questions, answers and a check list, has been posted on the website of the TCA (See Annex II).²

Finally, it should be said that although the Competition Board, the decision making body of the TCA, regarded awareness of competition rules as proving that there was existence of intent of the parties in violating competition rules³ or that the parties violated the competition rules deliberately⁴ in the past, it has not yet granted guidance on how to assess a compliance programme on competition law and whether to consider it as an aggravating, mitigating, or a neutral factor.

¹ Available via http://www.rekabet.gov.tr/dosyalar/images/file/Uluslararsilliskiler/son_mektup2011.pdf.

² Available via <http://www.rekabet.gov.tr/dosyalar/images/file/Uluslararsilliskiler/Competition%20Compliance%20Program.pdf>

³ See, for instance, the decisions of the Competition Board, namely *Aerated Concrete* dated 30.5.2006 and numbered 06-37/477-129; *Ceramic Coating Materials and Ceramic Health Appliances* dated 2.2.2006 numbered 06-08/121-30.

⁴ See, for instance, the decisions of the Competition Board, namely *Fiberboard and Chipboard* dated 19.12.2005 and numbered 05-85/1182-336; *Iron and Steel Products* dated 14.10.2005 and numbered 05-68/958-259.

ANNEX I**SECTION IV OF THE 2011 COMPETITION LETTER****Competition Compliance Program****The way to increase competitive power is through compliance with law in a competitive environment!**

When competition is handled as a rivalry on a lawful ground which needs to be considered within the framework of rules; competitive power and the competitive environment in which to gain competitive power are the sine qua non of each other. Therefore, undertakings must structure themselves in accordance with the requirements of competition law and the "rules of the game" of competition to survive and to be strong, and for this purpose must be sensitive or "prepared". A game without rules is not a game! For an undertaking and a management to be "sensitive and prepared" would not only mean being sufficient with regard to its costs and efficiency, and technology and investment power, but also with regard to its understanding of lawful competition, lawful conduct and transactions.

Undertakings and executives of undertakings must evaluate themselves from a competitive perspective or from the perspective of compliance with competition law. Compliance with competition law and suitability to a competitive environment is important for undertakings. The position with regard to knowledge, sensitivity, structuring and conduct, and the current standing and sufficiency of the undertaking or its understanding of management in that regard can be tried to be understood! Thus, the undertaking or executives can perform due diligence and see their deficiencies, take the necessary measures and prepare for the future. At this point, it must be pointed out that undertakings in countries that are relatively more experienced in the field of competition law and policy take special efforts to comply with the requirements of competition law. It will also be greatly beneficial - primarily for themselves - if our undertakings too, irrespective of their scale or size, develop the said compliance programs.

Let us briefly remind why it is important for undertakings to develop programs for compliance with competition law:

One thing that captured our attention during the activities of the TCA, which now approached 14 years, was that for the significant part of the examinations and investigations carried out by the TCA, the undertakings concerned or their executives and employees were not aware that they were infringing competition rules. We have witnessed many times defenses by the officials of undertakings or their representatives such as "We did not know that this conduct of ours was an infringement of competition" or "If we had known, we would have ceased our practice immediately". Unfortunately, such belated confessions or assertions do not absolve our undertakings of severe administrative fines in most cases. However, prior knowledge on what competition infringements are, may prevent many later problems. Granted, a responsible and professional understanding of management and business administration requires an ability to foresee what is to happen. A knowledgeable and discerning executive will take the necessary measures to avoid sanctions that may put the undertaking in a predicament not only from a financial but also reputational perspective. In this respect, drawing up and implementing "programs for compliance with competition law" tops the list of measures that can be

taken by our undertakings. Unfortunately, such studies, which are seen in most of the small or big businesses in developed countries, did not become widespread in our country yet.

Compliance programs serve two very important purposes: First, they enable the executives and employees of undertaking to have knowledge about competition rules. In this manner, it will be possible for executives of undertakings to avoid decisions and conduct that may mean infringement of competition. Second, if there is any kind of compliance program, it allows for the detection of conduct or practices that violate the competition legislation, and for the termination of such conduct.

Essentially, dissemination of compliance programs, which are based on the principle of prevention of competition infringement before happening, would both reduce the risk on the part of our undertakings to face administrative sanctions and contribute to the building of a competitive economic order in our country. In addition to the activities of the TCA within the framework of the competition legislation, prevalence of such sensitivity and practices would perhaps be more effective for the formation and institutionalization of a competitive environment in our country.

There are certain basic factors that affect the success of a competition compliance program!

A standard compliance program that can be put to work for every undertaking, in every circumstance, does not seem possible. On the contrary, it is preferable for a compliance program to be formed in accordance with the structure and conditions of the sectors in which the undertakings operate, and the needs of the business itself. However, let us still point out some basic factors which would determine the success of a compliance program, in order to offer our assistance, and in a way our guidance, to our undertakings.

We can summarize these basic factors under five headings:

1. Determination and support of the higher management
2. Existence of compliance policies and procedures
3. Continuing training
4. A regular evaluation process
5. A Consistent discipline and incentive practice

The most important among the said factors is the determination of the higher management and their leadership to the staff in this regard. A clear support from the higher management to the program and its regular reaffirmation of its sensitivity is an important sign for the success of the program. If possible, the top management should issue message to all employees to announce their commitment to the program as the management. The support of the top management may be rendered more palpable by talking about this sensitivity openly in the mission or code of conduct of an undertaking, likewise by entrusting a person among the top management with the responsibility of implementing the program, and asking that person to report regularly on this issue. In addition to being a symbol of warning to the internal and outside circles, this factor will also reinforce the interest and participation of the current as well as new employees into the program.

An effective program requires more than a verbal commitment that competition law will be complied with. Close care must be given to the fulfillment of the policy and procedures prepared for this purpose. For the program to be taken seriously, it would be important that all employees are asked for possibly a written commitment with regard to the fulfillment of their duties and responsibilities, and that a notification is made that executives and employees that are to engage in conducts that infringe competition law or that infringe competition, will face disciplinary proceedings without

compromise. Special attention must be taken to not give any responsibility to those employees that have a tendency to engage in conduct that is illegal and that violates competition law.

Granted, the undertaking must allow the employees to use consulting service as to whether the transactions in the organization are in compliance with competition law and what course of action they should take in what circumstances. A "hand book" or "booklet" to be prepared on this subject, which would also have sufficient content on competition legislation and other details, would also be beneficial in this regard.

Training is a very important part of an efficient compliance program. Effective training for all staff, if this is not deemed necessary, at least for managers and employees responsible for the implementation of strategic and commercial decisions and practices should not be neglected. There is not a strict and standard form and method to be successful. A suitable method can be chosen by taking into account the features of the undertaking and the staff who will receive training. The records of training activities through methods such as conference, seminar, video presentation and role-playing should be kept and reminded to those concerned when necessary. The program should clearly express the determination of the firm to comply with competition rules and include a simple, understandable and practical list of "do's and don'ts". Moreover, the firm should have a training program performed by an experienced consultant.

Continuous assessment of the events is another important point for success. It is necessary to test the knowledge of the staff about the act, the policy of the undertaking and the procedures, and to monitor the relations with other undertakings, sale, price and supply processes on a given date or without notice for controlling actual or potential infringements. In addition, notification of actual or potential infringements to senior management and determining the problem solving mechanisms require that a regular assessment system be developed. Assessment process should be as clear as possible and the staff should be helped to know that their behavior is assessed.

In order to ensure compliance with competition law, actions and employees that are important for competition should be monitored, reported and necessary disciplinary measures should be taken. It is indispensable for the success of the system that managers and employees know that the penalties and other negative outcomes, which the undertaking is subject to, will bear consequences for both the undertaking and the employees, and that especially infringements by managers will increase penalties and that those managers may be imposed fines personally. It is very important that employees who ignore the compliance program or fail to report other employee's wrongdoing know that they might be held responsible or be punished.

Advice for implementation

In order for a compliance program to be really effective, it must be designed for the business activities, organization, staff and culture of the undertaking. The undertaking, if its size permits, should have a proactive legal department or a competition law consultant. The lawyer and consultants of the undertaking should participate in executive meetings and ensure that employees know whom to consult when they have a question about competition legislation by visiting the facilities of the undertaking regularly. In addition, a proper reporting system should be established allowing the employees to know to whom they will report when they become aware of an improper practice. Some firms appoint an in-house consultant or establish advice line giving information directly while others assign legal departments for this task. Irrespective of the method, the confidentiality of the employee reporting the improper conduct or practice should be protected. Finally, the company official or the authorized person should make regular competition inspections, preferably without notice, and monitor the compliance efforts. These inspections should be made with advance notice or without notice where necessary and include the inspection of documents and computers (especially e-mails) of the employees with decision-making power related to competition and/or the staff of sales – marketing departments. Moreover, it is possible to talk to the employees about their relations with competitors.

As soon as the undertaking or the management become aware of an infringement, it should take action immediately, end the infringement, examine the case and inform the competition authority if necessary. It should be noted that especially in cartel agreements making active cooperation and benefiting from leniency sometimes become a kind of a race because the company that informs the competition authority first is the most advantageous company.

Associations of undertakings have important roles in maintaining the compliance program! Beside the undertakings, associations of undertakings such as chambers, unions and associations, which undertakings are members of, have also an important role. Within the frame of this role, associations of undertakings should prevent the practices under its body from violating competition rules and ensure that their members should have knowledge and awareness about competition law and policy in a general sense.

It is beneficial that like individual undertakings, associations of undertakings also publish certain guides/instructions/policy papers that can be defined as “competition compliance policy”. Those policy papers should be announced as a part of codes of conduct of undertakings and associations of undertakings and be shared with the public. In another words, undertakings and associations of undertakings should regard compliance with competition law as a moral and legal issue.

Undertakings should review and assess their current situation in terms of compliance with competition law. We have created a checklist to help undertakings and associations of undertakings. It should be emphasized that the checklist does not cover all situations but includes basic points in terms of competition legislation. We think that it is useful for undertakings and associations of undertakings to assess their situation according to this control or question list. Responds to the questions will determine to a large extend what kind of practice and approach is necessary for success.

Competition Compliance Program Checklist

A. Information about competition legislation and the TCA

It is vital to have sufficient information about competition legislation and the TCA to foresee many problems that would be very difficult to overcome otherwise. Knowledge and sensitiveness degree of managers and officials with the ability to make decisions resulting in competition infringements about what practices are legal and which kind of decisions and actions are prohibited serves as a basis to success or failure of the undertaking and the management in this area.

- Do you have sufficient knowledge about competition legislation?
Do you have information about the regulations, activities and decisions of the TCA?
- Do you regularly follow the website of the TCA?
- Is there a special department or an official to deal with competition legislation and related practices in your organization?
- Do you have rules, a booklet or a procedure prepared to ensure compliance with competition law, showing the required practices and informing all employees or the concerned?
- Do you use external consultancy services about competition legislation and practices?
- Have senior managers or employees received training about competition legislation and related practices?

B. Relations with competitors

The biggest obstacle in front of a fair competitive environment is anticompetitive agreements between businesses. Those agreements that can be defined as “cartel” are severely prohibited. Such decisions, activities and transactions, which mean “stealing from public welfare”, injure the reputation of a business and require heavy penalties.

- Do you determine prices and cost elements forming the price and sales conditions with your competitors?
- Do you exchange views with your competitors about prices and cost elements forming the price?
- Do you make geographical or consumer-based market allocation with your competitors?
- Do you have a common understanding with your competitors related to the restriction of supply and other input resources?
- Do you have a written or oral agreement with your competitors on refraining from competition?
- Do you act in common with competitors to push certain competitors or customers out of the market?
- Do you discuss with your competitors about issues such as price, cost elements etc. that might effect competition before or during tenders? Do you act jointly on these issues?

C. Relations with customers and dealers

Undertakings distributing or selling goods and services via vertical agreements must refrain from practices that may constitute a competition infringement. Such undertakings should be sensitive about the compliance of their marketing systems with competition law and make efforts.

- Do you determine the resale price of your dealer or customer?
- Do you intervene in sales conditions such as discount rates or due date of your dealer or customer?
- Do you impose restrictions on sales to customers in the agreements with your dealers?
- Do you impose prohibitions on sales by your dealers authorized in different regions into each other's region?

D. Undertakings with dominant position/market power

In certain markets, it is possible that one or more undertakings may have power to determine, independently from their competitors and customers, economic parameters such as price, supply and distribution volume. It is essential that such undertakings act without infringing competition.

- Do you apply different price and sales conditions to customers at equivalent positions?
- Do you impose an obligation to your customer to buy another good or service with a good sold?
- Is your pricing policy under or too much above the costs?

- Do you make restrictions on supplying goods to your customers or competitors without reasonable grounds?
- Is your pricing policy complicating your competitors' activities?
- Do you use financial or technologic superiority in a market to complicate your competitors' activities in other markets?

E. Associations of undertakings

Generally, undertakings operating in a sector come together in organizations created under the titles chamber, association, union or other for several reasons. It is natural that those organizations with or without legal personality work for the success of their members. However, those associations of undertakings, in certain situations, knowingly or ignorantly, lead to take anticompetitive decisions and cause anticompetitive practices.

- Are there any provisions restricting competition in the charter of the association of undertakings?
- Do the powers of the association of undertakings over its members affect competition between them?
- Does the association of undertakings take decisions about sales prices and other sales conditions of its members?
- Does the association of undertakings take decisions restricting its members' sphere of activity?
- Are members encouraged to talk about issues such as prices, sales conditions, market/customer allocation etc?
- Do technical standards aiming to regulate the members' activities restrict members' commercial activities?

The high number of "No" responses in section A indicates that decisions and practices of the undertaking or association of undertakings in question have a higher potential to violate the competition legislation. It is advisable that undertakings and associations of undertakings at this position implement a compliance program or at least receive consultancy/training services with respect to competition law. Regarding sections B, C, D, E a "Yes" response to any question indicates that the undertaking or association of undertakings in question might be involved in competition infringement. Such undertaking or association of undertaking should reassess its practice or action concerned in terms of competition legislation and terminate its action concerned if necessary. Shortly, implementing a compliance program is the most suitable solution for preventing a possible competition infringement.

ANNEX II
COMPETITION LAW COMPLIANCE PROGRAM

Distinguished shareholders,

Our substantial duty, as the Turkish Competition Authority, is to structure a competitive system and ensure its functioning. At the same time, this duty constitutes the basis of our power and responsibility, which depend on the Constitution and the Act No. 4054 on the Protection of Competition (the Competition Act). However, as we noted on different occasions before, the mission to protect and improve competition is such an important and comprehensive issue that it cannot be realized by the Turkish Competition Authority alone. It is possible to fulfill this function properly by extending competition culture. We expect that all social groups will adopt the fact of competition and support institutional efforts to create a competitive order.

We have also noted in several platforms that we attach importance to the role of not only public institutions but also all citizens, all undertakings regardless of size, and associations of undertakings in the institutionalization process for competition. While writing Competition Letter 2011, we stated that the most important factor or parameter that will increase competitive power in the long run is “compliance with the rules of law” or “compliance with rules of the fair game”. Up to now, many undertakings and associations of undertakings have been subject to inquiries and investigations by the Competition Board, the decision making body of the Turkish Competition Authority, and those infringing competition were imposed heavy fines. Sanctions and fines are important tools given by the law to protect and improve competitive order; however, it should be highlighted that these are only tools not the objective.

In fact, when the aim is to be honest and do work in compliance with law, there is an easier way. That is to prevent competition infringements before they occur and prevent competitive problems, which can easily be adopted by everyone. Our experience shows that many of the undertakings and association of undertakings that were imposed fines had not been aware that they infringed competition until they were subject to inquiries or investigations by the Turkish Competition Authority. This fact points out that there is a large area where competitive system can be protected and improved without using fines and sanctions. At this point, it is possible to see clearly the role of undertakings and associations of undertakings.

The fact that undertakings and associations of undertakings have information about competition legislation and enforcement and take institutional steps for compliance with the legislation is as important as the decisions and activities of the Competition Board in the establishment of a competitive environment. Efforts of the managers of undertakings and associations of undertakings for compliance with competition legislation serve for contributing to the institutionalization of competitive order as well as preventing their businesses and association members from being subject to heavy administrative sanctions.

The most comprehensive effort for compliance with competition legislation and enforcement is a Competition Law Compliance Program. A compliance program is a tool that enables undertakings and associations of undertakings to "make self-assessments and self-monitoring" in a sense. Those programs are widely seen in developed countries; however, unfortunately they have not become common in Turkey

yet. The main reason why we prepare a letter or a booklet institutionally about the issue is to encourage and extend such efforts, and help those interested.

The scope of the compliance programs shows that large-sized undertakings with an institutional structure engage in those kinds of activities more. Nevertheless, we believe that small and medium-sized undertakings may also make efforts easily for compliance with the legislation within the boundaries of their own possibilities. Therefore, we try to answer possible questions about compliance programs and efforts. We add a "checklist" for the benefit of especially small and medium-sized undertakings at the end of the booklet.

We have prepared Competition Law Compliance Program to clarify the issues and concepts focused in Competition Letter 2011. We wish that it will be helpful for all undertakings and associations of undertakings.

Sincerely,
Prof. Dr. Nurettin Kaldırımçı
The President

1. What is Competition Law Compliance Program?

Competition Compliance Program is a practice or the set of corporate regulations and rules that enables undertakings and/or associations of undertakings to monitor themselves in terms of competition law. The existence of a compliance program is an indication of the importance and consciousness about competing in accordance with the law. In other words, compliance program includes methods showing the measures that undertakings or associations of undertakings use to avoid actions and decisions violating the competition legislation and how those measures are applied in the organization.

2. Why is it important to develop a Competition Law Compliance Program?

In social life, it is obligatory to act legally; otherwise, it constitutes a risk for undertakings and managers. Acting illegally has both material and moral consequences. A striking point during the activities of the Turkish Competition Authority in the 14-year term is that in most of the investigations, undertakings are not aware that they are violating competition rules. However, this does not save them from being subject to heavy fines. Yet, being informed about competition infringements beforehand can prevent many problems. Responsible and professional management understanding requires foreseeing the coming events and avoiding legal/financial risks. A knowledgeable and conscious manager takes measures necessary for avoiding sanctions that will harm the undertaking in terms of both finance and reputation. From this point of view preparing and implementing "competition law compliance programs" is among the leading measures to be taken.

3. What is the aim of Competition Law Compliance Programs?

Compliance programs depend on the aim to prevent competition infringements before they occur or rise. In this respect, they serve for two important objectives. First is to ensure that undertaking managers and employees have knowledge about competition rules. By this way, managers might avoid decisions and actions that constitute a competition infringement. The second one is to allow detecting and terminating conduct and practices contrary to competition legislation, if any.

4. What is the scope of Competition Law Compliance Programs?

It seems impossible to talk about a standard compliance program for every undertaking to apply in any situation. On the contrary, it is desirable that the compliance program be shaped according to the structure and conditions of the markets where undertakings operate as well as to the undertakings' own needs. Nevertheless, it is appropriate to point out the basic issues that must be included in a compliance program in order to guide undertakings. Those issues may be classified under four topics:

1. Preparing a corporate guide explaining principles and procedures of the competition law compliance program
2. Training employees periodically
3. Regular assessment and monitoring of the compliance program
4. Consistent discipline and encouragement practices

5. What must be included in the guide explaining principles and procedures of the Competition Law Compliance Program?

The first step in terms of efficient functioning of the compliance program is generally to prepare a written guide for informing the employees about the program and direct the workflow within the framework of the program. This guide should be written in a comprehensible style avoiding legal and technical terms as much as possible. While preparing the guide, it is advisable that the following points be taken into account:

- The guide should emphasize that competition law compliance program is an important policy of the company.
- It should include information about the consequences of competition infringement for the company. It should be stated that if the company engages in a competition infringement, it might be subject to examinations and investigations by the Competition Board. It should also be noted that the company might face damages claims by the victims of the infringement beside heavy fines and administrative measures of the Competition Board. In addition, all legal and financial risks should be underlined.
- It should include information about principles of the Competition Act and powers of the Turkish Competition Authority and the Competition Board. This may also include information about secondary legislation of the Turkish Competition Authority depending on the field of activity or the main areas where the company operates. For instance, a company with a high number of dealers or distributors is advised to inform its employees about secondary regulations about vertical agreements adopted by the Turkish Competition Authority.
- The guide should include procedures on how to make internal monitoring about whether the activities and decisions of the company comply with competition legislation. To that end, entrusting an official or a unit to carry out the principles and procedures of compliance program will contribute to the efficient implementation of the program.
- It is important for the implementation of the program uncompromisingly to hold employees responsible for their actions and decisions that are contrary to competition legislation. In this

context, the guide should clearly explain the sanctions and discipline provisions to be imposed on employees engaged in competition infringements.

- The guide should include a simple, understandable and practical list of “do’s and don’ts” to counsel the employees. This list should be prepared taking the workflow of the company into account.

6. What is the role of training with respect to the success of Competition Law Compliance Program?

Training is an important part of an efficient compliance program. Effective training for all staff, if this is not deemed necessary, at least for managers and employees responsible for the implementation of strategic and commercial decisions and practices should not be neglected. Training can be given by the employees of the company or by an external professional or a firm. There is not a strict and standard form and method to be successful. Small and medium- sized enterprises may apply to more practical methods such as asking an expert, joining to courses or training programs or using the website of the Turkish Competition Authority. A suitable method can be chosen by taking into account the features of the undertaking and the staff who will receive training. The records of training activities through methods such as seminars, video presentation and role-playing should be kept and reminded to those concerned when necessary.

7. How should Competition Law Compliance Program be followed and monitored?

Regular assessment of the compliance program is another important point for success. It would be appropriate to test the knowledge of employees about the act, the policy of the undertaking and the procedures related to compliance program, and to monitor the activities of the employees on a given date or without notice for controlling actual or potential infringements. In addition, notification of actual or potential infringements to senior management and determining the problem solving mechanisms require that a regular assessment system be developed. Assessment process should be as clear as possible and the staff should be helped to know that their behavior is assessed.

The company, if its size permits and it has the opportunity, should have a specific department or a consultant. The officials concerned and consultants of the undertaking should participate in executive meetings and visit the facilities of the undertaking regularly. It is important that the employees know whom they will call when they have a question about competition legislation or when they become aware of an improper practice. Some firms appoint a consultant or establish an advice line giving information directly while others assign legal departments for this task. Irrespective of the method, the confidentiality of the employee reporting the improper conduct or practice should be protected. Finally, the company official or the consultant should make regular competition inspections, preferably without notice, and monitor the compliance efforts. These inspections should be informal where necessary and include the inspection of employees with decision-making power related to competition and/or the staff of sales – marketing departments.

8. Why a coherent disciplinary and encouragement practice is necessary for the success of the Competition Law Compliance Program?

In order to ensure compliance with competition law, it is necessary that actions and employees that are important for competition should be monitored, reported and necessary discipline measures should be taken. The surveys conducted in developed countries show that employees' awareness about compliance with legislation increase with disciplinary and encouragement activities.

An efficient program requires more than oral commitment to comply with competition law. Requesting commitment, if possible written commitment, from the employees to fulfill their duties and responsibilities properly and highlighting that disciplinary actions will be taken uncompromisingly against employees or managers who might be engaged in actions contrary to competition law or violate competition are important for the program to be taken seriously. Care should be taken to avoid giving responsibility to employees who have tendency to behave contrary to the competition law.

It is indispensable for the success of the system that managers and employees know that the penalties and other negative outcomes, which the undertaking is subject to, will bear consequences for both the undertaking and the employees, and that especially infringements by managers will increase penalties and those managers may be imposed fines personally. It is very important for a successful compliance program that employees who ignore the compliance program or fail to report other employee's wrongdoing know that they might be held responsible or be punished. On the other hand, employees who contribute to the prevention of decisions, practices or conduct harmful for the company should be appreciated and awarded.

9. Are there any methods to encourage employees' efforts for compliance with legislation?

Preparing a simple and understandable list of "do's and don'ts" that shows which actions and decisions are considered as infringements, and which ones are not problematic in terms of competition legislation will help employees significantly. This list can be organized as a general checklist for all employees or as specialized lists for each department according to their job definitions and workflows. The existence of an in-house official whom employees may consult for the issues not included in the checklist or when they hesitate will reinforce the expected efficiency of implementation.

A checklist is added at the end of this text to guide undertakings and associations of undertakings.

10. What is the role of senior managers in the Competition Law Compliance Program?

The determination of the senior management and their leadership is an important indicator for the success of the program. Clear support of senior management to the program and their regular statements about their awareness will lead to the perception of the program as an important company policy not a simple effort to comply with legislation. In large-sized enterprises, one of the members of the senior management team might be held responsible for applying the program and be requested to prepare reports regularly. This will materialize the support of the management. Besides being a warning to internal and external environment, this will reinforce interest and participation of newly employed personnel to the program as well as current employees.

11. What kind of resources might be used to prepare the Competition Law Compliance Program?

The simplest and cost-free way of preparing a compliance program is that the legal department of the company prepares and implements a program using the website of the Turkish Competition Authority. The officials may find detailed information about the Competition Act, secondary legislation, Competition Board decisions and activities of the Competition Board as well as works for sharing competition legislation and enforcement with the public such as Competition Letter, Competition Hand Book, Application Guide, etc. and academic work.

Companies wishing to follow a more professional way to prepare and implement the program may purchase services from consultancy firms.

12. What is the role of associations of undertakings in the development of Competition Law Compliance Programs?

Associations of undertakings have also important roles in implementing the compliance program. In this process, beside individual undertakings, associations of undertakings such as chambers, unions and associations, which undertakings are members of, have also an important role. Within the frame of this role, associations of undertakings should prevent the practices under its body from violating competition rules and ensure that their members should have knowledge and awareness about competition law and policy in a general sense. It is beneficial that like individual undertakings, associations of undertakings also publish certain guides/instructions/policy papers that can be translated into our language as “competition compliance policy”. Those policy papers should be announced as a part of codes of conduct of undertakings and associations of undertakings and be shared with the public. In another words, undertakings and associations of undertakings should regard compliance with competition law as a moral and legal issue.

13. What should company managers do when they realize that the company is engaged in competition infringement?

As soon as the management becomes aware of an infringement, it should take action immediately, end the infringement, examine the case and inform the competition authority if necessary. It should be noted that especially in cartel agreements making active cooperation and benefiting from leniency sometimes become a kind of a race because the company that informs the competition authority first is the most advantageous company.

14. Are there any kinds of undertakings or sectors where Competition Law Compliance Programs are particularly necessary?

Sometimes it appears that partners and senior executives are not aware that their undertaking is engaged in competition infringement. This is the case for large-sized holding companies operating in more than one sector, where day-to-day business and management responsibility belongs to professionals. Therefore, it is important that senior management be sensitive about the issue.

In some markets, competition infringements are more frequent because of the reasons such as product characteristics, entry conditions, operation scale, and the existence of mechanisms facilitating communication between competitors. We strongly advise that undertakings operating in such markets implement a competition law compliance program. Therefore, managers are recommended to review the following checklist, assess their risks and determine their needs about the compliance program accordingly.

- **Is your undertaking a leader in the market?**

Market leaders may face with "abuse of dominant position" allegations under Article 6 of the Competition Act. Decisions and actions of such companies may be subject of competition inquiries and investigations.

- **Is the number of producers and/or suppliers low in the market you operate? Is the important part of the market controlled by a few undertakings?**

The fact that there are a few number of undertakings in the market facilitate anticompetitive agreements (cartel) between competitors. The fact that a significant part of the market is controlled by a number of undertakings may lead to agreement attempts between competitors for market allocation.

- **Are the products you produce/sell standard products?**

In sectors where standardized products are produced and/or sold such as iron, steel, chemicals and cement, the parameters to agree are generally issues about price and sale; therefore, cartels are more frequent.

- **Can new firms easily enter into the market you operate?**

Markets where entrance into the market is difficult and there are many barriers, tendency to create and maintain cartels is higher compared to markets where entrance is easy, in other words, there are not entry barriers.

- **Is the market where you operate shrinking or being affected by the crisis significantly?**

Cartels are more frequent in markets that experience shrinking or effects of crisis significantly.

- **Is your pricing policy parallel to your competitors?**

The fact that practices of your undertaking such as price, term, discount, etc. are similar to those of your competitors significantly and for a long time may draw attention as an indicator of anticompetitive information exchange or a formation of cartel.

- **Was the sector where your undertaking operates subject to inquiries or investigations of the Turkish Competition Authority?**

The Turkish Competition Authority focuses its attention on the sectors where inquiries and inspections were concluded with an infringement decision.

- **Do the managers or employees of your undertaking participate in the meetings of associations, unions or chambers frequently? Is there a regular communication between your employees and competitors' employees?**

Associations of undertakings in the sector generally facilitate and sometimes even lead cartel agreements. Anti competitive information exchange individually or under the body of the association, the frequency of communications with competitors, the continuity and intensity of this communication increase the risk of infringement.

- **Is there a joint venture or a commercial agreement between your undertaking and competitors?**

Commercial relations and structural associations like joint ventures are among factors that facilitate cartels. Those kinds of relations may cause practices that can be deemed as grounds for infringement assertions.

15. How can small and medium sized enterprises comply with competition legislation?

Generally, it is not possible for small and medium-sized enterprises to prepare and implement a comprehensive compliance program. The checklist included in this brochure is prepared to help the said undertakings to some extent. Small and medium-sized undertakings are recommended to review their decisions and practices by using the website of the Turkish Competition Authority (www.rekabet.gov.tr) in addition to the issues stated here.

We think that it would be relevant to remind some points to be taken into account by undertakings in question. It is considered as a severe infringement if undertakings determine sales conditions such as sale prices, discounts and due dates, and allocate markets and customers with their competitors. Those kinds of infringements may be seen in the context of public tenders. Therefore, undertakings participating in public tenders may face with severe administrative fines if they determine tender price or other commercial issues related to tender with competitors.

Associations of undertakings such as chamber, union and federation may sometimes be used as a platform where market information that can affect decisions related to competition such as price, production volume, and sales conditions is shared between members. The Turkish Competition Authority often investigates the practices where price recommendation by associations of undertakings is perceived and used by member undertakings as a fixed price. Therefore, associations of undertakings should be sensitive about regulations that may lead to fixed prices and member undertakings should clearly warn managers of associations of undertakings if necessary.

Given the severity of administrative fines imposed by the Competition Board, competition infringements cause serious problems to small and medium-sized undertakings. As a result, managers of the undertakings in question should be attentive and make efforts to comply with competition legislation and enforcement in order to protect their vital interests.

CHECKLIST FOR COMPLIANCE WITH COMPETITION LEGISLATION

Undertakings should review and assess their current situation in terms of compliance with competition law. We have created a checklist to help undertakings and associations of undertakings. It should be emphasized that the checklist does not cover all situations but includes basic points in terms of competition legislation. We think that it is useful for undertakings and associations of undertakings to assess their situation according to this checklist or question list. Responses to the questions will determine to a large extent what kind of practice and approach is necessary for success.

A. Information about competition legislation and the Turkish Competition Authority

It is vital to have sufficient information about competition legislation and the Turkish Competition Authority to foresee many problems that would be very difficult to overcome otherwise. Knowledge and sensitiveness degree of managers and officials with the power to make decisions resulting in competition infringements about what legal practices are and which kind of decisions and actions are prohibited serves as a basis to success or failure of the undertaking and the management in this area.

- Do you have sufficient knowledge about competition legislation?
- Do you have information about the regulations, activities and decisions of the Turkish Competition Authority?
- Do you regularly follow the website of the Turkish Competition Authority?
- Is there a special department or an official to deal with competition legislation and related practices in your organization?
- Do you have rules, a booklet or a procedure prepared to ensure compliance with competition law, showing the required practices and informing all employees or the concerned?
- Do you use external consultancy services about competition legislation and practices?
- Have senior managers or employees received training about competition legislation and related practices?

B. Relations with competitors

The biggest obstacle in front of a fair competitive environment is anticompetitive agreements between businesses. Those agreements that can be defined as “cartel” are severely prohibited. Such decisions, activities and transactions, which mean “stealing from public welfare”, injure the reputation of a business and require heavy penalties.

- Do you determine prices and cost elements forming the price and sales conditions with your competitors?
- Do you exchange views with your competitors about prices and cost elements forming the price?

- Do you make geographical or consumer-based market allocation with your competitors?
- Do you have a common understanding with your competitors related to the restriction of supply and other input resources?
- Do you have a written or oral agreement with your competitors on refraining from competition?
- Do you act in common with competitors to push certain competitors and/or customers out of the market?
- Do you discuss with your competitors about issues such as price, cost elements etc. that might affect competition before or during tenders? Do you act jointly on these issues?

C. Relations with customers and dealers

Undertakings distributing or selling goods and services via mostly vertical agreements must refrain from practices that may constitute a competition infringement. Such undertakings should be sensitive about the compliance of their marketing systems with competition law and make efforts.

- Do you determine the resale price of your dealer or customer?
- Do you intervene to sales conditions such as discount rates or due date of your dealer or customer?
- Do you impose restrictions on sales to customers in the agreements you sign with your dealers?
- Do you impose prohibitions on sales by your dealers authorized in different regions into each other's region?

D. Undertakings with dominant position/market power

In certain markets, it is possible that one or more undertakings may have power to determine, independently from their competitors and customers, economic parameters such as price, supply and distribution volume. It is essential that such undertakings act without infringing competition.

- Do you apply different price and sales conditions to customers at equivalent positions?
- Do you impose an obligation to your customer to buy another good or service with a good sold?
- Is your pricing policy under or too much above the costs?
- Do you make restrictions on supplying goods to your customers or competitors without reasonable grounds?
- Is your pricing policy complicating your competitors' activities?
- Do you use your financial or technological superiority in a market to complicate your competitors' activities in other markets?

E. Associations of undertakings

Generally, undertakings operating in a sector come together in organizations created under the titles chamber, association, union or other for several reasons. It is natural that those organizations with or without legal personality work for the success of their members. However, such associations of undertakings, in certain situations, knowingly or ignorantly, lead to take anticompetitive decisions and cause anticompetitive practices.

- Are there any provisions restricting competition in the charter of the association of undertakings?
- Do the powers of the association of undertakings over its members affect competition between them?
- Does the association of undertakings take decisions about sales prices and other sales conditions of its members?
- Does the association of undertakings take decisions restricting its members' sphere of activity?
- Are members encouraged to talk about issues such as prices, sales conditions, market/customer allocation etc?
- Do technical standards aiming to regulate the members' activities restrict members' commercial activities?

F. Undertakings participating in public tenders

Another area where competition infringements are seen widely is public tenders. It is considered as a severe competition infringement if the bidding undertakings in a public tender make close communication and share tender or tender elements as a result of this communication before or during a tender.

- Does your undertaking communicate with competitors about the tender or tender elements before or during tenders?
- Is your undertaking in an agreement with its competitors about price, amount, etc. related to tender?
- Does your undertaking allocate tenders with the competitors especially when there are more than one tender?
- Does your undertaking agree with your competitors and withdraw from tender in favor of one or more competitors?

The high number of "No" responses in section A indicates that decisions and practices of the undertaking or association of undertakings in question have a higher potential to violate the competition legislation. It is advisable that undertakings and associations of undertakings at this position implement a compliance program or at least receive consultancy/training services with respect to competition law. Regarding sections B, C, D, E, F a "Yes" response to any question indicates that the undertaking or association of undertakings in question might be involved in competition infringement. Such undertaking or association of undertaking should reassess its practice or action concerned in terms of competition legislation and should terminate its action concerned if necessary.

UNITED KINGDOM

1. Introduction

The Office of Fair Trading (OFT) considers that most businesses wish to comply with competition law – and is keen to help them do so. Promoting competition law compliance is, in our view, a powerful complement to an authority's robust enforcement agenda. Compliance, most obviously, can prevent infringements, and the harm caused thereby, from occurring in the first place. Moreover, businesses with a solid commitment to compliance will be better able to detect and terminate any potential infringements for which their employees might be responsible. Such businesses may also be more likely to self-report to competition authorities and/or actively co-operate with an investigation than those who lack such a commitment. An added bonus is that such businesses may be better able to spot when they might be the victims of an infringement, and therefore complain to competition authorities or to bring private actions for redress. Encouraging compliance can therefore increase the effectiveness of competition enforcement and in turn, the deterrent effect of the regime. The OFT further observes that non-compliance with competition law is a significant form of financial risk for a business, which can have a materially adverse impact upon shareholder value. As such, competition law compliance should be a core element of a business's risk management and compliance systems and can be readily integrated into such systems and controls, alongside others, such as those dealing with internal fraud and anti-bribery and corruption.

In this paper we will discuss some of the recent work that the OFT has undertaken to give effect to our commitment to competition law compliance, including the report OFT1227 *Drivers of Compliance and Non-Compliance With Competition Law* which was published in May 2010, the guidance documents *How Your Business Can Achieve Compliance With Competition Law* and *Company Directors and Competition Law*, as well as the OFT *Quick Guide to Competition Law Compliance* and our film on competition law compliance, all of which are to be issued in June 2011. We will discuss the OFT's recommended four-step process for achieving a culture of competition law compliance. We will also suggest that there is an opportunity at an international level for competition authorities to set out what they consider to be best practice in competition law compliance, which will be of benefit to both competition authorities and business.

2. Background

As many delegates will know, the OFT is the UK's primary competition and consumer agency. Our mission is to make markets work well for consumers. Our work enables competitive markets to deliver the incentives for greater business efficiency, and to ensure that firms are responsive to consumer demands. One of the means by which we do this is through high-impact enforcement to achieve compliance with competition law.¹ But we also aim to influence and change the behaviour of businesses, consumers and Government to make markets work well.² We recognise that most businesses wish to comply with competition law and we are keen to help them to do so. In tandem with our enforcement programme, we therefore use different levers to encourage a culture of compliance with competition law, including the

¹ See, for example OFT1294 *Office of Fair Trading Annual Plan 2011-12*, p. 14, available at <http://www.oft.gov.uk/about-the-oft/annual-plan-and-report/annual/>.

² Ibid.

publication of guidance on compliance.³ The OFT in 2007 published research that it had commissioned by Deloitte into the deterrent effect of its competition law enforcement efforts.⁴ As part of the research exercise, Deloitte interviewed competition lawyers in private practice and businesses. The interviews suggested that the sanctions that are most relevant depended upon the type of the infringement in question. Fines, adverse publicity and Competition Disqualification Orders (CDOs) were seen as significant sanctions for cartels and abuse of a dominant position, for example.⁵ In terms of the perceived importance of sanctions, both lawyers and businesses placed criminal penalties at the top of the list. Lawyers however rated financial penalties on business as the second most important deterrent. Businesses rated disqualification of directors as second. CDOs were regarded by lawyers as the third most important deterrent sanction, while adverse publicity was seen as third most important by businesses. Adverse publicity was regarded by lawyers as the fourth most important deterrent sanction. Meanwhile, businesses rated financial penalties as the fourth most important deterrent sanction. Both lawyers and businesses regarded private damages as the fifth, and for the purposes of the research, least most important deterrent sanction.⁶

The Deloitte research also included analysis of the scale of the deterrent effect of competition law sanctions in relation to the compliance activities of businesses. It noted firms were more likely to have ceased or modified activities if they had taken some form of compliance action.⁷ However, whether a business undertook compliance activities was found to be strongly related to its size, with larger businesses being more likely to have undertaken such activities.⁸

According to the Deloitte report, the most common compliance measure was taking external advice (40 per cent of businesses). Other relatively common compliance measures were:

- having a policy code (34 per cent)
- providing seminars on competition law (26 per cent)
- employing a dedicated competition compliance officer (20 per cent)
- taking economic advice (16 per cent), and
- requiring employees to take an online training programme (nine per cent).⁹

Following on from this research, the OFT commissioned the London Economics report OFT1132 *An assessment of discretionary penalties regimes*, which explored the extent to which the UK penalty regime is characterised by penalties that are optimal to achieve deterrence, as well as the interaction of corporate fines with sanctions on individuals, particularly non-monetary sanctions such as CDOs and criminal sanctions.¹⁰ The research found that with regard to fine levels there is no evidence that the UK is fining

³ See, for example, OFT1294 at p. 16.

⁴ OFT962 *The Deterrent Effect of Competition Enforcement by the OFT* available at <http://www.of.gov.uk/OFTwork/publications/publication-categories/reports/competition-policy/oft962>.

⁵ See, for example, OFT962 at para. 5.56.

⁶ See, for example, Table 5.11 at p. 72 of OFT962.

⁷ OFT962 at para. 5.100.

⁸ OFT962 at para. 5.99.

⁹ OFT962 at para. 5.98 to 5.99.

¹⁰ <http://www.of.gov.uk/OFTwork/publications/publication-categories/reports/Economic-research/oft1132>.

above the international comparators and some evidence that the UK is fining below them.¹¹ On non-monetary sanctions the UK regime compares well to international comparators.¹²

3. Drivers of compliance and non-compliance with competition law

The OFT wished to build on this work by examining more closely what drives compliance with competition law. The OFT therefore commenced research in 2009 for the report OFT1227 *Drivers of Compliance and Non-Compliance with Competition Law*, which was published in May 2010 ("the *Drivers report*").¹³ We were particularly keen to gain insight into best practice in competition law compliance. Our focus was on what motivates business to comply with competition law and what has worked well in practice to achieve this. But we were also keen to learn why competition law compliance challenges can sometimes arise despite compliance efforts. Our plan was to gather examples of best practice that we might in turn be able to share and to understand how we can best use our limited resources in order to help businesses to comply. Our background research included looking at good examples of compliance guidelines already available in other jurisdictions, including the US Federal Sentencing Guidelines,¹⁴ as well as the guidelines issued by the Canadian Competition Bureau¹⁵ and the ACCC¹⁶, among others.

We conducted qualitative research in the form of in-depth interviews with in-house staff in larger businesses having direct experience of driving competition law compliance, in order to gain insights from their experience and practical examples of best practice. We also conducted 3 group sessions with in-house counsel and private practice lawyers.

The *Drivers* report discusses the "sticks" and "carrots" that can drive compliance. Among the most significant "sticks" are the following:

- The adverse reputational impact of having committed an infringement (or even being seen to have done so)
- Concern about significant financial penalties,
- Concern about criminal sanctions,
- Concern about director disqualification orders, and
- Internal disciplinary sanctions.¹⁷

We found that the "carrots" that can drive competition law compliance included the following:

- A strong managerial commitment to competition law compliance (one that is clear, unambiguous, from the top down)
- Competition law compliance being seen as helping to win business by allowing the business to position itself as an "ethical business", especially where competition law compliance is integrated with other key compliance activities, such as those dealing with anti-bribery and corruption

¹¹ See, for example, OFT1132 at para. 1.7.

¹² Ibid. para. 1.9.

¹³ <http://www.oft.gov.uk/OFTwork/publications/publication-categories/reports/competition-policy/oft1227>.

¹⁴ http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm.

¹⁵ <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html>.

¹⁶ <http://www.accc.gov.au/content/index.phtml/itemId/54418>.

¹⁷ See, for example OFT1227 at para. 1.10.

- Being able to have confident employees who know the rules of the game and know how they can compete for business without infringing competition law, and being able to identify when they should seek expert advice and knowing how they can do so
- Internal incentives being linked to compliance activities.¹⁸

We also made some interesting findings with respect to what can drive non-compliance. Employees might be tempted to engage in infringing activity if they perceive even a hint of ambiguity in management's commitment to compliance. They might sometimes feel that "it is worth the risk" if they think that management will see it as being acceptable if there is seen to be some commercial benefit for engaging in such activity.¹⁹ Naturally, if management is saying "do it, but don't get caught" or is seen to be saying that, then non-compliance can easily result.

Another interesting potential cause of non-compliance was said to be competition law compliance "having to fight for airtime" with other compliance activities.²⁰ This was perhaps closely linked to a lack of clear and unambiguous managerial commitment to competition law compliance. Some of the people to whom we spoke said that they were aware of businesses in which it was already difficult to get board time for compliance matters and that such time might be consumed by what was seen to be higher profile compliance areas, such as health and safety or environmental protection. Implicitly, in such cases, competition law was seen to be a remote risk or one with less severity than other areas. Where this was the case, there would be difficulty in getting the necessary clearance in order to undertake proactive competition law compliance efforts.

Many of the people that we spoke with identified the so-called "rogue" employee as a driver of non-compliance.²¹ The "rogue" employee was seen as a person who circumvented or overrode internal compliance policies and controls and engaged in infringing activity, usually concealing such activities from others within the business. One interviewee memorably described the "rogue" employee as

*"...someone who thought they were smarter than everyone else and that one day the business would be "jolly grateful for them" "*²²

There was a widespread view that a "rogue" employee could circumvent even the best competition law compliance efforts and that the business would essentially be the victim of such a person.²³ A "rogue" employee was seen to be distinct from a "scapegoat", who was a person who unfairly took all of the blame for causing the infringement.²⁴ Many considered that it was wrong for the otherwise compliant business to be penalised for infringements attributable to a "rogue" employee.²⁵

¹⁸ Ibid.

¹⁹ Ibid., para. 1.11.

²⁰ Ibid., para. 4.2.24.

²¹ Ibid., at para. 4.2.7 to 4.2.13.

²² Ibid., at para. 4.2.10.

²³ Ibid., at para. 4.2.8.

²⁴ Ibid., at para. 4.2.13.

²⁵ Ibid., at para. 5.2

Another interesting driver of non-compliance can be a loss of trust in legal advice.²⁶ This is particularly the case where legal advice is seen to be so risk averse as to be commercially obstructive. What can then happen is that businesspeople either do not seek legal advice, as they will think that they will just tell them that they cannot do what they want to do (and will not be presented with a commercially viable alternative), or they will disregard the legal advice that they do receive.

Other causes of non-compliance can include the following:

- Confusion or uncertainty about how competition law applies (usually said to be with respect to more complex or novel infringements)²⁷
- Simple employee error or naivety about competition law (such as not even being aware of competition law), and²⁸
- A "box-ticking" approach to competition law compliance – which tended to make competition law compliance highly form-based and which was not geared towards addressing or reviewing the actual competition law risk exposure of the business.²⁹

4. Best practice in competition law compliance

As noted above, in addition to identifying what drives compliance and non-compliance with competition law, the OFT in the *Drivers* report wanted to share examples of best practice in competition law compliance. Interviewees were keen to share examples with us, which we in turn consolidated and published in the report. One of the key elements of best practice was for compliance efforts to be risk-based, which is to say, they addressed the actual competition law risk exposure of the business.³⁰ This meant a rejection of any notion of "one size fits all" approach to competition law compliance.³¹

We have included in our report examples of best practice in competition law compliance, in order to provide ideas to businesses designing or refreshing their competition law compliance strategy. We make it clear that we are not however suggesting that any or all of them are necessary to be implemented. We have also provided insights in the *Drivers* report on issues such as

- Identifying competition law risks
- Obtaining management commitment and demonstrating this to staff
- Identifying the sort of compliance activities that may be appropriate for the business, depending upon the risk
- Encouraging behaviour change in order to drive compliance, and
- Monitoring and following up on competition law compliance activities.

²⁶ Ibid., para. 4.2.17 to 4.2.20.

²⁷ Ibid., para. 4.2.14 to 4.2.15.

²⁸ Ibid, para. 4.2.16.

²⁹ Ibid., para. 4.2.22.

³⁰ See, for example, *ibid.*, para. 4.3.16.

³¹ *Ibid.*, para. 4.3.24.

5. Four-step review process

In the *Drivers* report, having regard to its research, the OFT sets out a four-step risk-based framework for achieving a culture of competition law compliance, in the form of a "virtuous circle".³² At the hub of this process is a clear and unambiguous commitment to competition law compliance, from the top down – which is to say, at all levels of the management chain. The four steps can be briefly summarised as follows:

- Step one – risk identification: identify the competition law compliance risks it faces. These risks might be specific to the operations of the business and might even vary between business units within the same business.
- Step two – risk assessment: assess whether the risks identified are high, medium or low risks for the business, based upon the likelihood of the risks occurring. This assessment should be undertaken for each risk identified.
- Step three – risk mitigation: identify and implement appropriate risk mitigation activities.
- Step four – regularly review all steps of the process. This step is designed to highlight that this framework for competition law compliance is not static. The competition law risks faced by a business might change over time and the compliance activities must adapt to such changes.

The four-step process can be represented graphically, as follows:



6. How your business can achieve compliance with competition law: OFT guidance

The OFT discusses the four-step process in more detail in the Guidance *How Your Business Can Achieve Compliance with Competition Law* ("the Compliance Guidance"), to be published in June 2011. The Compliance Guidance replaces the earlier OFT Quick Guide OFT424 *How Your Business Can Achieve Compliance*, which many respondents in the *Drivers* report research considered could be usefully updated and re-launched, in order to share examples of best practice gained in that report. The Compliance Guidance builds on the *Drivers* report.

³² See, for example, *ibid.*, at para. 1.16.

The Compliance Guidance sets out a practical framework for implementing each step of the four-step process as well how management can demonstrate a clear and unambiguous approach to competition law compliance from the top down within a business. This includes "red flags" of possible infringements, such as businesspeople seeming to have knowledge of competitors' commercially sensitive information.³³ The OFT makes it clear that this risk-based process is merely suggestive, not mandatory. Indeed, the OFT does not mandate any specific compliance measures.³⁴ Furthermore, it acknowledges that businesses may already have in place, or choose to implement, a compliance methodology that differs from the four-step process discussed in the Compliance Guidance, but which is equally effective in delivering an effective competition compliance culture within the business.³⁵ In the OFT's view, the key point is that businesses should find an effective means of identifying, assessing, mitigating and reviewing their competition law risks.³⁶

7. Other publications

The OFT has also issued a number of publications with a compliance focus in addition to the Compliance Guidance. For example, at the same time as the Compliance Guidance, we issued *Company Directors and Competition Law*, which sets out the key competition law risks that individual company directors need to be aware of, the role that directors can play in minimising the risks of their company infringing competition law and what they can do in order to minimise the chances of a CDO application being made against them. We take the view that the level of knowledge expected and the specific steps that a director ought to take in order to encourage a culture of compliance within a company will depend on his or her role within the organisation, as well as the size of organisation. But we consider that there are some things that all directors should know about competition law, including that cartel agreements (such as price-fixing, for example) are serious infringements of competition law. Directors can benefit from cross-referring to the Compliance Guidance in order to get a practical feel for what they can be doing to ensure that their company has an effective competition law compliance culture.

In June 2011, we will also publish a *Quick Guide to Competition Law Compliance*, which draws on the content of both of these guidance documents. It offers a high-level summary of the key points for competition law compliance and may be of particular benefit to managers within smaller businesses. The four-step process mentioned above is graphically represented in the Compliance Guidance and the *Quick Guide* in the form of wheel. This wheel will be available in interactive form on the OFT website from June, as has the film, *Understanding Competition Law*. Also available free of charge in DVD form, the film includes interviews with OFT officials and a leading commentator on competition law, in which they explain what competition law is, why it is important and how businesses can implement the OFT's suggested four-step process for competition law compliance. The film's emphasis is on practicality and ease of understanding. The aim of these various publications is to build upon the foundation work that the OFT has done on compliance.

8. Financial incentives for compliance/discounts for infringements committed by "rogue" employees

During its research for the *Drivers* report, many stakeholders called upon the OFT to provide significant financial discounts to businesses that had implemented compliance programmes, some calling for reductions as high as 30 per cent.³⁷ One interviewee put it memorably that "I think the fact that you can

³³ *How Your Business Can Achieve Compliance With Competition Law* at para. 3.3.

³⁴ *Ibid.*, para. 1.13 to 1.14.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ See, for example, OFT1227 at para. 5.10.

have a compliance policy and get no credit for it is basically unfair".³⁸ Many other interviewees also said that the OFT should grant discounts or even decline to impose financial penalties for infringements that committed by undertakings that are the result of "rogue" employees, where the business otherwise has a thorough and effective compliance culture.³⁹

With respect to penalty reductions for compliance efforts, the OFT observes that the key benefit of compliance activities for a business is the avoidance of competition law infringements in the first place.⁴⁰ Accordingly, the OFT's position for businesses that have undertaken compliance activities is neutral: there are no presumptions of discounts (or for that matter, increases) to the level of the financial penalty if the business has undertaken compliance activities.⁴¹

That said, the OFT also states in the Compliance Guidance that it might reduce the amount of the financial penalty where adequate steps have been taken with a view to ensuring compliance with the Chapter I and Chapter II prohibitions of the Competition Act 1998 (CA98), and Articles 101 and 102 of the Treaty on the Functioning of the European Union.⁴² Taking "adequate steps" for these purposes might include having implemented the four-step process described above, or, in the OFT's view, reasonably equivalent measures.⁴³ In response to stakeholder suggestions, we have clarified that this can apply where the steps pre-date the infringements or where they were implemented quickly following business first becoming aware of the potential competition infringement.⁴⁴ Each case will be assessed on its own merits and the OFT takes the view that a business seeking a reduction in the amount of the financial penalty will be expected to adduce evidence of adequate steps having been taken in relation to:

- achieving a clear and unambiguous commitment to competition law throughout the organisation;
- risk identification;
- risk assessment;
- risk mitigation, and
- review.⁴⁵

Reflecting the risk-based approach that we wish to encourage, as well as our rejection of any "one-size fits all" approach to compliance, the OFT will expect the business to demonstrate that the steps taken were appropriate to the size of the business concerned and its overall level of competition law risk.⁴⁶

Where the OFT, having regard to these factors, considers that adequate steps have been taken and a reduction in the amount of the penalty is justified, we will consider reducing the amount of the financial

³⁸ Ibid., para. 5.9.

³⁹ Ibid, for example at para. 5.2.

⁴⁰ *How Your Business Can Achieve Compliance With Competition Law*, para. 7.1

⁴¹ Ibid.

⁴² Ibid., para. 7.2..

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid, para. 7.2.

⁴⁶ Ibid., para. 7.3.

penalty by up to 10 per cent.⁴⁷ This will be assessed on a case by case basis. A relevant factor for these purposes will be the steps take by the business following discovery of the infringement.⁴⁸

Following on from the *Drivers* report, the OFT also makes it clear in the Compliance Guidance that we will not ordinarily regard the existence of a competition law compliance programme as a factor to warrant an increase in the amount of the financial penalty to be imposed against an undertaking for a competition law infringement.⁴⁹ There are some exception to this, such as where the purported compliance programme has been used to facilitate the infringement, to mislead the OFT as to the existence or nature of the infringement, or had been used in an attempt to conceal the infringement.⁵⁰

8.1 *Rationale*

The OFT appreciated stakeholder comments that it was important to provide some incentive for businesses to implement compliance programmes. We also considered that there was force in comments that being seen to have a policy that a competition law compliance programme would be an aggravating factor for the purposes of the financial penalty could tend to act as a disincentive to compliance efforts: some boards might well ask "what is the point?" As to the latter, the OFT considered it appropriate to clarify that we would not ordinarily regard the presence of a compliance programme as an aggravating factor warranting an increase in the amount of the financial penalty. That said, the OFT was also anxious not to undermine the deterrent impact of financial penalties. Our research discussed above showed that the threat of significant financial penalties is a crucial factor driving compliance. As a result, the OFT did not consider that granting significant reductions in the amount of the financial penalty was appropriate, but we did conclude that a reduction of up to 10 per cent was appropriate. In this respect, the OFT notes that the Competition Appeal Tribunal (CAT) in its judgments in the *Construction*⁵¹ and *CRF*⁵² cases essentially endorsed our approach of granting modest reductions in the amount of the financial penalty for compliance efforts.

The OFT does not consider the "rogue" employee issue in the Compliance Guidance, as we did not consider that it would be appropriate to do so in a document intended to share practical steps to achieving compliance. In the *Drivers* report, the OFT said that we did not consider that it would ordinarily grant discounts from penalties for infringements committed by "rogue" employees.⁵³ We again wished to avoid any risk of undermining the deterrent impact of financial penalties, as well as creating any incentives for "scapegoating" within the organisation.⁵⁴

9. **Non-traditional stakeholders**

As noted above, the OFT considers that competition law compliance can sit comfortably with, and be integrated into, other high-priority items in a business's risk and compliance systems and controls and should have a higher profile in the corporate governance agenda. Many of these controls are managed by non-competition law specialists. Furthermore, the OFT's research showed that competition law compliance

⁴⁷ Ibid., para. 7.4.

⁴⁸ Ibid.

⁴⁹ Ibid., para. 7.5.

⁵⁰ Ibid.

⁵¹ *Kier and others v Office of Fair Trading* [2011] CAT 3 para. 218.

⁵² *Eden Brown and others v Office of Fair Trading*, [2011] CAT 8 at para. 127.

⁵³ OFT 1227 at para. 6.16 to 6.19.

⁵⁴ Ibid.

was sometimes at risk of having to "fight for airtime" alongside other compliance areas, which could in turn drive non-compliance with competition law.

In view of this, the OFT suggests that competition authorities can help to drive compliance by engaging with risk management, compliance and corporate governance professionals, some of whom might not be traditional stakeholders for competition authorities: these can include chairs of audit and risk committees, company secretaries, head of internal audit as well as those responsible for fraud controls. The OFT suggests that raising practical awareness of the importance of competition law compliance among these professionals can be a means of integrating competition law compliance into the broader corporate governance agenda, and help to mitigate the risk that it has to fight for airtime alongside other issues. The OFT is currently exploring avenues of raising awareness among these professionals. We are also pleased to note that such professionals can be a valuable source of intelligence for competition authorities: for example, the *Construction* case resulted from the concerns of an internal auditor in the National Health Service.⁵⁵ The OFT considers that increasing awareness of competition law can be of potential benefit to the competition authority's casework.

10. Compliance: recognition of international norms

During its research for the *Drivers* report, as well as during the consultation on the Compliance Guidance, some stakeholders suggested that inconsistent approaches to compliance programmes in different jurisdictions and the lack of international "standards" of compliance made it more difficult for businesses to comply with competition law. Some even suggested that it would be useful if an overarching international standard was adopted, which set out international best practice principles for competition law compliance. Another respondent said it would be particularly useful if there was a best practice standard for competition law compliance which applied throughout the EU, which could be adopted through the European Competition Network.⁵⁶

The OFT considers that there is some merit in examining further these suggestions. Some form of guidance on international standards of good practice in competition law compliance may be of benefit in helping business people to get investment from boards to dedicate to compliance efforts, as they can show to boards that these are generally agreed provisions of compliance best practice. Such provisions could in turn act as a skeleton for compliance policies. In this regard, the OFT notes the OECD Anti-Bribery and Corruption Working Group has published *Good Practice Guidance on Internal Controls, Ethics and Compliance* ("the OECD Guidance").⁵⁷ The OECD Guidance is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions and to business organisations and professional associations, which play an essential role in assisting companies in these efforts. The OECD Guidance is flexible, and intended to be adapted by companies, in particular small and medium sized enterprises, according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.⁵⁸ The OFT would therefore encourage competition authorities to use fora such as the OECD and the ICN to agree and set out similar standards of good practice in competition law compliance. Any document containing such provisions would not need to be very long or detailed (the OECD Guidance runs to not more than four pages, for example). It could also

⁵⁵ *Kier*, *ibid* at para. 10.

⁵⁶ See, for example, OFT1227 at para. 5.49.

⁵⁷ <http://www.oecd.org/dataoecd/5/51/44884389.pdf>

⁵⁸ Introduction to the OECD Guidance.

make it clear that the provisions set out did not bind the national competition authorities, particularly with respect to penalty determination.

11. Conclusion

The OFT considers that most businesses wish to comply with competition law. We are keen to help them do so and have issued a number of publications to this end. Promoting competition law compliance is, in our view, a powerful complement to a robust competition enforcement programme. Encouraging compliance can therefore increase the effectiveness, and in turn, the deterrent effect of the competition regime. We also take the view that competition law compliance efforts can be readily integrated into a business's risk management and compliance systems, and should have a higher profile in the corporate governance agenda. The OFT would also encourage competition authorities to use international fora such as the OECD and the ICN to set out international standards for good practice in competition law compliance, as has been done at the OECD level with respect to anti-bribery and corruption controls.

UNITED STATES

This paper responds to the Chairman’s invitation for written submissions on the topic of promoting compliance with competition law. The Federal Trade Commission (“FTC”) and Antitrust Division of the U.S. Department of Justice (“Division”) (collectively “the agencies”) are pleased to provide our perspective on this important issue. The paper addresses the topic in three parts. The first part offers various agency enforcement perspectives on the topic. The second part looks into the role private antitrust enforcement plays in promoting compliance. Finally, the third part provides agency perspectives on antitrust compliance programs. The agencies note that the agencies are not best placed to answer some of questions suggested in the invitation for submissions. Private companies are in a better position to explain what factors determine their decision to comply or not comply with competition laws.

1. Promoting better compliance: Agency perspectives

1.1 Transparency of the agency process & clear guidance

1.1.1 Transparency of enforcement actions

The agencies complement their enforcement actions by providing detailed guidance to consumers, the business community, and the private antitrust bar that counsels it. Robust transparency promotes compliance because it informs antitrust enforcement’s stakeholders of the boundaries between legitimate conduct and conduct that runs afoul of the antitrust laws.

The agencies provide the public with substantial information about all aspects of antitrust (policy, enforcement, history, statutes, agency operations) through their public websites.¹ In our legal system, administrative litigation at the FTC and litigation in federal court by both agencies result in written judicial and agency opinions that form a body of legal precedent that can guide private compliance with the antitrust laws. The agencies similarly make this jurisprudence available through our websites.²

Parties in most of our cases settle matters instead of litigating. Settlements generally do not result in a substantive judicial opinion. Nevertheless, they form an important body of precedent with broad influence in the private antitrust bar, the business community, and consumers at large. In accordance with the Tunney Act,³ when the Division files its complaint and proposed consent decree in federal court, it also files a competitive impact statement and invites comment from interested parties. Before the FTC accepts a consent order, it follows a similar practice, inviting public comment by issuing a draft complaint, a press release, and a notice to aid public comment that explains the actions it is planning to take.⁴ These

¹ See, for example, the FTC Competition Policy Guidance gateway page *available at* <http://www.ftc.gov/bc/guidance.shtm>; relevant documents on the Antitrust Division webpage at <http://www.justice.gov/atr/public/index.html>.

² See <http://www.ftc.gov/bc/caselist/index.shtml>; <http://www.justice.gov/atr/cases/index.html#page=page-1>.

³ Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(f).

⁴ See Rule 2.34 of the FTC Rules of Practice, *available at* <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b7afccdbff50301d4053192eb44c484b&rgn=div6&view=text&node=16:1.0.1.1.3.3&idno=16>.

materials help the public to understand the reasons for our concern and how the remedy will work, and invite the public to express their views about the terms of the settlement. These materials also explain the agency's analysis in the particular area of the law more generally. When a settled case raises novel issues, the Federal Trade Commissioners often issue public statements explaining the bases for their decisions, providing further guidance.

In addition, there are instances in which the FTC or the Division issues a closing statement to explain a decision to abstain from an enforcement action. These statements are important not only to make the agencies' decisions transparent to the public, but also to make them accessible to other agencies that face similar issues, as well as the antitrust community at large.

1.1.2. Transparency in non-enforcement activities

Our educational efforts are not limited to enforcement actions. The agencies also hold workshops and public hearings on important or novel competition issues, and issue Advisory Opinions and Business Review Letters on specific antitrust conduct. Our workshops and hearings solicit input from interested parties as part of the process of formulating public policy, but they also serve an educational role, alerting the business community and consumers that particular issues are of interest to us. The agencies periodically issue formal guidelines, which the agencies have found to assist in these educational efforts. The agencies also conduct competition advocacy, with frequent filings before regulatory and legislative bodies, both federal and sub-federal.

The FTC has an advisory opinion process, which allows private parties to request a review of particular, novel competition questions and obtain the FTC's opinion about any competitive questions that may be raised. Advisory opinions may also be issued by staff and are non-binding on the agency, but nonetheless provide valuable guidance in situations where novel competition issues arise.⁵ Similarly, under the Division's business review procedure, an organization may submit a proposed action to the Division and receive a statement as to whether the Division would likely challenge the action under the antitrust laws.⁶

Finally, the agencies' leaders regularly speak publicly to provide further clarity on their enforcement agenda to the antitrust bar, the business community, and the public; many speeches are available on the agencies' websites.

These educational efforts can have valuable, indirect deterrent effects. One of the ways the agencies generate new civil cases, beyond the premerger reporting laws, is through complaints by customers, suppliers, and competitors. Accordingly, as the agencies increase the general awareness of how antitrust laws apply in the U.S. economy, the business community becomes more educated in the basics of competition law and is aware of the opportunity to bring competition problems to the agencies. The more the business community knows about what the agencies do, the more effective our enforcement program will be, and the greater its deterrent effect.

⁵ FTC advisory opinions are available at <http://www.ftc.gov/ftc/opinions.shtm>, and its advisory opinions on healthcare scenarios are available at <http://www.ftc.gov/bc/healthcare/industryguide/advisory.htm>. The FTC will not render an opinion if doing so would require a factual investigation (or if the conduct is ongoing).

⁶ Copies of the Division's Business Review Letters are available at <http://www.justice.gov/atr/public/busreview/letters.html#page=page-1>. The Business Review process is described in the Division Manual at III-132 – III-136, available at <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf>.

1.2 *Counseling by the private bar*

The agencies devote considerable resources to antitrust enforcement, but our resources are limited and our mandate is broad. The U.S. economy is so large that the agencies cannot review all private economic behavior. Hence, private antitrust counseling and private antitrust lawsuits play an important role in deterring anticompetitive conduct before it occurs. Such preemptive deterrence significantly augments the agencies' antitrust enforcement.

Many large, sophisticated companies and trade associations regularly consult antitrust counsel before engaging in conduct and transactions that may present potential competition issues. Collectively, the antitrust bar likely reviews far more business conduct than the antitrust enforcement agencies ever see. Counselors explain to their clients the risks presented by possible conduct and transactions as accurately as possible. Accordingly, private counseling can often stop problematic conduct before it ever occurs.⁷ Agency transparency increases the value of private counseling by providing the private bar with the information attorneys need to effectively counsel their clients on the risks of problematic conduct.

1.3 *Bringing cases against both big and small violators*

It is both natural and appropriate to focus the agencies' limited resources on enforcement with the greatest public benefit, but the agencies enforce the law against small firms as well as large. To restrict our focus to just the largest companies that impact a substantial volume of commerce is risky, because it may lead smaller players to believe they are *de facto* immune from antitrust enforcement. The agencies therefore also pursue competition issues in small markets and against small firms, for good reason. First, the agencies do not want to establish *de facto* safe harbors for violations of the antitrust laws based on the volume of commerce. Second, in aggregate, small firms make up a substantial percentage of the total U.S. economy, so while an individual small firm may not have a great economic impact, the impact of ignoring all smaller firms would be substantial. Third, small companies can be engines of innovation and, in some markets, innovation competition is at least as important as price competition. Fourth, anticompetitive conduct by smaller firms or in smaller markets can cause serious harm to a substantial number of consumers, and the agencies will not ignore situations where clear and egregious violations result in consumer harm. Fifth, cases involving small firms can also be used to establish key principles of law and enforcement policy. Finally, it is important to the continuing vigor of our economy that all firms play by the same antitrust rules.

1.4 *A history of violations is an important variable*

U.S. antitrust experience shows that some industries have a history of antitrust violations. Many of these industries bear structural characteristics that are conducive to competition concerns, such as frequent, observable transactions and easy methods to detect and punish deviation from an anticompetitive agreement. This suggests that enforcers can profitably focus their efforts on industries where anticompetitive conduct has occurred. Therefore, the U.S. enforcement agencies will continue to monitor sectors that have a history of violations. This is true both for civil investigations where, for example, mergers in a sector with a history of collusive conduct will be examined closely for potential anticompetitive effects, as well as for criminal matters.

This principle is recognized in the criminal context in the U.S. Sentencing Guidelines, where a history of antitrust convictions can result in a higher fine range for companies and individuals and a higher prison

⁷ Such counseling can also ensure better compliance with the mandatory merger notification requirements of the Hart-Scott Rodino Act. 15 U.S.C. §18a.

range for individuals.⁸ Thus, the U.S. Sentencing Commission recognizes the need to punish repeat offenders more harshly and, likewise, the Division recommends harsher penalties for repeat offenders. These increased penalties act as a deterrent. The Division also employs what it calls the “Penalty Plus” program against companies that do not report to the Division additional cartels in which the company engaged. Thus, companies should undertake a thorough internal investigation to determine whether their involvement in cartel activity extends beyond the products or services already under investigation. If a company fails to report its participation in a second antitrust offense and the conduct is later discovered, the Division will seek a sentencing enhancement. The Division will recommend a greater penalty for a company that is aware of the second offense but elects not to report it than one that fails to detect the wrongdoing as a result of an inadequate internal investigation. In assessing the amount of the penalty, the Division will, of course, distinguish between those companies that made every effort to ferret out wrongdoing in their internal investigations and those that simply turn a blind eye. In egregious “penalty plus” cases, the Division’s policy is to urge the sentencing court to consider the company’s and any culpable executive’s failure to report the conduct voluntarily as an aggravating sentencing factor. The Division will request that the court impose a term and conditions of probation for the company pursuant to U.S. Sentencing Guidelines §8D1.1 - §8D1.4, and the Division will pursue a fine or jail sentence at or above the upper end of the Guidelines range.⁹

1.5 Enforcement across various sectors

Although the agencies monitor sectors with a history of violations, that does not mean that the agencies do so to the exclusion of other sectors. The agencies believe that refraining from a narrow focus on particular sectors of the economy advances important policy goals. In particular, the agencies want to create and maintain an expectation throughout the economy that the antitrust laws will be uniformly enforced. Just as no firm should escape antitrust scrutiny because of its size, no firm should think its exposure to the antitrust laws is lessened just because it happens to make something other than cement or vitamins, to take two examples. An explicit, sector-specific enforcement agenda derived from the agencies’ enforcement history could potentially undermine the expectation of universal enforcement. Equally important, it is crucial for competition enforcement to respond dynamically to changes in the economy and the emergence of new markets. At the same time, the agencies, while responsible for competition in the entire economy, will naturally tend to focus their resources on sectors that are most important to consumers (*e.g.*, health care, transportation, high-tech, energy, and telecommunications).

1.6 Criminal penalties for hard-core cartel violations

The Division has long advocated that the most effective deterrent for hard-core cartel activity, such as price fixing, bid rigging, and market allocation agreements, is significant prison sentences. Prison sentences are important in anti-cartel enforcement because companies necessarily commit cartel offenses through individual employees, and because prison is a penalty -- in contrast to fines -- that cannot be reimbursed by the corporate employer. As a corporate executive once told a former Assistant Attorney General: “[A]s long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can

⁸ U.S. Sentencing Guidelines §§ 4A1.1; 5E1.2(d)(6); 8C2.5(c)(1)-(2). The 2010 Guidelines are *available at* http://www.ussc.gov/Guidelines/2010_guidelines/ToC_HTML.cfm.

⁹ Scott D. Hammond, Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program, Speech before the ABA Antitrust Section’s 56th Annual Spring Meeting (March 26, 2008), *available at* http://www.justice.gov/atr/public/speeches/232716.htm#N_13.

do for me.”¹⁰ Executives often offer to pay higher fines in exchange for a reduction in their jail time, but they never offer to spend more time in prison in order to get a discount on their fine.

Prison sentences are also a deterrent to non-U.S. executives who would otherwise extend their cartel activity to the United States. In many cases, the Division has discovered cartelists who were colluding on products sold in other parts of the world and who sold the product in the United States, but who did not extend their cartel activity to U.S. sales. In some of these cases, although the U.S. market was the cartelists’ largest market, the collusion stopped at the border because of the risk of going to prison in the United States.

1.7 International cooperation among antitrust agencies can prevent compliance problems

Cross-border mergers are increasingly subject to simultaneous review by multiple jurisdictions. In practice, this means that cooperation and collaboration among the affected jurisdictions is beneficial to parties, the reviewing enforcement agencies, and consumers. Cooperation and collaboration help address and resolve issues of common concern in a manner that avoids inconsistent or detrimental outcomes.

This kind of review requires agency staffs to address any overlapping concerns in a coordinated manner. Such coordination strives to ensure that, where the competitive concerns are the same in different jurisdictions, respective remedies cover the same assets under the same terms, to avoid subjecting the parties to conflicting obligations. Therefore, for example, after obtaining waivers from the merging parties, the U.S. agencies find it useful to coordinate with sister agencies to ensure complementarity of their respective remedies in appropriate cases.¹¹

2. U.S. private litigation’s contribution to promoting better compliance

In a 2003 paper, FTC Commissioner William Kovacic identified five variables that affect individuals’ and firms’ decisions on whether to comply with antitrust law:¹²

- The substance of the legal command -- the specification of behavior that the law forbids or compels.
- The standards of evidence that adjudicative tribunals will apply to determine whether the plaintiff has proven a violation.
- The likelihood that transgressions of the law will be detected.
- The likelihood that observed transgressions will be prosecuted.
- The severity of sanctions that will be imposed if guilt is established.

¹⁰ Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693, 705 (Oct./Dec. 2001).

¹¹ See, e.g., Ciba-Geigy/Sandoz, materials available at <http://www.ftc.gov/os/caselist/9610055.shtm>, and discussion of this point in John Parisi, ENFORCEMENT COOPERATION AMONG ANTITRUST AUTHORITIES, p. 15, available at <http://www.ftc.gov/oia/speeches/1008enforementantitrust.pdf>.

¹² Then General Counsel, William E. Kovacic, Private Participation in the Enforcement of Public Competition Laws, British Institution of International and Comparative Law, Third Annual conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue (May 15, 2003), available at <http://www.ftc.gov/speeches/other/030514biicl.shtm>.

Three of these variables appear to be enhanced by private antitrust litigation. First, when every aggrieved private party in the market can initiate an antitrust proceeding, the likelihood of observed transgressions being prosecuted grows. Second, a system of private antitrust litigation increases the likelihood of prosecution of antitrust violations, because private parties may fully internalize the benefits of their antitrust enforcement.

Finally, the remedies available for successful U.S. private claimants are very broad. Under Section 4 of the Clayton Act,¹³ claimants injured by violations of the antitrust laws may sue for and recover “threefold the damages...sustained.”¹⁴ Congress adopted this rule to encourage private antitrust litigation.¹⁵ A prevailing private litigant may also be entitled to equitable relief. Trebling is mandatory, as the court lacks discretion to award single damages or a multiple other than three so long as the court finds the defendant's conduct to be culpable. U.S. law also permits the prosecution of private antitrust cases on behalf of classes of injured parties, which can strengthen the position and magnify the negotiation power of the plaintiffs in private suits. Class actions can deter unlawful antitrust behavior, although concerns have arisen that they may create incentives to bring meritless class actions and do not always offer meaningful relief, given the way they have evolved.¹⁶ Overall, private antitrust litigation creates incentives that enhance antitrust compliance in the U.S.

3. Antitrust compliance programs

3.1 General antitrust compliance programs

The agencies do not generally impose specific requirements upon firms directing *how* they must comply with the antitrust laws. When the FTC issues orders to remedy violations, it does not generally impose specific obligations about how to comply with the orders; the firm is expected to determine how to comply on its own. At times, however, the FTC’s orders contain broad instructions about how to comply. For example, in the *Transitions Optical* matter,¹⁷ the consent order requires Transitions to designate an officer to coordinate the design of a program to educate its employees, distribute the order to employees and third parties, train employees, retain certain documents, and maintain a website link to the order. Similarly, in the *Microsoft* case, the Division’s consent decree required Microsoft to appoint a compliance officer to oversee its compliance with the decree, administer its general antitrust compliance program, distribute copies of the decree, and ensure that annual training was provided to all officers and directors on the requirements of the decree and the antitrust laws. The compliance officer was also responsible for setting up a website where complaints could be submitted and for serving as a central clearinghouse for

¹³ 15 U.S.C. §15(a).

¹⁴ *Id.*

¹⁵ See *Reiter v. Sonotone Corp.*, 442 US 340, 344 (1979) (“Congress created the treble-damages remedy of section 4 precisely for the purpose of encouraging private challenges to antitrust violations”).

¹⁶ Class actions can be an efficient mechanism for using judicial resources, providing consumer redress, deterring wrongdoing, and safeguarding the integrity of the marketplace. As consumer class actions have evolved over time, however, concerns have been raised about whether some of these actions and, in particular, some of the settlements reached in these actions truly serve consumers’ interests and deter unlawful behavior by defendants. These concerns focus on, among other things, the disproportionate influence of the class certification decision, insufficient notice to the class, consumer redress that does not really provide anything of value, and excessive attorneys’ fees that may either reduce consumer redress in meritorious cases or provide incentives for prosecution of meritless cases that can harm consumers indirectly. See more in the June 2006 U.S. Submission to the OECD Competition Committee, Working Party No. 3, Roundtable Discussion of Private Remedies, available at <http://www.ftc.gov/bc/international/docs/RdtbleOnPrivateRemediesUnitedStates.pdf>.

¹⁷ See <http://www.ftc.gov/os/caselist/0910062/100427transopticaldo.pdf> (final order at Paragraph III).

complaints submitted by third parties, the Division, the state plaintiffs, and the committee of technical experts established by the decree to assist the Division and states in their enforcement efforts.¹⁸

When the FTC orders specific obligations regarding a compliance program, it nevertheless does not specify the precise details of what that program must contain, for two primary reasons. First, it is the firm's responsibility to comply with the order and to determine how best to do that; the firm is in the best position to know which employees need to be trained, how, and how often. Second, precise description of a program could have the effect of creating a kind of informal "safe harbor" for the firm; that is, if it complies with the specific obligations yet nonetheless violates the order, it might argue that it should be excused because it did precisely what the FTC's order required. Accordingly, the FTC refrains from imposing that level of detail. Nevertheless, as shown in *Transitions Optical*, it may be appropriate in some cases to give some guidance and establish minimum standards for what an order compliance program must contain.¹⁹

The agencies do, however, encourage the establishment of order (and decree) compliance programs by the way they view the culpability of a firm if it violates an order. A true effort to comply, including periodic training and quick intervention if an employee strays, will be viewed as "good faith," and can mitigate the amount of any civil penalty that might be sought for a violation. Conversely, failure to take steps to develop a compliance program will be considered bad faith (or at a minimum a lack of good faith) and will call for a higher penalty for an order violation.²⁰

In addition, the FTC works closely with firms, especially under new orders, to ensure that they begin their compliance efforts "on the right foot." New orders also require firms to submit reports showing their compliance, which allows the FTC staff to alert the firm if a problem appears in their compliance. Finally, the FTC staff will answer questions (and provide an advisory opinion if requested) if a firm is unsure how to proceed. In these various ways, the FTC remains involved in the firm's compliance efforts, subject as noted to the overall observation that it remains the firm's obligation to comply in the first instance.

3.2 *Anti-Cartel Compliance Programs*

The most effective anti-cartel compliance programs are the ones the Division never learns about, because they are the ones that help a company avoid violating the law in the first place. Such programs help the company avoid the consequences that flow from a violation, including federal civil and criminal penalties, private civil litigation and treble damages, state enforcement, enforcement actions in non-U.S. jurisdictions, and other penalties such as suspension and debarment, along with other harms such as loss of good will. The goal should be the creation of a culture of compliance at all levels of operation within the company. If a violation does occur, an effective compliance program increases the chances of early internal detection and thus of being the first company to self-report and qualify for leniency under the Division's leniency program. Even if the company is not the first to approach the Division with information about the cartel, early cooperation can result in plea agreements that recommend reduced penalties under the Sentencing Guidelines.²¹

¹⁸ See <http://www.justice.gov/atr/cases/f245100/245110.htm> (final judgment at Sections IV.C, IV.D).

¹⁹ It should go without saying that a true corporate compliance program, designed to assure compliance, is viewed quite differently from a pretextual compliance program, designed to give the appearance of sincerity without truly being effective.

²⁰ See, e.g., the FTC's recently filed \$1.3 million civil penalty settlement in *FTC v. Toys R Us*, available at <http://www.ftc.gov/os/caselist/9410040/index.shtm>. The third count alleges that Toys "R" Us failed to "adopt any specific program or procedure to assure compliance" with the FTC's original order. Toys "R" Us also allegedly failed to maintain records, as the order required.

²¹ United States Sentencing Commission, Guidelines Manual (2010), supra note 8, § 8C4.1.

The U.S. Sentencing Guidelines contemplate a reduction in a corporate fine for an effective compliance program. As applied by the Division, a reduction will be available so long as there was no involvement of high-level personnel (defined broadly) in the illegal activity, and no delay in reporting the activity. Recent guideline amendments permit a limited exception for the involvement of high-level personnel, in circumstances where four criteria are met, including that (1) the compliance program “detected the offense before discovery outside the organization or before such discovery was reasonably likely;” and (2) “the organization promptly reported the offense to appropriate governmental authorities.”²² A company meeting the latter criteria may also qualify for leniency, making any fine reduction irrelevant. To date, no antitrust defendant has qualified for a sentencing reduction based on its compliance program.²³

²² *Id.* § 8C2.5(f)(3)(C).

²³ Further information on anti-cartel compliance programs can be found in the U.S. Sentencing Guidelines, *supra* note 8, § 8B2.1; Gary Spratling, former Deputy Assistant Attorney General, Antitrust Division, *Corporate Crime in America: Strengthening the “Good Citizen” Corporation, The Experience and Views of the Antitrust Division*, Remarks Presented at a National Symposium Sponsored by the U.S. Sentencing Commission (Sept. 8, 1995), available at <http://www.justice.gov/atr/public/speeches/speech1grs.htm>.

EUROPEAN UNION

1. General introduction

Efforts of undertakings to ensure compliance with EU antitrust rules are laudable. The European Commission (hereafter "the Commission") welcomes such efforts and notes a growing awareness within the business community of the importance to ensure compliance with competition rules.

This note sets out the Commission's approach to compliance and in particular highlights the different instruments which the Commission uses to promote compliance by companies with EU competition rules. It describes the advocacy initiatives and efforts to promote compliance and the enforcement tools which the Commission uses to convince companies to comply with the EU antitrust rules. In addition, it explains the Commission's approach towards corporate competition compliance programmes and its general policy in that respect.

2. Determinants of compliance

High fines on undertakings provide certainly a major incentive for companies to engage in compliance efforts. In addition, companies may have many other reasons for setting up compliance programmes, such as the fear of reputational damage. Companies subject to a negative decision for infringing competition rules may suffer from a general loss of reputation and face hostile reaction of clients and consumers or their own shareholders who feel cheated. Moreover, investigative measures by competition authorities may also turn out to be very time consuming and costly for firms. Inspections on their premises - which firms are obliged to accept - may disrupt day-to day work. Preparation of a defence may occupy considerable resources and cause high expenses for legal advice and representation. Finally, also the increase over the last years in corporate governance requirements and expectations¹ has obliged companies to invest further in compliance.

3. Promoting better compliance

3.1 *Compliance as advocacy tool*

In order to ensure their effective compliance with EU antitrust rules companies must be aware of these rules and of potential conflicts with these rules. They should also know how to avoid conflicts on all levels of the company, from employees to middle and top management. To help companies take that responsibility, the Commission has developed different ways of clarifying the applicable EU antitrust rules (Article 101 and 102 TFEU). Furthermore, the application of these rules has also been made transparent to allow companies to acquaint with their practical application and to be informed of every development in their enforcement. Such guidance on the legal framework and its enforcement should enable companies to better assess ex ante their actions in the market and prevent their involvement in any anti-competitive conduct.

¹ E.g. The UK Corporate Governance Code (2010) also requires the board to conduct an annual review of the effectiveness of the company's risk management and internal control systems.

3.1.1 *Guidance on EU antitrust law*

The Commission has made a lot of efforts to clarify and explain the scope of application and the substance of the EU antitrust rules.

First, the Commission has exempted certain types of agreements from the general prohibition contained in Article 101(1) TFEU on anticompetitive agreements if their restrictive nature can be justified by countervailing benefits/efficiencies. Such guidance as to whether an agreement is deemed exempted or not from Article 101(1) TFEU is provided on a regular basis in particular by way of so-called Block Exemption Regulations. Such regulations exempt a number of restrictions in certain categories of agreements (e.g. R&D, Specialisation or Distribution agreements) up to a particular level of market power, defined in terms of market share, provided that there are no “hardcore” restrictions and that certain conditions are met. In 2010, the Block Exemption Regulation covering distribution agreements has been updated taking into account the development in the last 10 years of the Internet as a force for online sales and for cross-border commerce². In the same year, the Commission has also revised the Block Exemption Regulations applying to specific types of horizontal agreements adding further clarification as to the applicable rules in this area³. Additional assistance is provided in accompanying guidelines of the Commission on both vertical restraints⁴ and horizontal co-operation agreements⁵ which set out its policy and decisional practice on a variety of contentious competition issues such as information exchange and standardisation. As regards abusive behaviour, the Commission has published guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings⁶. These regular reviews of the guidance on the substantive antitrust rules are conducted in close cooperation with business people and other stakeholders through their involvement in public consultations on provisional drafts.

In addition to guidance on the applicable rules, the Commission has since a number of years set out its fining policy in a Commission Notice⁷. These guidelines clarify the financial risk which companies run if they do not comply with EU competition rules. Fines aim at deterring companies from engaging in anticompetitive behaviour. Therefore, they serve as a further incentive to comply with the competition rules.

Moreover, the Commission encourages firms which are involved in certain hardcore infringements of EU competition rules (cartels) to come forward and fully cooperate with it during administrative procedures. An immunity from, or reduction of the fine that may be imposed for breaching the rules, may be obtained if the applicant significantly contributes to the disclosure and punishment of the infringement

² Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L102/1 of 23.4.2010.

³ Commission Regulation 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements, OJ L 335/38 18.12.2010 and Commission Regulation 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements, OJ 335/43 of 18.12.2010.

⁴ Commission Guidelines on vertical restraints, OJ C 130/1 of 19.05.2010.

⁵ Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C11/1 of 14.01.2011.

⁶ Communication from the Commission, OJ C45/7 of 24.2.2009.

⁷ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, published in OJ C 210/2 of 1.9.2006.

by providing information and evidence on the cartel. Under its so-called Leniency Notice⁸, the Commission thus provides firms with incentives to unveil secret horizontal cartels or to hand over evidence which is decisive in proving that such a cartel exists. The conditions to be met by firms in order to qualify for full immunity from fines or for a (substantial) reduction of the fine which would otherwise be imposed on them are explained in the Notice. The Commission has made it especially transparent for companies which information they need to provide and which procedural framework applies. In doing so, companies can better assess whether they would qualify for immunity or a reduction before actually coming forward with the relevant information and evidence on their involvement in an infringement.

Clarity about the Commission's policy and practice is further provided through constant dialogue with all stakeholders including business representatives. The Commissioner for Competition, the Director General and other high level officials of the Commission regularly participate in conferences. In their speeches they highlight the most important developments and priorities of the Commission and provide further guidance for companies on its enforcement actions and policy reflections. The overall aim is that companies are aware of the EU competition rules and policy and to encourage them to comply with it. The Commissioner for Competition has, for example, recently on two occasions clarified his approach with regard to compliance and explained the Commission's support to efforts from companies to achieve full compliance⁹. This is a further illustration of the ongoing dialogue with the business community and the commitment of the Commission to promote a culture of compliance.

The Commission also publishes an annual report on competition policy¹⁰ and a number of informative brochures explaining EU competition policy from different angles. The annual report provides a yearly comprehensive overview of recent developments in antitrust rules and policy and the enforcement actions of the Commission. This is complemented by a number of brochures which target different audiences and allow them to become familiar with EU competition policy from different angles. The existing brochures on EU competition policy in general, the framework for distribution agreements and the benefits of competition for consumers are currently being updated to continuously reflect the actual status of the law.

3.1.2 *Application of antitrust law to individual cases*

The Commission is conscious of the fact that it does not suffice for companies to consider the law in isolation but that their behaviour in the market should be considered against a specific factual background. To guide them in defining the appropriate actions in conformity with EU competition rules, the Commission makes all its antitrust decisions publicly available on its website. These decisions are normally accompanied by a press release to bring them to the attention of a much wider audience than the limited number of companies directly involved. In addition, the Commission publishes the formal opening and closing of proceedings on its website or by issuing a press release¹¹.

⁸ Commission Notice on Immunity from fines and reduction of fines in cartel cases, published in OJ C 298/17 of 18.12.2006.

⁹ Speech of Commissioner Joaquín Almunia on "Compliance and Competition Policy" at the Competition conference organised by both Business Europe and the US Chamber of Commerce in Brussel on 25 October 2010, and his speech on "Cartels: the priority in competition enforcement" at the 15th International Conference on Competition: A Spotlight on Cartel Prosecution in Berlin on 14 April 2011. These and other speeches are available at <http://ec.europa.eu/competition/speeches/>.

¹⁰ http://ec.europa.eu/competition/publications/annual_report/index.html

¹¹ The same applies in cases where proceedings have not been formally opened but DG Competition has already made public the fact that it was investigating the case (e.g. by having publicly confirmed certain inspections). See DG Competition's Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU.

A similar communication strategy has been put in practice by the General Court and the Court of Justice of the European Union. Their judgments reviewing decisions of the Commission in the area of antitrust are made public in all languages of the EU on the Courts' website and the particularly important judgments are accompanied by a press release¹².

3.2 *Effective enforcement to ensure compliance*

The Commission ensures the effective application of the EU antitrust rules. It investigates suspected infringements and addresses binding decisions to firms in order to bring established infringements to an end. It also has the power to impose fines on companies which have been found to infringe EU competition law. The Commission is increasingly supported in its enforcement activity by national competition Authorities which are equally empowered to apply EU competition rules.

Like most competition authorities over the world, the Commission has essentially two strings of activity: (1) finding an infringement and punishing past behaviour (Article 7 prohibition), and (2) obtaining a change in the future behaviour of a company (Article 7) decisions with a cease and desist order imposing structural or behavioural remedies, or Article 9 commitment decisions). Both instruments pursue the same objective, namely the efficient application of competition law, but they achieve this objective by different means.

The main difference between a prohibition decision pursuant to Article 7 and a commitment decision pursuant to Article 9 of Regulation 1/2003 is that the former contains a finding of an infringement while the latter makes the commitments binding without concluding on whether there was or is still an infringement. A commitment decision concludes that there are no longer grounds for action by the Commission. Moreover, commitments are offered by undertakings on a voluntary basis. By contrast, in prohibition proceedings, the Commission imposes remedies and or fines on undertakings.

Over the last years the Commission has adopted numerous prohibition decisions finding an infringement of Articles 101 and 102 TFEU¹³. The Commission has also used the commitments tool regularly to make companies comply with EU antitrust rules¹⁴.

3.3 *Fines*

For the violation of EU antitrust rules, the Commission can impose fines on undertakings of up to 10% of the company's turnover. Fines or periodic penalty payments can also be imposed on companies for their failure to comply with procedural obligations. These powers are an important enforcement tool for the Commission in order to stop undertakings from infringing competition rules and to ensure adequate deterrence from illegal behaviour.

Fines represent the principal tool in the European Commission's enforcement of EC competition law. The European Court of Justice (hereinafter, the "ECJ") indicated in *Musique Diffusion France (Pioneer)*¹⁵,

¹² <http://curia.europa.eu>.

¹³ See e.g. Commission Decision of 8.12.2010, LCD; Commission Decision of 9.11.2010, Airfreight, Commission Decision of 20.7.2010, Animal feed Phosphates, Commission Decision of 11.11.2009, Heat Stabilisers, Commission Decision of 7.10.2009, Power transformers, Commission Decision of 28.1.2009 Marine Hoses, Commission Decision of 12.11.2008, Car glass, Commission Decision of 13.5.2009, Intel.

¹⁴ See e.g. Commission Decision of 8.12.2010, MIF; Commission Decision of 14.4.2010, Svenska Kraftnät, Commission Decision of 17.3.2010, EDF; Commission Decision of 9.12.2009, DRAMS, Commission Decision of 16.12.2009, Microsoft, Commission Decision of 26.11.2008 EON, Commission Decision of 11.10.2007, Distrigas.

that the underlying rationale for the imposition of fines is to ensure the implementation of Community competition policy. Fines therefore serve two objectives (i) the suppression of illegal activity and (ii) the prevention of recidivism.

The Commission has imposed considerable fines in recent years, particularly in cartel cases, both overall and on individual undertakings. It should be noted that high fines may be imposed even where the illegal purpose of an infringement was not actually achieved. Members of a cartel, for example, which are found to have fixed prices, will face high fines irrespective of whether or not the price levels did rise as intended. The risk of engaging into anti-competitive behaviour is thus considerable for companies.

3.3.1 Parental liability

The correct and opportune attribution of liability for antitrust infringements is part of the Commission's enforcement policy. It is the Commission's long standing practice to hold jointly and severally liable for an infringement of EU competition law both the entities that took directly part in the infringement and those who instructed them to do so ("*decisive influence on the subsidiary at the time of the infringement*"), to the extent that this is possible. This means that both - the subsidiary and the parent company - are held liable for the whole amount of the fine and the payment by any of the two liberates the other from its debt. This choice is deemed to ensure better the payment of fines and to enhance their deterrent effect, since the maximum level of fines can be calculated on the basis of the highest turnover. It also reduced the risk of addressing the enforcement measures to holdings without turnover or the risk of not being able to collect the payment from a legal entity without any establishment within the EEA/EU. The choice to hold one entity liable or another or even a whole group has a bearing for the calculation of fines, for the rights of defence and other procedural rights. The adequate choice of the entity liable for the infringement is essential to deter companies from committing infringements and a factor of credibility of the enforcement of EU antitrust rules.

3.3.2 Recidivism

The Commission considers recidivism as a very serious aggravating circumstance¹⁶ which may give rise to a significant increase of the amount of the fine imposed on an undertaking¹⁷. The first time that the Commission applied a 100% increase was in the calcium carbide case¹⁸ where at the time of the infringement a company was found guilty of involvement in four previous cartels.

It is irrelevant whether the new infringement is committed in a different business sector or in respect of a different product. It is sufficient that the same undertaking has already been found by the Commission or by a competition authority of an EU Member State responsible for similar infringements.

The Commission considers this to be an important deterrent tool since such recidivist undertakings were not effectively discouraged from infringing competition law by the fines already imposed upon them, and they thereby show a propensity to infringe competition law.

¹⁵ Joined Cases 100-103/80, SA Musique Diffusion v. Commission, 7.6.1983, ECR 1983, 1825.

¹⁶ See Pt. 28 of the Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ C 210, 1.9.2006.

¹⁷ See Commission decisions in cases Heat Stabilisers, Power Transformers, Calcium Carbide, Car Class, Candle Waxes, etc.

¹⁸ Commission Decision of 22.7.2009, Calcium Carbide, OJ C 301, 11.12.2009, p.18.

3.4 *Leniency*

Along with the other detection and investigation tools at the Commission's disposal, the leniency policy has proven very successful in fighting cartels by destabilizing their operation as it seeds distrust and suspicion among cartel members. It also has a very deterrent effect on cartel formation. In order to obtain total immunity under the Leniency Notice¹⁹, a company which participated in a cartel must be the first one to inform the Commission of an undetected cartel by providing sufficient information to allow the Commission to open an "on the spot" investigation or to enable it to find an infringement of Art.101 TFEU. If the Commission is already in possession of enough information to launch an inspection or has already undertaken one, the company must provide evidence that enables the Commission to prove the cartel infringement. In all cases, the company must also fully cooperate with the Commission throughout its procedure, provide it with all evidence in its possession and put an end to the infringement immediately. The cooperation with the Commission implies that the existence and the content of the application cannot be disclosed to any other company. The company may not benefit from immunity if it took steps to coerce other undertakings to participate in the cartel. Lastly, it is important to mention that while the Commission does not provide for further reduction in penalties for disclosing cartels in two different markets, it applies a sliding scale to the reduction of fines even for contributing evidence of significant added value, even if the company does not satisfy the criteria for full immunity under the leniency scheme.

4. **Corporate competition compliance programmes and the Commission's policy in this respect**

The prime responsibility to comply with the law, as in any other field, lies with those subject to the law. EU competition rules applying to undertakings are a fact of daily business life to be reckoned with, because failing to know the law will not avoid the consequences of breaking it.

While it is clear that companies are under an obligation to comply with the rules, they are largely free to decide how to go about it. This is only natural, given that the size of companies, their resources for seeking advice, their field of activity and their exposure to the risk of becoming involved in infringements of EU competition rules vary considerably. Awareness of the rules, however, is a precondition for effective adherence to them in any case.

Certainly the major reason to comply with the law is the potentially high costs of non-compliance. But compliance can also - and indeed should - be approached positively. An active and supportive strategy of compliance with the law can certainly serve to distinguish a firm for promotional and recruitment purposes, very much like an explicit environmental or family-friendly agenda would do. It can help to raise job satisfaction of staff and contribute to a constructive sense of belonging, even pride, within a firm. Staff which is aware of what constitutes illegal behaviour will also be more alert to infringements which competitors or other commercial partners commit and can help more actively to bring such market failures to the attention of the competition authorities in order to have the level playing field re-established.

Any effort of a company to ensure compliance with EU competition rules is important. What is however key is the fact that the rules are actually complied with. When it comes to taking practical steps to ensure compliance, firms should keep in mind that their efforts will be assessed by competition authorities on the basis of results, or in other words, by their success in avoiding infringements.

It has been the Commission's long standing policy to welcome compliance efforts by undertakings. However, the Commission does not reward corporate compliance programmes when setting the fine.

¹⁹ Commission Notice on Immunity from fines and reduction of fines in cartel cases, published in OJ C 298/17 of 18.12.2006.

Although in the early eighties and nineties in certain cases relating to vertical restraints or abuse of a dominant position compliance efforts led to a reduction in the sanction²⁰, or, conversely, were used as aggravating circumstance²¹, the Commission has in the past 15 years (all cases related to cartels) taken the stance, as endorsed by the case law of the European Courts²², that it is a duty of companies to respect the law and compliance programmes have not been taken into account (neither as attenuating nor as aggravating circumstance) when setting the fine²³. This policy has been explained towards the business community repeatedly²⁴.

5. Conclusions

The Commission would like to encourage a "culture of compliance" in the business community that minimises the need for sanctions. It is recommended that companies throughout the EU engage in serious efforts to ensure compliance with competition rules. Good and effective compliance programmes are welcomed.

The Commission has been trying to support compliance efforts in different ways:

- Dissemination of comprehensive information on EU competition rules;
- A constant dialogue with business people and other stakeholders to refine guidelines, notes, and other information material.
- Encouragement of compliance and training programs.

The Commission will assist the business in their efforts and will consider additional forms of support especially for smaller business which cannot afford large legal departments and expensive competition lawyers. The Commission therefore welcomes the debate on these issues.

²⁰ Commission Decision of 7.12.1982, National Panasonic, JO L 354, p.28; decision of 14.12.1984, John Deere, JO L 35, p.58; decision of 16.12.1985, Sperry New Holland, JO L 376, p.21; decision of 18.12.1987, Fischer-Price/Quaker Oats Ltd – Toyco, JO L 49, p.19; decision of 22.12.1987, Eurofix-Bauco/Hilti, JO L 65, P.19; decision of 18.7.1988, British Sugar, JO L 284, p.41; decision of 5.6.1991, Viho/Toshiba, JO L 287, p.39, decision of 15.7.1992, Viho/Parker Pen, JO L 233, P.27.

²¹ Decision of 14.10.1998, British Sugar plc, JO L 76, p.1.

²² See judgment of the General Court, Case T-65/99, Strintzis Lines SA v Commission [2003] ECR 2003 II-5433, at paragraph 201; judgment of the General Court, Case T-224/00, Archer Daniels Midland v Commission, [2003] ECR II-2597, paragraphs 280 and following. See also Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 Tokai Carbon Co. Ltd and Others v Commission, [2004] ECR-II-1181, paragraph 343.

²³ See e.g. Commission decision of 18.7.2001, Graphite electrodes, OJ L 100/2002, p.1; decision of 21.11.2001, Vitamines, OJ L 6/2003, p.1; decision of 5.12.2001, Citric Acid, OJ L 239/2002, p.18; decision of 11.12.2001, Zinc phosphates, OJ L 153/2003, p.1; decision of 2.7.2002, of 2.7.2002, Methionine, OJ L 255/2003, p.1; decision of 20.11.2007, Professional videotapes, OJ C 57, p.10 (summary) and of 7.10.2009, Power Transformers, OJ C 296, p.21 (summary).

²⁴ See Speeches of Vice-president Almunia in the context of the joint competition conference Business Europe/US Chamber of Commerce in October 2010 and more recently at the 15th International Conference on Competition in Berlin, see above, FN 9.

BULGARIA

Introduction

The general objective of the public enforcement of competition rules by the competition authorities is to achieve compliance with these rules, thus leading to the ultimate aim of the competition law and policy-effective competition for the benefit of consumers. Unlike the private actions for damages, aimed at recovering individual company losses suffered as a result of other undertaking(s) unlawful behavior, the rationale behind the enforcement actions of the competition authorities as public bodies is to protect the general interest of the society through guaranteeing sound and fair competition, not the interest of a particular competitor.

In its work pursuing this general objective, the competition authorities employ a variety of tools in order to ensure the observance of competition law provisions, ranging from financial sanctions for the infringers (as well as criminal prosecution in some jurisdictions) to competition advocacy and public awareness activities, aimed at the business community as a whole or at specific economic sectors.

The experience of Bulgarian Commission on Protection of Competition shows that the reasons behind the anti-competitive behavior of undertaking(s) or associations of undertakings might be quite different. Infringements of competition rules take place not only when undertaking(s) deliberately take actions contrary to the provisions of competition law (e.g. in cases of margin squeeze or predatory pricing), but also in cases where there is a lack of competition culture and understanding of the substance of the competitive process as such. In a number of cases the CPC has observed that SMEs and associations of undertakings often consider and claim that the main problem in their respective sector is the “unfair competition” by those companies which do not observe the commonly agreed prices or other business conditions. In Bulgaria such anti-competitive practice as fixing of prices, for example, occurs often within branch associations for sectors, where SMEs prevail (e.g. bread producers, milk producers, construction companies), or for some regulated sectors like insurance sector, as well as within some liberal professions associations (architects, construction engineers).

1. Fines and recidivism

Bulgarian legal system envisages administrative liability for the undertakings for infringements of the provisions of the competition law and there is no criminal liability for persons committing such infringements.

Bulgarian Law on Protection of Competition (LPC) empowers the Commission on Protection of Competition (CPC) to impose sanctions (pecuniary sanctions, periodic sanctions and/or fines) for infringements of the provisions of the law. Pecuniary sanctions are imposed for infringements of the provisions of the LPC on restrictive agreements, decisions or concerted practices, on abuse of dominant position, on concentrations, as well as for infringements of art. 101 and art. 102 TFEU.

The law stipulates that the CPC should adopt a Methodology on determining the amount of the sanctions imposed under the LPC. The Methodology sets the main objectives of the sanctions, namely:

- The pecuniary sanctions and the fines under the LPC aim at punishing the infringer, at deterring him from repeated infringement (special prevention) and at preventing other undertakings, association of undertakings or natural persons from infringing the law (general prevention);
- The periodic sanctions and periodic fines are imposed in order to force the infringer to stop the infringement;
- In order to achieve the necessary deterrent effect, the exact amount of the pecuniary sanctions, the fines and the periodic sanctions under the LPC should be above the possible unlawful gains, that might have been acquired as a result of the infringement;
- In line with the principle of proportionality, the exact amount of the sanctions and fines should not exceed the necessary for effectively punishing the infringer and for achieving the targeted deterrent effect (prevention).

The CPC determines the amount of the sanction on the basis of the net incomes from the sales of the relevant products (goods, services or production) which are directly or indirectly affected or might be affected by the infringement. The amount of the sanction cannot however exceed 10% of the aggregate turnover of the undertaking concerned for the last financial year.

This method for determining the sanctions was introduced with the adoption of the current Law on Protection of Competition (into force as of 2 December 2008). Under the repealed Law on Protection of Competition the amount of the sanctions were set in absolute values, not exceeding 300 000 BGN (~ 150 000 Euro) and 500 000 BGN (250 000 Euro) for repeated infringement. The main reason for this change was the fact that the sanctions as set in absolute values were quite low thus they did not have the expected deterrent effect.

Having sanctions as main instrument for enforcing compliance with competition rules, the LPC also provides incentives for undertakings to submit leniency application to the CPC and to provide information on existing cartel agreements, thus allowing them to get reduction of the amount of the sanction. In addition to these provisions in the law, Bulgarian Commission on Protection of Competition has also adopted detailed Leniency program.

Furthermore, to the administrative sanctions and fines envisaged in the Law on Protection of Competition for the undertakings, which had infringed the provisions of the law, could be added potential civil lawsuits for damages. Art. 104 of the LPC provides explicitly that all natural persons and legal entities who had suffered damages even where the infringement had not been directed against them have the right to claim damages under the Civil Procedure Code. The decision of the Supreme Administrative Court which has entered into force, and which upholds a decision of the Commission finding an infringement of the LPC, shall be binding upon the civil court as regards the fact whether the decision of the Commission is valid and compliant with the law. A decision of the Commission, which has not been appealed against or the appeal against it has been withdrawn, shall have binding force upon the civil court as well. All news briefs on CPC infringement decisions, published on the Commission's web-site, inform of the possibility to claim damages in a civil lawsuit.

Finally, when the CPC has addressed Statement of Objections to alleged infringers, the undertakings concerned may decide to propose commitments. The Commission on Protection of Competition is empowered under the LPC to decide whether to accept, modify or reject such commitments. For the purposes of ensuring better transparency of its work the Commission has adopted and published detailed Rules on this matter. The Rules state that the CPC may approve commitments when they would bring fast and effective end of the infringement, when they are of the nature to create conditions for restoring the

effective competition on the relevant market and they are considered by the Commission to have more deterrent effect on the undertakings concerned. It should be noted however that the CPC has the full operational power to decide on how to bring an infringement to the end – with infringement decision or with commitment decision. Some particularly grave infringements of the LPC like cartel agreements, black listed vertical agreements, structural or exploitative abuses, etc. are excluded from the possibility for the CPC to accept commitments from the undertakings concerned.

When assessing the direct effect of the amount of the sanctions on the behavior of the infringers, the CPC experience under the repealed Law on Protection of Competition (which set maximum, relatively low amounts of sanctions, even for repeated infringements) shows that the sanctions have to be comparable to the gravity of the respective anti-competitive behavior, otherwise these sanctions do not have the envisaged deterrent effect. An example in this respect was the behavior of the former incumbent Bulgarian telecommunications operator some years ago. Bulgarian Commission on Protection of Competition had adopted a number of infringement decisions in the period 2002-2008 for different forms of abuse of dominant positions and had imposed sanctions on the undertakings ranging from 75 000 BGN (~38 000 Euro) to 300 000 BGN (~150 000 Euro). The undertaking paid the sanctions imposed after the CPC decisions entered into force being upheld by the Supreme Administrative Court. It should be noted however that following the introduction of the new sanctioning model under the now acting Law on Protection of Competition there are no cases with established infringement of the LPC by this undertaking.

2. Guidelines and other information materials

The sanctions imposed are not the only tool used by Bulgarian Commission on Protection of Competition. As already pointed out, the lack of knowledge among undertakings, particularly the SMEs, on competition rules and CPC powers and enforcement practice is one of the reasons leading to infringements of the provisions of the Law on Protection of Competition. Due to this Bulgarian Commission on Protection of Competition has the power under the LPC to adopt guidelines, methodologies and other materials, aimed at helping the undertakings to better understand competition rules and comply with them. An example of such information material is the guidelines on fighting bid-rigging, adopted and published by the CPC in 2010. Even though it mainly targets the central and local bodies in their capacity as public procurement contracting authorities or control bodies, the guidelines could serve the undertakings. Many of these undertakings are often unaware that some of their actions in the process of public procurement procedures could be considered to be bid-rigging, thus falling within the scope of the application of the Law on Protection of Competition.

At the moment the CPC is in the process of drafting guidelines on information exchange between competitors.

3. Raising competition culture and public awareness activities

Another area of work of Bulgarian Commission on Protection of Competition, aimed at promoting compliance with competition rules, is linked to various activities like public events and relations with media. These activities include organization of and/or participation in seminars, workshops, conferences, etc. as well as active and open approach toward media and media coverage of CPC work.

As regards public events, in the last several years the CPC was co-organizer (together with business associations or legal companies) and main participant in several seminars, which covered topics like prohibited agreements, decisions and concerted practices; cartels and CPC leniency program; block exemption regime, etc. The Commission considers such events to be very useful, as they present unique opportunity for the CPC management and experts to explain directly to the business community its enforcement practice and priorities, some specific issues of competition law. These fora are aim at

prevention of anti-competitive behavior through raising the competition culture and attracting public interest.

Further to these activities, Bulgarian Commission on Protection of Competition pays big attention to presenting to the general public and to the media on everyday basis its enforcement practice. News briefs on the most interesting CPC decisions are published regularly on the Commission's web-site and sent to the media. The purpose of this policy is to spread knowledge on Commission's enforcement practice as widely as possible thus strengthening the preventive effect of the CPC infringement decisions.

4. Corporate competition compliance programs

Bulgarian legislation, in particular the Law on Protection of Competition and the CPC Methodology on setting sanctions, does not provide for that the existence of corporate compliance programs is taken into account when determining the amount of the sanction for infringements of competition law. Such programs however could be additional and useful tool at company level in raising the competition culture and disseminating more thorough knowledge of the competition rules among companies' employees.

In conclusion, when pursuing the objective of compliance with competition rules the competition authorities may use variety of complementing instruments and tools depending on the specific features of the national economy, the legal framework and competition culture.

INDONESIA*

Introduction

Compliance with competition law constitutes the basic requirement for achieving the main objectives of competition law enforcement in a country. Compliance is expected to decrease potential violations - thus eventually creating a fair business climate - which is beneficial for consumers, or in other words it can enhance public welfare. Business actors' compliance with competition law can be actualized by appropriate sanctions, particularly sanctions in the form of penalty or confinement. Compliance is also evident from the number of cases or the number of leniency applications. However, it needs to be admitted that these various efforts may not have been optimal in creating compliance effect among business actors. The purpose of this article is to review the existing conditions in Indonesia, along with various endeavors which may be applied with the aim of improving business actors' compliance, given the limited authority of the competition agency.

1. Competition law enforcement conditions in Indonesia

The enforcement of Law No.5/1999 by the Commission for the Supervision of Business Competition (KPPU) during the last 11 (eleven) years has become one of the spearheads for improving efficiency in the economy through the instrument of business competition. As the actual facts in several industrial sectors indicate, this has been a highly effective instrument in promoting efficiency in various industrial sectors. Price/rate reduction in several industrial sectors is closely related to the presence of competition in those sectors. If such conditions occur in all Indonesia economic sectors, it is not unrealistic to expect that a much improved over-all level of economic efficiency can be realized in the near future.

The enforcement of competition law in Indonesia has been undergoing rapid development in recent years. This has been evident from the high intensity of reports as well as cases handled by KPPU. In 2010, KPPU received a total of 385 reports comprising 194 official reports and 191 other instances of written information being provided. In total, during the period of 2000-2010, KPPU handled 249 competition cases which can be classified into 2 (two) groups, namely tender- and non tender- related cases. During the said period, the majority of reports received by KPPU were cases related to tender conspiracy (81%). The rest of the cases were non tender-related reports. Out of 249 cases, KPPU reached infringement decisions in 198 cases. In addition, there were 51 stipulations (or outcomes in which the KPPU did not make an infringement decision), comprising 41 stipulations finding no indication of violation of Law No. 5 Year 1999, as well as 10 stipulations issued due to changes that took place in conduct.

In addition to receiving reports from the community, KPPU also conducts examinations based on its own initiative as a result of supervision and research on competition issues. Last year, KPPU examined 4 (four) cases based on KPPU's initiative.

* This report is prepared by the Foreign Cooperation Division with valuable input from internal sources to contribute for series of the OECD Competition Committee Meeting in June 2011. Further information or clarification on stipulated issues may be obtained from Mr. Deswin Nur (Head of Foreign Cooperation Division) through his e-mail addresses, deswin@kppu.go.id or from our international team at international@kppu.go.id.

Thus far, KPPU has been focusing its attention on addressing sectors which are important for the livelihood of the people at large, or various sectors which are particularly prone to violation of Law No. 5 Year 1999. Those sectors include, among other things, energy, services, telecommunication, transportation and retail.

2. What is the level of competition law & policy compliance in Indonesia?

Indications of the level of compliance can be obtained from the extent to which competition policy is adopted in each economic policy of the government, as well as the number of decisions being implemented (without any objection), the percentage of penalties paid, or the awareness indicators obtained through specific surveys.

In 2010, KPPU issued 13 (thirteen) recommendations and considerations to other government agencies in relation to several strategic sectors. Out of these thirteen recommendations, the government has given positive response to four recommendations and considerations. This indicates that the rate of effectiveness of KPPU products reached 30.7% in 2010. Such figure may be relatively low compared to practices in developed countries, however, in developing countries with a relatively newly introduced competition policy, such figure is quite positive and it actually exceeded the target of KPPU's strategic plans set at 25% for that year.

With regard to the law enforcement aspect, out of 198 decisions issued by KPPU, 160 decisions stipulated that the parties involved were in violation. Of the aforementioned 160 decisions, 78 decisions (48.75%) were appealed against in the District Court. This indicates that business actors filed objections against almost half of KPPU's decisions. This may be considered as an indication of a low level of compliance by business actors in implementing KPPU decisions (by setting aside the aspect of substantiation in the decisions).

Furthermore, with regard to penalty payment, during the last 10 (ten) years, penalties and compensation imposed by KPPU reached a total of USD 220 million. Out of the aforementioned amount, penalties which had obtained permanent legal force (affirmed) reached a total of USD 21.5 million. Out of the said amount, USD 1.24 million was paid by business actors and was deposited at the State Treasury Office. Based on the aforementioned penalty amounts, it can be concluded that only 5.7% of penalties which had obtained permanent legal force were actually paid by business actors.

With regard to awareness, in 2009 KPPU conducted a study of business awareness to assess the extent of business actors' knowledge of competition law nationally. Based on the above mentioned study, 83% of all the samples of business actors (300 samples) stated that they are aware of the existence and the substance of competition law. This figure is quite encouraging and it can serve as a supporting factor in enhancing compliance with competition law.

With reference to the aforementioned factors, it would appear that the current level of public awareness of competition law enforcement in Indonesia is still limited to knowing about the existence of the law, and it is still quite far from compliance with the existing provisions. This certainly creates rather difficult challenges for KPPU, because it indirectly affects the commission's image at the national and international levels.

3. What are the possible causes of non-compliance?

There are several potential factors causing the relatively low level of compliance with competition law in Indonesia, particularly the relatively low sanctions imposed and the lack of the competition agency's investigative powers.

To date, the sanctions imposed by the commission are limited to administrative measures as provided for in article 47 of Law No. 5/1999. Such sanctions include the cancellation of agreements, ordering the termination of the illegal activity, cancellation of a merger or acquisition, orders to pay compensation and penalties ranging between USD 111,764 – USD 2.94 million (1 USD = IDR 8,500).

The amount of penalty is often insignificant if it is correlated with the assets and profits of the reported parties. This has certainly not been able to create a deterrent effect to large-scale business actors in Indonesia due to the relatively low sanctions imposed by KPPU. For instance, in the case involving Carrefour Indonesia, KPPU decided that the party concerned had violated monopoly rules and abused dominant position. In the said case, the maximum amount of penalty was imposed of IDR 25 billion or USD 2.94 million. This amount was certainly disproportionately small considering Carrefour's penetration into the expansive Indonesian market with a market share of 57.99%¹. Each year, the profits generated by Carrefour indicated a relatively rapid progress, so that in 2008, profits reached IDR 1.4 trillion (USD 167.3 million)². The sanction imposed was certainly far smaller than the profits, only approximately 1.8% of the company's profits in 2008. Carrefour Indonesia did not only violate the law once, rather they had been proven to have violated the law in other competition cases too.

Furthermore, in a case involving a State-owned Enterprise in the oil and gas sector, PT. Pertamina, it was decided that the company had committed an illegal discrimination practice. In this case, Pertamina was subject to a penalty sanction amounting to IDR 1 billion (USD 111,764), which was notabene only 0.45% of its annual profits in the relevant year (IDR 22.4 trillion)³. As in the case of Carrefour, Pertamina has also been involved in several other legal proceedings with KPPU.

Criminal sanctions can also be imposed in competition cases; however, criminal sanctions can only be imposed by a Court of law in cases of objection to KPPU decisions. The primary criminal sanctions as set forth in article 48 of Law No. 5/1999 include pecuniary criminal sanctions ranging from IDR 1 billion (USD 111,764) to IDR 100 billion (USD 11.7 million) or criminal sanction of imprisonment ranging from 3 (three) months to 6 (six) months. In addition to that, the court can also impose additional criminal sanctions, such as ordering the termination of the illegal activity, prohibition from holding management positions and revocation of business permits. The problem is that, until now, such criminal sanctions have not been imposed by District Courts in competition cases.

Such a relatively low level of sanctions in competition cases has been one of the factors hampering compliance, along with the lack of the commission's investigate powers. Pursuant to the law, KPPU has the authority to investigate, examine and impose sanctions for competition violations. However, in investigation, KPPU investigators have not been given the authority to conduct search, interception, arrest or seizure. Documents and information used as evidence are obtained only in the field investigation process (monitoring), as well as documents and information provided by reported parties/witnesses/experts during examinations.

A combination of the aforementioned two facts has been undeniably the main factor causing the low level of compliance in Indonesia. Other factors, such as the absence of leniency program, have also indirectly reduced the level of compliance in Indonesia since business actors do not have any incentive to report competition law violations.

¹ The data is based on the copy of Commission for the Supervision of Business Competition's Decision No. 09/KPPU/L/2009.

² Equal to the above.

³ <http://berita.kapanlagi.com/ekonomi/nasional/2006-laba-pertamina-diperkirakan-naik-dua-kali-lipat-h1croy2.html>

4. Compliance improvement methods applied by KPPU

Realizing the low level of compliance in Indonesia, KPPU has been continuously making endeavors in order to ensure effectiveness in the enforcement of competition law in Indonesia. The commission has applied several methods to improve compliance, including advocacy (both to the public as well as to the government), amendments of regulations, and cooperation with other law enforcement apparatuses.

As an effort to improve compliance by the public, particularly business actors, KPPU has been intensively conducting advocacy among stakeholders. Such advocacy is intended to enhance the public's understanding of competition law. Advocacy has become a preventive measure undertaken by KPPU enabling people to take an active part in competition policy compliance and enforcement.

Throughout the year 2010, there were 51 (fifty-one) public advocacy activities conducted by KPPU in the form of dissemination of information to journalists, the media, public and government institutions, universities and business associations, both at the central and the regional levels. Such public advocacy activities were conducted by involving business actors, the media and the government. Their involvement (particularly of the media and business actors) has been extremely important in improving compliance since they are able to create positive public opinion. Business actors should, and have been, frequently involved in every advocacy activity, as they are the stakeholders having the greatest level of interest in it. A strong relationship with the media can also be one of the determining factors in improving compliance, since they have the capacity to build public opinion by way of media communication. Therefore, the commission has been making continuous efforts towards building a good relationship with the media, for instance by regularly organizing forums with journalists and joint events with journalists.

In addition to active advocacy among stakeholders, KPPU has also involved in cooperation with law enforcement agencies, such as the National Police of the Republic of Indonesia. Such cooperation has been established with the aim of enhancing the investigation functions performed by KPPU in various cases. The institutional conditions of KPPU's Secretariat, which is not yet a part of the Civil Service, have created a barrier in the performance of the formal investigation function, as the formal investigation functions must be undertaken by state apparatuses, namely by police officers or civil servant investigators. By establishing cooperation with the police, KPPU can obtain support from an agency that part of the state apparatus in enforcing competition law and policies in Indonesia.

The cooperation between KPPU and the National Police of the Republic of Indonesia had been established a long time ago; however it was not officially realized until October 8, 2010. This cooperation is expected to result in a synergy among the elements of both institutions enabling them to handle monopoly and unfair competition cases. In the context of such cooperation, both KPPU and the Police can exchange information related to alleged criminal acts and unfair business competition.

In addition to the cooperation with the National Police of the Republic of Indonesia, KPPU has also engaged in an unofficial cooperation with the Supreme Court. In the context of such cooperation, KPPU has been organizing regular and intensive education and training programs - related to competition law and policies for District Court Judges and Supreme Court Justices. It is expected that through such training, the courts will attain the necessary knowledge and skills required for addressing cases related to unfair business competition.

KPPU has also made changes in law enforcement rules with the aim of improving effectiveness in the handling of cases and due process of law, as well as improving business compliance. This was provided for in the changes of the case handling procedures under Commission Regulation No. 1/2010 concerning the new proceeding procedures before the commission. Based to such rules, improvements have been made in the aspect of transparency in the handling of cases and the quality of substantiation. At the present time,

a new case can only be examined if there are at least two means of evidence (statements and documents), unlike the previous rules, which allowed the use of a single source of evidence in the examination of a case. In addition to that, at the present time anyone (the public) may be present in the hearing room to follow the course of panel examination, provided of course that they comply with the existing examination code of ethics.

In the context of supervision (monitoring), KPPU has also introduced the granting of awards to monitored business actors that comply with the terms stipulated by the commission and the provisions of the law for 3 (three) consecutive years. The granting of awards is expected to serve as an incentive to business actors to comply with the provisions of the law. The idea is when it is announced that a business actor is to be monitored on certain suspected violation, then the business shall provide regular report (every six months) and any data or information requested by the Commission in conducting such monitoring activity. After three consecutive years of active monitoring, if they are proved not to violate competition law, then an award will be provided. The award may take in form of a Commission Decree. The mechanism for the granting of awards is currently still subject to careful formulation by the commission, in order to ensure that it will not become a disincentive in the enforcement of the law in the future. It will be implemented when the necessary implementing regulation is in place.

Another method applied by the commission has been the strengthening of the fundamental aspects of competition law, namely disseminating knowledge about competition law to educational institutions (through universities). KPPU considers academicians as potential targets for instilling the values of competition in Indonesia as academic circles are very dynamic and open to information. Therefore, KPPU has been cooperating with academic circles throughout Indonesia for improving the understanding of competition law and policies, particularly by way of official cooperation. In particular KPPU has also prepared text books regarding competition law. The books written by KPPU along with leading professors of economy and law are expected to become primary reference materials in classes at all universities (nationally).

5. Compliance improvement methods applied by other government institutions

To date, compliance improvement methods applied by KPPU have been relatively effective since they have operated in two-ways, both in a punitive way and in a preventive way. Another institution which is similar to the KPPU, the Corruption Eradication Commission (KPK), has also applied the same methods in eradicating corruption. During the early days of its establishment, KPK tended to apply a punitive methods in taking action against people involved in corruption. However, in recent years, KPK has been more focused on the use of persuasive methods in which they are more focused on nurturing public awareness of the risks of corruption and on way of addressing the same. By applying this method, it is expected that it can improve public awareness of corruption.

One of the KPK's preventive actions has been establishing cooperation with the Supreme Court and the Constitutional Court in eradicating corruption, referred to as the Judiciary Exaltation Program. This has been one of the KPK's efforts in eradicating practices of corruption in judicial institutions. In addition to the above, KPK has also been making efforts for reforming the bureaucracy and businesses potentially having the element of corruption. However, it cannot be denied that the effectiveness of corruption eradication efforts in Indonesia have also been supported by KPK's authority to conduct inquiries and enforcement action.

The same kind of authority has also been exercised by the Directorate of Taxes of the Ministry of Finance in taking action against disobedient taxpayers. Since last year, they have been trying to reform and restore public trust through linkage with the national mass media and advocacy regarding awareness in paying taxes. This method has proven to be effective because it has enabled people to understand gradually

the importance of punctuality in paying taxes. In addition to that, the government has also made amendments in the internal procedures for imposing taxes in order to ensure greater transparency. With regard to regulations, they have also introduced the sunset policy in order to grant lenience to taxpayers who have not paid their taxes before the due date, thus enabling them to pay their taxes without being subject to penalties for delays in payments.

The Directorate General of Taxes has also been making efforts to promote compliance of individual and corporate taxpayers through the mechanism of law enforcement. Law enforcement measures have also been taken through collection, examination and follow-up inquiries. In fact, in very extreme conditions, they have also cooperated with other law enforcement apparatuses in order to search and seize the assets of delinquent taxpayers.

Based on the several above described practices, it is undeniable that investigation authority is an important factor in improving compliance in Indonesia, in addition to effective preventive measures.

6. Other ways to improve compliance

Business actors are KPPU's main stakeholders because its main mission is to ensure fair treatment in conducting business activities in Indonesia. The KPPU's direction and objectives are the inverse of the main aims of business actors. Business actors have a natural tendency to seek to dominate the market and retain their dominance in various ways. However, KPPU has the role to control business actors' conduct in order to ensure that it is in accordance with applicable legal principles. KPPU is making endeavors to create a comfortable business climate for business actors and fair treatment to all circles.

As for companies listed on the stock exchange, most of their attention is focused on fluctuating share value as well as the building of image presented to the public. The performance on the market of a company's shares is an important key to a company's success. The value of shares is often parallel to the progress achieved by the company. The rapid growth of the company is accompanied by an increase in the value of its shares, in line with its development.

At the same time, the image of the company is closely related to the existing public image building. External factors such as this affecting a company are highly significant as a means of public control of the company. Therefore, many companies conduct Corporate Social Responsibility (CSR) to strengthen their image before the public. In addition to actualization, image building also serves as a stabilizing media in competition with competitors, as competitors are likely to make efforts, either directly or indirectly, to bring a company down and take its market share.

In several cases, the decisions made by KPPU can affect the image and image building of a company. An example of this has been the commission's decision regarding the trading term of Carrefour Indonesia, in which several regions have put a negative stigma on the company for violating Law No. 5/1999. This occurred when Carrefour was refused the opportunity to expand its business in Palembang (one of the provincial capital cities in Indonesia) after KPPU's decision⁴ had been issued, even though it was due to the misinterpretation of KPPU's decision by the regional government. This condition at least implies that the legal product issued by KPPU has obtained legitimacy and has served as a reference for stakeholders in their conduct. This proves that KPPU's decisions can effectively change a firm's conduct and that there has been adequate awareness in the community of competition law and policies.

A similar situation was also experienced by PT. Telkomsel when KPPU imposed a sanction in the case of cross ownership and monopoly practice by Temasek business group (a Singaporean entity). At that time, KPPU considered that Temasek group of companies had tried to gain control over Telkomsel and Indosat (other similar business actors) leading to less competitive cellular market in Indonesia. The cross

ownership structure of the Temasek group caused a condition of price-leadership in the telecommunication industry in Indonesia.

The stock exchange immediately gave a negative response. For 3 (three) days, the price of Telkomsel's shares decreased due to KPPU's decision. Although the decrease of the share price did not persist over a long period of time, it has given legitimacy to KPPU in view of its decision.

Specific research has also been conducted regarding the effect of KPPU's decisions on share prices. Noor (2009), by applying the abnormal return approach, found that the share prices of several companies had been affected by KPPU's decisions during event window period (in different periods). Specifically, by calculating average standardized abnormal return of all companies observed, it was proven that KPPU's decisions significantly affected the companies' share value on the (-) 3rd day before the decision and on the D day or the day on which KPPU's decisions were made. However, it was observed that such changes were still incidental, as the companies' share price experienced a rebound on the first day following the issuance of the decisions.

The aforementioned facts prove that legal products issued by KPPU have significantly affected competition law and policies. On the other hand, such condition indicates a relatively strong awareness of competition law and policies among business actors and the Indonesian people in general. The evidence presented above also indicates that the influence of the media in creating public opinion through reports on the commission's decisions has been rather significant. The image of a company (particularly a large-scale or foreign company) is likely to be highly affected if it is found guilty by the competition agency. As a result, they will be very careful when they are involved in the handling of competition cases by KPPU. This can be certainly used to improve compliance in the implementation of competition law in Indonesia.

7. What are the lessons learned?

Compliance with competition law means acceptance by KPPU's stakeholders of the rules set forth in Law No. 5 Year 1999, in a manner that they are able and prepared to adapt to various provisions therein. Compliance as a foundation for self-assessment can be achieved once the key elements have been applied effectively.

Compliance in Indonesia today is still very closely related to fear of the potential consequences when dealing with a competition case. Such fear is generally identical to the risks being faced. The high level of risk will also be highly dependent on the competition agency's authority of investigation and enforcement. Admittedly, other elements, such as advocacy and other similar elements, have a rather significant influence on compliance, on the other hand, namely the strengthening of fundamental aspects which are a useful investment for compliance in the future. These two factors have a very crucial role, indeed. Their scale of priority will be highly dependent on the economic conditions in the country concerned. In Indonesia's case, it is undeniable that endeavors for improving law enforcement authority are still a priority.

8. Conclusion

The enforcement of competition law in Indonesia has created a special dynamic in the industry and trade sectors. The enforcement of competition law in Indonesia has brought positive developments in investment and the national economy. Such a harmonious relationship between competition policies and investment has provided strong support for KPPU in enhancing the enforcement of competition law with the aim of improving the welfare of the Indonesian people.

Compliance can be indicated by the extent to which competition policies have been adopted in each economic policy of the government, the number of decisions implemented (without any objection), the

percentage of penalties paid, or based on indicators of awareness obtained through specific surveys. Given the aforementioned facts based on experience, it can be concluded that there has been a rather sufficient development of awareness in Indonesia, however the level of compliance is still low. This is closely related to the relatively low level of sanctions imposed in competition cases, and the lack of the competition agency's investigative powers.

The Commission has been addressing such low level of compliance in various ways, particularly through advocacy (either to the public or to the government), amendments of regulations, and the establishment of cooperation with other law enforcement apparatuses. The lessons learned from other similar institutions also indicate that in addition to preventive measures which are effective, investigative powers are a very important factor in improving compliance in Indonesia.

Another method which can be applied is the development of public opinion through the media (by way of good media relations) which can potentially affect companies' image and value as reflected in their share prices on the stock exchange.

The combination of the aforementioned various methods (the level of sanctions, authority, advocacy and development of public opinion) may become the best combination for improving compliance with the implementation of competition law and policies in Indonesia, as well as in other countries in the World.

ROMANIA

Introduction

International experience has shown that undertakings will only comply with compulsory rules if non-compliance results or may result in negative consequences for them. In this sense, the threat of sanctions appears crucial for encouraging competition law compliance. However, competition policy is much more than a sanction policy. Under particular circumstances, imposing appropriate remedies in cases where companies have distorted or are about to distort competition complement the sanctions since they allow the competition authority to move faster, to be more efficient and to involve companies in ways of safeguarding or restoring competition.

In cartel and antitrust proceedings, the following sanctions and remedies are available under Romanian competition law, after the amendments brought through the Emergency Government Ordinance no. 75/2010. First of all, the Romanian Competition Council (hereinafter referred as RCC) may order the relevant undertakings to cease the respective conduct. It may also impose heavy monetary fines and periodic penalty payments in cases where it is necessary to guarantee competition and to deter violations. In addition, in emergency cases, the RCC may also impose interim measures when it finds following a first evaluation, the existence of a deed of an anticompetitive nature expressly prohibited by the law that needs to be eliminated without any delay. Also, any anticompetitive contract or agreement is by law considered null and void. Alongside sanctions, RCC, following EC's model, has developed alternative procedures namely settlements, commitments and leniency.

In addition to these sanctions and remedies, the natural or legal persons affected by anticompetitive conduct may also seek private judicial relief in court asking for damages within 2 years from the date when the RCC's decision becomes final and irrevocable.

Therefore, imposing fines is a means not an end of RCC's antitrust policy. Its ultimate objective is to foster a culture of compliance that minimizes the need for sanctions in the first place. To explain these assertions, the paper will explore which features of the Romanian competition policy regime endeavor to foster a culture of compliance with competition law in Romania.

There are three main ways in which the RCC antitrust regime seeks to promote compliance with competition law: deterrence, positive rewards such as leniency measures and increased transparency and legal certainty for the sake of businesses.

Therefore, in the rest of the paper we shall touch upon each of these tools explaining how they have contributed over the years to increased compliance.

1. Deterrence

The agreements between undertakings aimed at price fixing, production or sales quotas, sharing markets or clients, bids rigging, generally known as "cartels" are sanctioned regardless the market share or the turnover of the undertakings involved with fines up to 10% of the total turnover and by confiscating the supplementary incomes obtained by the undertakings from infringing the law.

Fines are only imposed by RCC on business undertakings or an association of business undertakings. It is not possible for RCC to impose sanctions on natural persons, since RCC's proceedings are administrative in nature.

However, in case a company manager is found to be involved with fraudulent intent and in a decisive way to the conceiving, organization or the performance of a cartel, RCC can notify the prosecutors in regard with the potential criminal offences discovered during an investigation. RCC has already started to make use of this power and this happened recently, after the conclusion of a cartel investigation on the bread market.

Therefore, an executive officer of a company could be personally punished too, but under the terms provided by the Criminal Code. More specifically, he could be fined or convicted to jail from 6 months to 4 years and would be disqualified by a court decision from his managerial duties in case he made use of his position to commit the offence.

Fines are designed not only to punish the company concerned, but to deter as well. As per the 2010 refined Guidelines of RCC for calculating the fines in case of substantial offences of the Law, setting of a fine departs from establishing a basic amount (determined according to the gravity and duration of the infringement, criteria referred to in the Law on the basis of the firm total turnover). Then, the basic amount may be adjusted upwards for aggravating circumstances (for example, leading role in a cartel or repeated infringement) or downwards for attenuating circumstances (for example, the mere cooperation in administrative proceedings which implies that the incumbent provides information and support the Competition Council's investigation outside the leniency programme and beyond his legal obligations, the passive role in a cartel setup or termination of the infringement as soon as the RCC intervenes).

In case of offences for the violation of the provisions of Articles 5 and 6 of the national law and their equivalents, i.e. Articles 101 and 102 of the TFEU, cooperation in the form of acknowledgement of the anticompetitive deed (a form of settlements) was as well introduced in the primary law and detailed in the new Guidelines for calculating the fines. At the moment of the individualization of fines, acknowledgment of the anticompetitive deed is considered as a mitigating circumstance with a special regime, in the sense that the fine may be reduced between 10% - 25% from the basic level and only in respect to that company. Therefore, the reduction achieved under this mechanism is more than that obtained following a simple mitigating circumstance, but less than the reduction achieved under the leniency policy. This type of reward offered to offenders could occur only when the company becomes interested to do this, which means after the communication of the investigation report which triggers also the company's right of access to file or during hearing and only in respect to that company. RCC expects that this mechanism would decrease the interest of perpetrators to challenge the Competition Council's decision, after acknowledging the deed and obtaining a considerable reduction of the fine;

Also, the new Guidelines provides now not only for a maximum level of fine, respectively 10% of the total turnover of the offender in the financial year prior to the sanctioning decision, or the financial year before that, should figures not be available, but also a minimum level of fine of 0.5%.

According to the criteria of assessing the gravity of the infringements, infringements are put into one of three categories: minor infringements, serious infringements and very serious infringements and cartels are included in the category of very serious infringements of Competition Law.

In order to ensure the dissuasive effects of the fines, the Guidelines provides as well for the possibility to increase the penalty in order to exceed the amount of illicit gains obtained as a result of the infringement, when it is objectively possible to estimate that amount.

Moreover, the ability to pay of the perpetrator may be taken into consideration in exceptional and justified circumstances after calculating the basic amount of the fine and revising it in accordance with aggravating and mitigating circumstances applicable to the infringement.

Therefore, the success or failure of a fine depends on the ratio between the amount of fine, the size of the incumbent, the gravity and duration of the infringement. It depends as well, to a large extent, on the timing, i.e. the sooner the sanction is imposed, the more efficient its application is.

1.1 Increase in the level of fines

In 2010, the RCC focused its activity on a more deterrent sanctioning policy, prosecuting cartels and other restrictive business practices, the total volume of fines applied amounting up to EUR 31.4 million. Comparing with the total amount of fines applied by the Competition Council in the previous year, that is an increase of approx. 15 times.

As a proof, in 2010, the RCC imposed the largest fine has ever given, in terms of the percentage level of the fine in the turnover in the case of the cartel concluded within the Body of Experts and Licensed Accountants of Romania. More exactly, the Body of Experts and Licensed Accountants of Romania was fined in the amount of 4,056,264 Lei (about 950,000 Euro), which is over 9% of CECCAR revenues in 2009. This is as well the largest penalty imposed on associations by RCC. It is due to the gravity of the offence, its high duration (9 years - the longer duration of facts found by the Competition Council) and the retaining of the aggravating circumstances i.e. continued infringement after the start of the investigation and ignoring warnings about the anti-competitive nature of the Regulation setting the fees in the profession. In addition, the RCC imposed CECCAR to cease the anti-competitive practice and to abolish the impugned Regulation within three months of official notification of the decision. Based on internal estimates of the RCC, after eliminating the anticompetitive practices, accounting services consumers will benefit from annual cost savings of between 70 and 200 million Lei. These savings are the estimated aggregate cost which accounting services consuming firms will no longer pay above market prices.

The first ranked highest fine applied to an undertaking in terms of absolute was about 34.8 million Euro and it was levied to Orange, in 2011 for abusing its dominant position on the market of mobile call termination services in its own telephony network followed by Vodafone who was fined with 28.3 million Euro for abusing its dominant on the market of mobile call termination services in its own telephony network.

The third ranked highest fine in terms of absolute value that is 103,373,320 Lei (about 24.06 million Euro) was applied by RCC in 2010, to the Romanian Poste National Company for abusing its dominant position consisting of preferential treatment and discriminatory tariff reductions. The fine applied to the Romanian Poste National Company represents as well the second ranked highest fine in terms of the percentage level of the fine in the turnover (7.2% of total turnover achieved by the offender in 2009).

Apart from the fines imposed in this case, the RCC ordered as well a series of corrective measures to ensure the restoration of a normal competitive environment. Thus, RCC ordered that the anticompetitive practices committed by the Romanian Poste National Company must be ceased. Moreover, the Romanian Poste National Company was required to satisfy certain obligations of non-discrimination and transparency. Also, a series of recommendations were formulated to the Romanian Poste National Company concerning the implementation of internal compliance programs that would bring to the attention of its decision-making staff the national and Community legislation in the field of competition and the consequences of their breach. Recommendations were made also to the regulatory authority, the National Authority for Management and Regulation in Communication, on taking measures to comply with the rules of competition in postal services.

Apart from the high level of fines, deterrence depends as well on the likelihood that the illegal behaviour is discovered and punished. In this respect, RCC considers that the higher overall amount of fines levied by RCC in 2010 can partly be attributed to the fact that more hard-core cartels were discovered than in previous years.

Statistics on cartel enforcement in Romania from 1999 to present

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Number of cases	5	3	2	4	2	1	3	1	0	3	2	6

Yet, industries where cartels have been discovered are: cement, telecommunications, insurance, real estate, meal tickets, mineral water, tobacco, pharmaceuticals, bread market and related markets, liberal professions (dental technicians, accountants), road and sea transportation sector (taxis, shipping companies), automotive sector, services sector, private pensions sector and last but not the least, public procurement sector.

However, what RCC learnt from international experience is that in construction and construction materials sector, important input for manufacturing, hard core cartel activity may be as well frequent. That is why in 2010, RCC opened a sector inquiry in the field of construction of road and motorways. Another important project under way envisages the development of a system of competition indicators to track market performance or criteria to identify the markets which are more prone to anticompetitive behaviour or which exhibit higher entry barriers.

1.2 *Designing procedures for encouraging private enforcement*

In RCC's opinion, private antitrust enforcement, like public enforcement, contributes as well to the goals of deterrence and compliance with competition law.

According to the legal system in Romania, the public action, conducted by the RCC, and the private action, conducted by the private entities do not exclude each other. On the contrary, the decision issued by the competition authority can be used in front of a civil court as a legal base in a damages action.

The 2010 amendments brought to competition law provide now for the possibility of RCC to participate in private litigation as *amicus curiae*. This development will contribute in the future to the development of the economic expertise of courts both to establish the violation and to assess the damages to particular plaintiffs.

Moreover, as plaintiffs in private actions for damages frequently will have insufficient evidence to support their claims, rules that facilitate the access of Courts to evidence in the RCC's possession information have been introduced in the law in order to create premises for the development and well-functioning of private enforcement system. However, while receiving access to the case file, the Courts are obliged to ensure the protection of trade secrets and of other information deemed confidential.

2. Leniency programme

Apart from the deterrent effects of fines, RCC has built other tools in its competition enforcement system to promote compliance. Leniency policy is one of these tools.

The leniency programme has a clear underlying economic logic: it increases the probability of detection and punishment by placing the cartel members in a prisoners' dilemma.

In the theoretical literature several useful insights for designing optimal leniency programmes can be found. This literature also shows that positive rewards may deter collusion in a more effective way than reduced fines. However, Motta and Polo demonstrate that it can be efficient to reduce fines even when an antitrust investigation is already under way, but the competition authority has not yet obtained evidence of an infringement¹. Therefore, reduced fines are a second best instrument in cases where the budget of the competition authority is not sufficiently high to intervene often enough to fully deter collusion. The RCC Guidelines on leniency is in line with this theoretical insight, since RCC's leniency programme admits cartel members to join the leniency programme even after an investigation has started, when the incentive to cheat is stronger and the cartel more unstable.

It deserves to point out that, in September 2009, RCC replaced its original 2004 leniency program, which has not produced any result, with a new amended version in line with the ECN Leniency Model. The amendments offer clearer guidance for businesses, setting out new elements such as the marker system for immunity applicants that will allow a unitary approach with EU Member States for leniency applications. Given the current economic situation, through the amendments brought to the leniency programme in 2009, RCC expanded the scope of its leniency policy to hard-core vertical agreements such as resale price maintenance and absolute territorial protection. Thereinafter, RCC set up a leniency unit within the authority in order to ensure a proper interface between RCC and businesses.

RCC reinforced leniency policy also by other means, i.e. by protecting more efficiently the companies participating in leniency programs from damage claims. This amendment makes the leniency applicant accountable only for the damage caused by its own conduct and not for the damage created by other participants in the cartel. This rule is to be found also at the Community level with regard to the actions for damages for violation of Article 101 and 102 TFEU.

Being aware that more applications for leniency would help companies comply with antitrust rules because they raise the risk of being exposed by the other members of the cartel, since 2009, RCC started to actively advertise its refined leniency policy in the media.

As a result of this work, RCC sanctioned in 2010 for the first time in its activity a cartel through the leniency policy. More exactly, two companies which have collaborated with the competition authority have benefited from full-fine immunity, respectively from a 50% fine reduction.

Therefore, RCC rewards cooperation in discovering the cartel by means of leniency, rewards cooperation during the proceedings before RCC, may reward companies that have had a limited participation in the cartel or that provided information and support to the Competition Council's investigation outside the leniency programme and beyond their legal obligations, but there is no room for reward in case the offenders would claim that they operate compliance programmes. In RCC's opinion, the key reward of an effective competition law compliance programme operated by an undertaking should be the avoidance of an infringement decision in the first place, not the breaching of the competition law.

3. Increased transparency and legal certainty

Ensuring greater predictability of RCC's decisions for the benefit of companies is another key aim of RCC. RCC put into place various strategies in facilitating voluntary compliance with the Competition Law, including guidelines setting out workable standards, guidance letters to businesses on the interpretation of the Competition Law as well as a series of advocacy measures;

¹ M. Motta and M. Polo, "Leniency Programs and Cartel Prosecution", *International Journal of Industrial Organisation*, vol. 21, 2001, pp. 347-379.

3.1 *Guidelines setting out workable standards and guidance letters*

Guidelines setting out workable standards have an important role to play both in developing policy and providing certainty. In the context of a series of important amendments brought to the primary legislation in competition field in 2010, RCC issued immediately after a series of general guidelines on various issues relating to competition law, for example, on market definition, interim measures, commitments acceptable in merger cases and commitments acceptable in case of anticompetitive practices.

Notwithstanding, RCC retains for itself the necessary room for discretion to react to changes in business practice when drafting guidelines, while pursuing the goal of providing legal certainty to business.

Guidance letters has played as well a very important role in RCC's activity within the last year mainly due to the elimination of individual exemptions and fillings in the case of franchise, technology transfer, cooperation and distribution agreements, where block exemptions do not apply that requires nowadays companies to conduct more extensive self-assessment in line with the EC's best practice.

3.2 *Advocacy*

Advocacy in terms of speeches, official statements available on RCC's website, publications or workshops organized by the RCC play also a role in clarifying the way in which the RCC interprets and applies the antitrust rules, even if provides much less legal certainty to business. Advocacy is actually a valuable complement to guidelines and formal decisions.

Being aware that a severe sanction applied to a firm for participation in a cartel or for abusing its dominant position is a warning for any firm in a similar position that any anticompetitive conduct could be severely punished, the Competition Council advocates its sanctioning policy, making use of a large range of communication tools such as press releases and decisions' publication on its website both in Romanian and English languages.

Moreover, the RCC effectively uses the media, both print and electronic, to publicise important investigations and decisions. The aim of the media campaign is two-fold: one is to inform the public on the on-going work of the RCC in ensuring a competitive economic environment; and the second to inform businesses of prohibited practices. Over the last two years, the President of the RCC has given dozens of interviews to daily newspapers and magazines. Equally important was the increase in the number of reports on the activities of the RCC, broadcast on the main news programs.

Overall, the RCC's increased media exposure is having the effect of educating firms about the types of cases RCC is pursuing and the fines that those who contravene the competition law may be liable to pay. Information activities include as well press conferences and information provided to mass media.

As a result of these advocacy efforts, in 2010, the activity of the competition authority was reflected in 3342 postings in the written press, radio-TV and news websites, recording an increase of about 80% compared to 2009. Most of these postings (about 80%) were recorded at the central level. As concerns the press releases issued by RCC, their number recorded in 2010 an increase with around 9% above the number of press releases in 2009.

Due to the enhancement of the actions focusing on promoting the institution activities, the number of information requests submitted based on the law on the access to public information has decreased by 56% compared to 2009. At the same time, the number of petitions i.e. letters by which legal or natural persons bring to the attention of the Competition Council various issues which do not fall within the Council's jurisdiction forwarded to competent authorities in order to be solved has decreased by 19%.

Various consultations, seminars or lectures have been also an important source of information for business environment and an effective tool for raising its awareness on the importance of complying with competition rules in the course of driving the Romanian economy towards competitiveness and performance. During the last two years, RCC officials have been very often involved in policy debates by giving speeches in a series of seminars focusing on the protection of competition in various sectors sensitive for the Romanian economy such as agro-food sector and pharmaceuticals. A truly important event took place in October 2010 in Bucharest on the occasion of the release to public debate of RCC's Annual Report entitled *Competition issues in sensitive sectors for the Romanian economy*. Out of the sectors analysed within the report, two subjects of interest in the context of the economic crisis were chosen to be discussed within the event: *Competition and effective regulating measures within key sectors of the Romanian economy* and *Incentive measures for a competitive environment along the agricultural food products chain*. The conference works resulted in a constructive dialogue between all decision makers and social partners as well as in identifying optimal solutions in order to improve the legislative framework and to increase the competition degree within very important sectors so as to ensure the welfare of the final consumer.

Other publications include a quarterly activity bulletin, RCC's Competition Policy Magazine, RCC's annual reports, "*Competition - studies and researches*" bulletin of the RCC territorial offices etc.

4. Conclusions

There are several clear messages that arise from RCC's experience. As shown throughout the paper, the amendments brought to the competition law in 2010 gave RCC a larger scope of tools for ensuring compliance with competition law, enabling now RCC to fine-tuning each case at issue by contemplating the possibility of negotiating commitments or settlements or whether high sanctions or remedies will be more appropriate.

Due to the development of the market economy in Romania and RCC's increased presence on the market, more and more big companies started to develop compliance programs with competition law. However, this development does not mean that compliance programmes should be trusted.

Taking due consideration to the fact that over the last years, companies started to conduct their business in secret and that the leniency programme can be effective only if the financial risk incurred by the cartel members is high and if the cartel members fear that the probability of their cartel being investigated or revealed by one of its members is high, Romanian Competition Council intends to maintain its deterrent sanctioning policy so to give an important incentive for cartel members to seek leniency and it will continue to advocate the Leniency programme and its benefits. Further, by doing this, companies will understand that breaching of the competition is not profitable.

Also, RCC will continue to use various other means to assist companies to comply, including education through guidance on novel or unresolved questions of competition law, workshops, seminars, the media and other publications. In this way, it will ensure

Even if all these tools have proved to be successful in overall, there are still challenges before there is a full culture of compliance in Romania.

RUSSIAN FEDERATION

The competition authority may contribute to more effective compliance with the competition legislation by means of different tools.

Competition advocacy is the main mechanism for prevention of violations of the competition legislation. Competition advocacy means that the competition authority explains the purposes and objectives of the competition policy, requirements to the public authorities, economic entities and its activities set forth in the competition legislation, as well as informs about prohibitions and consequences of violations of the competition legislation.

The FAS Russia performs competition advocacy in different ways:

1. Interaction with the judges:
 - holding regular seminars and meetings with judges of arbitration courts and courts of general jurisdiction to discuss the most complex and controversial issues arising during competition legislation enforcement in Russia.
2. Interaction with public authorities:
 - providing support for legislative initiatives of the FAS Russia;
 - ensuring compliance of legislative initiatives of other federal public authorities with the competition principles;
 - increasing officials awareness on the necessity to comply with the competition legislation.
3. Interaction with academic, public and business community:
 - ensuring close cooperation with the Non-Commercial Partnership “Assistance to Competition Development”;
 - maintaining 20 Expert Councils under the FAS Russia activity;
 - holding different seminars and conferences;
 - maintaining interaction with the Russian universities;
 - holding meetings with foreign business on the margins of the Embassies.
4. Ensuring openness and transparency of the FAS Russia’s activity:
 - maintaining Community Liaison Office of the FAS Russia;
 - providing information and comments by the Press Service of the FAS Russia;
 - placing outdoor social advertising and radio advertising;
 - publishing specialized books and booklets;

- submitting and placing the reports on the FAS Russia activity on the official FAS Russia web-site (www.fas.gov.ru) (Reports on the State of Competition, Annual Reports on competition policy for the OECD, contributions to the OECD, ICN, UNCTAD and Global Competition Review).

5. International cooperation:

- participating in the activity of major international organizations, such as the OECD, ICN (the FAS Russia is a member of the ICN Steering Group and chairman of the ICN Advocacy Working Group), UNCTAD, EBRD, IMF and etc.
- annual publishing information on considerable authority's achievements in such reputable editions as Global Competition Review, Euromoney, etc.;
- promoting competition principles within the frameworks of BRICS integration;
- interacting with the European Commission aimed at harmonization of competition principles, as well as holding of joint investigations of violations of the competition legislation;
- participating in the development of integration process on the CIS countries territory, including the development of cooperation between the CIS countries competition authorities within the frameworks of the Interstate Council on Antimonopoly Policy as well as in forming legal framework aimed at ensuring competitive environment in the frameworks of Customs Union between Belarus, Kazakhstan and Russia;
- providing technical assistance to Mongolia, Kazakhstan, Kyrgyzstan and Moldova competition authorities.

The FAS Russia clarifies the provisions of the competition legislation and other legal acts on protection of competition, particularly through:

- clarification of legislation for indefinite number of persons placed on the FAS Russia official web-site in the Internet;
- responses to the public appeals received from physical and legal persons.

The FAS Russia believes that such activities contribute to legitimate companies behavior in the Russian market.

1. Risks of non-compliance with the competition legislation.

According to the statistics of the FAS Russia for 2010, the majority of violations of the competition legislation such as *abuse of dominant position* were performed in the following areas:

- electricity and heat power (more than 38% of all cases of abuse of dominant position);
- sphere of natural monopolies (more than 29%);
- housing and utilities (approximately 10%);
- gas (more than 5%);
- communications (2,5%).

The majority of violations such as *competition restrictive agreements and concerted actions* of economic entities were revealed in the following areas:

- trade, catering, domestic services (27% of all identified agreements and concerted practices);
- construction sector (approximately 12%);
- housing and utilities (more than 9%);
- oil and oil products (approximately 5%);
- agriculture and forestry (more than 5%).

The FAS Russia considers that random increase in fines is not justified, however the fines for violations of the competition legislation should depend on the amount of revenues received by a violator. Moreover, the size of a fine should not lead to the bankruptcy of the company.

The most effective ways to ensure the compliance with the competition legislation applied by the FAS Russia are the following:

- imposition of administrative sanctions, including imposition of turnover fines;
- issue of instructions to transfer the income received as a result of violation of the competition legislation to the federal budget.

If a company has the special Program on compliance with the competition legislation, it does not mean that the FAS Russia will take it into account when calculating the amount of fine (reduction of fine) to be imposed on the company if the company violates the competition legislation.

Besides competition advocacy, in 2011 the FAS Russia developed the so-called "third antimonopoly package of amendments" aimed at improving the antimonopoly regulation and competition development in the Russian Federation and increase of the efficiency of its enforcement.

Particularly, in accordance with these amendments, the FAS Russia will have a right to make warnings to the managers of economic entities who publicly announce their planned conduct on the market if such conduct can lead to violation of antimonopoly legislation.

The mechanism of administrative appeals against actions of public and local governmental bodies' officials will be introduced if such actions prevent carrying out of business activity.

The Government of the Russian Federation will have a right to establish the rules of non-discriminatory access to the infrastructure of natural monopolies, as well as to the products that are technologically connected to them.

The post merger notification will be eliminated, however the antimonopoly authority will have a right to impose behavioural or structural remedies on the merging companies if the authority reveals that the transaction made by those companies restricts competition on a particular market; in case if these remedies are not fulfilled, the antimonopoly authority will have the right to bring a case to the Court in order to cancel the transaction, etc.

The adoption of these amendments would enable the FAS Russia to promote more effective compliance with the competition legislation.

All abovementioned measures and actions of the FAS Russia within the frameworks of competition advocacy and improvement of the competition legislation are targeted at the promotion of compliance with the competition legislation.

SOUTH AFRICA

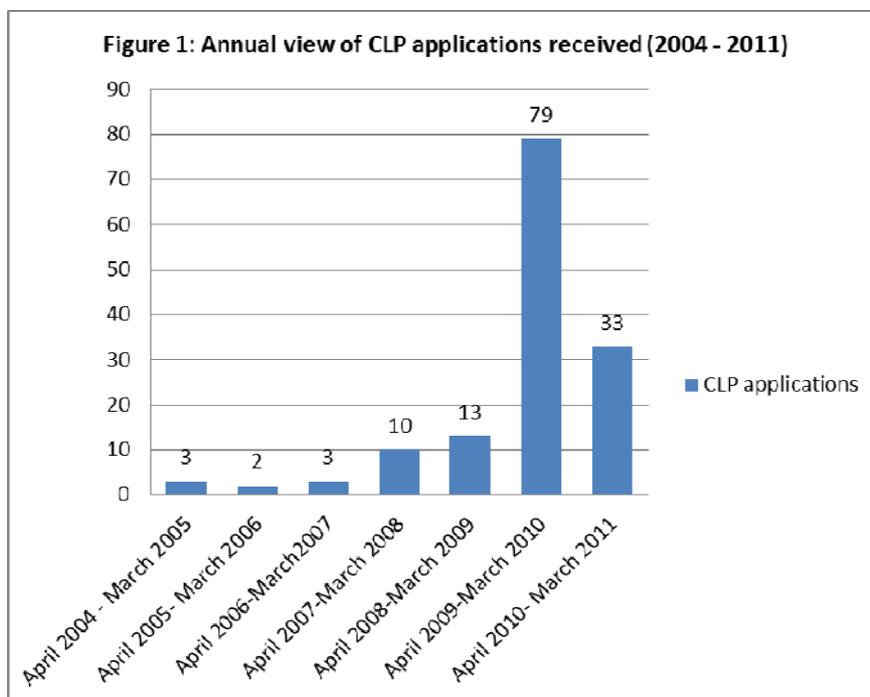
1. Introduction

The attention given to the work of the competition authorities by the media in South Africa has been a major contributor in creating awareness within the business community. This is particularly significant when penalties are levied. Exposing anti-competitive behaviours through the Commission's investigations have elicited public outrage resulting in embarrassment and reputational harm which corporates generally want to avoid.

Voluntary compliance with the competition law is an important indicator of the success of a competition policy regime. Policy makers are keen for feedback on the extent to which business behaviour is changing as a consequence of competition law. Measuring compliance is difficult to achieve in practice but a number of factors suggest that compliance is on the increase in South Africa.

2. Corporate leniency

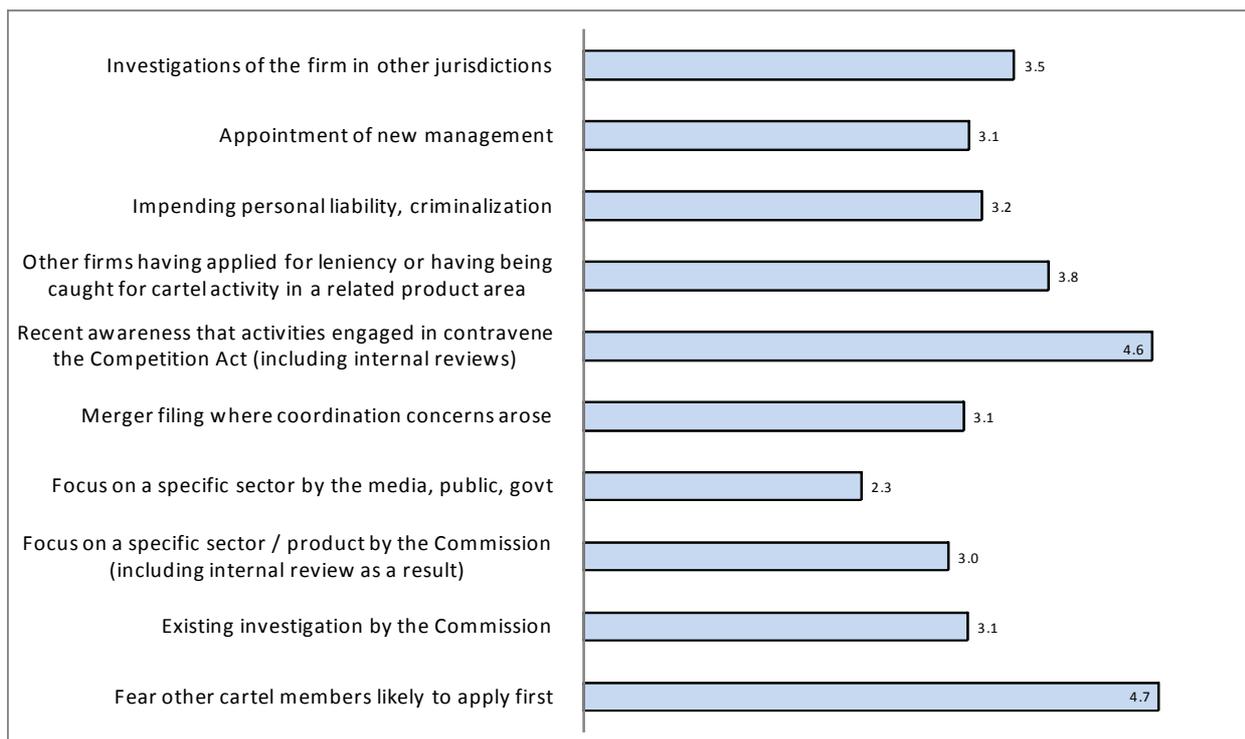
The increase in the number of corporate leniency applications to the Commission indicates that firms are becoming more aware of competition law, are putting more effort into identifying where they may have contravened the law and are willing to cooperate with the authorities.



Source: Competition Commission

A survey conducted by the Commission in 2009 sheds some light on the factors which motivate firms to comply with the Act (see figure 2 below). This survey was conducted as part of a ten year review of the activities of the competition authorities¹. Attorneys practising in all major law firms working on competition matters were surveyed on the drivers of CLP applications by their clients. Their responses were weighted according to the number of marker and leniency applications that respondents have been involved in.

Figure 2. Drivers of leniency applications on a scale of 1 (not important) to 5 (very important)



Source: “Unleashing Rivalry – Ten years of enforcement by the South African Competition Authorities”

The most important factor prompting firms to apply for leniency is the fear that other cartel members will apply first exposing them to the risk of a penalty. In general, firms applied for leniency when they became aware that their activities contravene the Act, either through internal reviews or through publicity of Commission investigations in related product areas, including through leniency applications. Together these suggest that successful enforcement and the CLP have played an important role in driving leniency applications. The fact that the firm is being investigated in other jurisdictions is also a very important consideration, with the fourth highest rating.

The prospect of the individual criminalisation (as envisaged in the Competition Amendment Bill 2009²) is also a driver in some firms making leniency applications.

¹ A copy of the 10 year review : “Unleashing Rivalry: Ten years of enforcement by the South African Competition Authorities” can be found at <http://www.compcom.co.za/10-year-review/>.

² The Competition Amendment Act 2009 was signed by the president of the Republic of South Africa in August 2009 however the amendments will only become effective on a date yet to be promulgated. The

2. Settlement

While in contested cases the Commission seeks the maximum penalty, it rewards firms that cooperate and seek early settlement with reduced penalties. This is consistent with the Tribunal's approach reflected in its recent Pioneer³ judgement where it imposed the maximum penalty because of intransigent behaviour:

“In considering all of the factors listed above together we find that Pioneer has not made out a case for any leniency whatsoever. Arguably we might have reached the same conclusion in respect of Pioneer's conspirators, Tiger Brands and Foodcorp, had they elected to oppose the Commission's referrals. But both Tiger and Foodcorp elected not to do so. Both provided information to the Commission, agreed to a penalty and to the implementation of compliance programmes in their organisations. By doing so they also elected to keep away from the public eye the embarrassing details and duration of their conspiracy. Pioneer on the other elected to place itself in the public spotlight, submitted itself to cross-examination and in so doing revealed for all to see the details of a long standing conspiracy. In this process it also demonstrated its willingness to construct a case based on falsehoods and misleading tactics. Its lack of co-operation with the agencies and the fact that to date it has not taken disciplinary action against, at date of hearing, a single person involved in these contraventions all count against it. We accordingly believe that the company should be subject to the highest penalty that the Tribunal is entitled to levy⁴.”

Increasing numbers of settlements reached with respondents (22 in 2010 compared to 5 in the preceding year) suggests a greater willingness of firms to comply with the law. Settlement agreements contain standard clauses which promote compliance. Respondents are required to admit their transgression and undertake to cease from such offensive behaviour in the future. Further, respondents undertake to assist the Commission in the prosecution of other firms involved.

Firms that are settling must also commit to implementing a competition compliance program which is integrated into the corporate governance practices of the firm. The firm is required to provide the Commission with a copy of the compliance programme within 60 days of the date of confirmation of the agreement.

3. Compliance programmes

Anecdotal evidence suggests that South African firms are paying more attention to compliance in the wake of the enforcement successes of the authorities. An increasing amount of work undertaken by private law firms involves conducting competition compliance audits and devising compliance programs. Compliance programmes are being recognised as a valuable management tool.

The King Code on Corporate Governance, revised in 2009⁵ (King III Report), which is a guide on governance practices for South African firms, places responsibility on the Board of Directors for compliance with applicable laws. The King III Report specifically singles out compliance with the

new law will bring about four key amendments to the existing Act relating to concurrent jurisdiction, the corporate leniency policy, complex monopoly conduct and the introduction of personal criminal liability.

³ Competition Commission and Pioneer Foods, Case no: 15/CR/Feb07

⁴ Competition Commission and Pioneer Foods, at paragraph 171.

⁵ The King III Report can be found at: www.iodsa.co.za/en-za/productsservices/kingiiiireportpapersguidelines/kingreportoncorporategovernanceinsa/kingiii.aspx

Competition Act. Boards of directors are required to monitor compliance and manage risks associated with non-compliance.

4. A holistic approach to promoting compliance

The Commission adopted a holistic approach in tackling bid rigging in public procurement arising out of its prioritisation strategy. This has included a combination of advocacy, training, policy development and enforcement interventions.

In its advocacy interventions the Commission focussed on raising awareness about bid rigging through the training of government procurement officials; ensuring that training on bid rigging was included as part of the supply chain management curriculum of government's public service training academy; and advocating for policy changes to include the use of the Certificate of Independent Bid Determination (CIBD) in official government procurement processes.

Enforcement in bid-rigging cases was also stepped up resulting in a fast-track settlement procedure to incentivise firms to enter into a comprehensive settlement that is financially advantageous. Firms which do not declare their involvement in bid-rigging and settle will risk prosecution and a maximum penalty. Further, the Commission has indicated that it will advocate that Government cease conducting business with firms that do not cooperate.

This combination of measures (advocacy, training, policy development and enforcement) was designed by the Commission to stamp out the practice of bid-rigging by addressing different stakeholders that play a role in the public procurement process.

CHINESE TAIPEI

1. Introduction

This report addresses the issues related to the determinants of compliance, practices of promoting better compliance and motivating corporate competition self-compliance program.

Competition law is aimed to maintain market mechanisms, to establish a free and fair market economy environment through the enforcement of the law. However, as the Chinese philosopher Mencius said, “the existence of law itself does not ensure it will be followed.” In addition to firm government’s adherence, enterprises must thoroughly understand and practice competition law in their business operations to truly put fair and reasonable competition order into place.

Since enacting the Fair Trade Act in 1992, in the effort to establish an environment in which domestic enterprises could compete fairly, in addition to formulating related guidelines, increasing public awareness of competition, and investigating and handling conduct which encumbered competition in the relevant market, Chinese Taipei Fair Trade Commission (the Commission) has worked with competent government agencies across various industries.

In the future the Commission will continue to promote vigorous enforcement of the Fair Trade Act and competition advocacy to facilitate corporate adherence to competition laws and regulations, reducing enterprises’ risk of punishment for violations, avoiding damage to reputation, and enhancing image for ethical operation and social responsibility.

2. Determinants of compliance

The Commission holds that the following factors are the principle determinants of competition law compliance among enterprises:

- Weighing the amount of fines and benefits derived on account of the unlawful act. When the fines are imposed too low they pose insufficient deterrent force, resulting in a low likelihood of compliance and increased recidivism.
- Increased support from the administrative court upon resolutions made by competition agencies results in a higher rate of compliance among enterprises and reduced recidivism.
- When enterprises subjectively and confidently presume a low chance of detection or discovery on competitive constraints conduct, or are not sufficiently familiar with competition laws and regulations, a lower compliance rate results.
- When competition agencies lack independence, enterprises believe that exertion of political power can influence competition agencies’ enforcement, reducing the rate of compliance with competition law.

3. Practices of promoting better compliance

3.1 Revisions to the Fair Trade Act

3.1.1 Proposal for new legislation

Since the promulgation and enforcement of the Fair Trade Act in 1992, four revisions have been undertaken in response to changes in the economic environment in Chinese Taipei and abroad. The Commission has actively worked on the fifth revision to the Act, completing formulation of the draft amendment to the Fair Trade Act, mainly consisting of the following: 1) addition of a general clause for concerted actions exemptions; 2) addition of a provision for a leniency policy, and raised administrative fines for concerted actions; 3) delineation of restrictive competition or unfair competition conduct categories and differentiation in administrative penalties for various violations; 4) application of the rule-of-reason standard to resale price maintenance; 5) addition of search right for anti-competitive cases.

3.1.2 Amendments to raise administrative fines for concerted actions

The draft amendment to the Fair Trade Act differentiate administrative penalties for various violations, such as an administrative fine ranging from NT\$100,000 New Taiwan Dollars (NT\$) to NT\$50 million for anti-competitive conduct. When such enterprise fails to cease, rectify the conduct or take any necessary corrective action after the lapse of the prescribed period, the Commission may continue to order violators to cease, rectify the conduct, or take any necessary corrective action within the time prescribed in the order, and each time may successively assess thereupon an administrative penalties of not less than NT\$200,000 nor more than NT\$100 million until its ceasing therefrom, rectifying its conduct or taking the necessary corrective action.

Compared to the administrative fines of other government agencies, the abovementioned maximum allowable fines are Chinese Taipei's highest administrative fines. In combination with Administrative Enforcement Act, such measures will impel enterprises to comply with the Fair Trade Act and reduce anti-competitive practices.

3.1.3 Introduction of leniency policy

In light of the serious impact of cartels on the trading order and the increasing difficulty of obtaining substantive evidence on cartels, with reference to trends in international competition laws and adopting the recommendations of the OECD, the Commission introduces a leniency policy to effectively prevent and deter cartels, reduce investigation costs, enables early detection of illegal conduct, and contains the spread of damage.

Under the Fair Trade Act and the current practice of "first apply administrative sanctions, then criminal punishment" when penalties against concerted actions are ruled, the "administrative leniency" prescribed in the Fair Trade Act draft amendment practically has the legal effect of immunity or reductions to administrative fines for offenders in leniency policy.

In accordance with Article 41-1 of the Fair Trade Act draft amendment, the Commission formulates "Regulations Governing Implementation of Immunity from or Reduction of Administrative Fines against cartels (draft)." In order to encourage cartel members to voluntarily provide cartel operation information and offer assistance in investigations and evidences collections, the Commission may grant immunity from or reductions of administrative fines to increase the difficulty of successful cartels, thereby indirectly compelling enterprises to comply with the competition laws and regulations.

The major content of the draft regulations includes: applicable targets of leniency policies, application requirements, application methods, requirements for granting immunity and reductions to administrative fines, provision of evidence of illegal conduct, conditional agreement clauses, confidentiality of identity, and other enforcement items.

3.2 *Formulation of guidelines or policy statements*

With the experience gained from handling cases and the knowledge learned from foreign competition authorities, the Commission continues to formulate or revise guidelines for handling particular industries or sectors and conduct to provide guidance to businesses, build a fair competition environment, facilitate compliance among enterprises and raise the transparency of enforcement work.

From 1992 to date, the Commission has issued nearly 70 guidelines or policy statements. Among these, the Commission has formulated guidelines directed at industries with higher violation rates or emerging industries, such as the 4C enterprises, telecommunications, cable television, e-commerce, real estate brokerage, financial industry, distribution industry, motorcycle industry, aviation, petroleum products, and liquefied petroleum gas market, and provided detailed descriptions of acts listed which possibly violate the Fair Trade Act to assist enterprises in understanding the standards by which the Commission upholds the law.

3.3 *Engaging in competition advocacy and building a competition culture*

The Commission adheres to the principle of equal emphasis on promotional communications and management, actively utilizing multiple ways to continually advocate the concepts and contents of the Fair Trade Act to the business communities. The effective enforcement of the Fair Trade Act cannot only lead to a more competitive market structure, but also safeguard the rights of businesses. To raise awareness of the Fair Trade Act, the Commission conducts the public compliance education activities through following means to ensure broad coverage:

- To promote discussion and study of aspects related to competition policy and law across various sectors in Chinese Taipei, the Commission holds symposia, seminars, consultation meetings, and speeches on various specific themes. In addition to deepening communication of Fair Trade Act concepts these sessions provide opportunities to solicit feedback as reference for enforcement and legal revisions.
- Selecting certain specific industries each year to hold advocacy meetings on sector regulations. Such promoting education work familiarizes industry with the purpose of guidelines and policy statements, raising legal compliance through enhanced awareness of the Commission's position in law enforcement.
- Invitations to local businesses and the public to attend annual regional advocacy meetings in various cities and counties.
- To provide up-to-date enforcement information through the mass media, including Internet, radio, cable TV, billboards, newspapers and magazines, to advertise on public buses, and to release publications on the enforcement strategies, priorities and achievement. These are to facilitate familiarization with the Fair Trade Act among industries and the general public.
- To hold press conferences to familiarize the news media with the Fair Trade Act through communication and liaison.

- Establishment of a service center to provide up-to-date information and guidance concerning the Fair Trade Act to all sectors. Staff in the service center handles calls and visits from the general public. The center serves at an average rate of over 10,000 calls per year.

3.4 Investigation and punishment of violations

Upon its enactment, the Fair Trade Act regulated antitrust matters and unfair competition as well as multi-level sales. Since its founding in 1992 through the end of 2010, the Commission processed 34,889 cases, including 25,681 complaint cases, 6,501 merger applications/notifications (approvals or non-prohibitions totaling 6,164 cases; in 2002 the prior approval system was changed to a pre-merger notification system), and 158 applications for concerted action approval (approval granted or partially granted to 128 cases). The average case conclusion ratio was 99.5% for this period.

Between its founding in 1992 through the end of 2010, the Commission has initiated investigations into 1,505 cases. Decision rulings were undertaken in relation to 703 cases, and only 86 of these fell into the category of anti-competitive practices.

Among these, as of the end of 2010 a total of 3,339 cases in violations of the Fair Trade Act (including complaints and initiated investigations), with administrative fines totaling NT\$2.729 billion (including NT\$1.43 billion in fines for anti-competitive practices and NT\$818.5 million for unfair competition). These included 354 anti-competitive cases (nine for monopoly, 47 for merger, 153 for concerted action, 39 for resale price maintenance, and 115 for less competition or impede unfair competition) and 2,472 unfair competition cases. As of the end of 2010, 132 dispositions were revoked and 3,227 cases upheld by administrative courts for an upholding rate of 96.6%.

The top four most sanctioned industries were wholesale, retail, real estate, and information and communications.

3.5 Active cooperation and coordination with regulatory agencies

Paragraph 2, Article 9 of the Fair Trade Act stipulates that for matters provided for in the Act concerned other authorities, the Commission could consult with those other authorities to deal with the issue. The Commission consults actively with industry regulators, exchanging views and cooperating through consultation and coordination sessions to maximize efficient use of administrative resources, improve the market structure and fight illegal conduct together to prevent sector regulatory laws from becoming a protective umbrella for enterprises to skirt the Act.

To maintain and promote domestic competition environment, the Commission participates in meetings at various regulatory agencies concerning legal revisions and provides recommendations on competition policy. The Commission continues to establish consensus on enforcement with various regulatory agencies, consulting or proposing revisions to sector regulatory laws that conflict with the legislative purposes of the Fair Trade Act, to either remove entry barriers or improve the existing regulation which encumbered competition in the relevant market and jointly promote market freedom, openness and competition. For example, with reference to the suggestions of the Commission, the Financial Supervisory Commission deleted the provisions of the Certified Public Accountant Act for authorizing trade associations to set unified remuneration standards, then the Congress passed it.

Further, in 1994 and 1996, respectively, the Commission reviewed all regulations which could have possibly been inconsistent with the Fair Trade Act, and to do so, the Commission set up the “Promoting Regulation Liberalization Project” and “Deregulation and Promoting Market Competition Project”. In the effort to lift inappropriate government regulations over the market, the Commission constantly consulted

with all relevant agencies to adjust outdated regulations or regulations that conflict with the regulative purposes of the Fair Trade Act for counselling state-owned enterprises, public utilities and transportation enterprises.

The Commission conducted consultation meetings with sector regulators, reviewing 74 kinds of regulations and 122 articles of laws and achieving consensus. Further, review was undertaken of regulations suspected of unnecessary or undue regulatory control and interference with market fair competition in 12 markets such as telecommunications and petroleum products. The concrete results of deregulation on regulated regulations, for example, could include: 1) Liquefied Petroleum Gas (LPG) market be opened up for imports; 2) recommendation for deleting the regulation on the distance between two gasoline stations should be more than 500 meters.

4. Motivating corporate competition self-compliance program

The Commission believes that the purpose of law enforcement is not to sanction, but for subjects of regulation to understand and abide by the law. In order to reduce the risk of enterprise violations to ensure market competition, the Commission undertook promotion of the Motivating Corporate Competition Self-compliance Program in 2001 in the hope that through the establishment of self-compliance mechanisms enterprises could avoid violations to the Fair Trade Act and reduce disputes involving competition law cases. Key steps included:

- Phase 1: establishing an information window for two-way exchange on legal affairs with major enterprises with a record of frequent violations or suspected violations to help enterprises minimize the risk of violations to the Fair Trade Act.
- Phase 2: five or more major enterprises with a record of frequent violations or suspected violations were selected to establish internal self-compliance program in accordance with the self-compliance guidelines set forth by the Commission.
- Phase 3: announcing the outcomes of trial efforts by the above five or more major enterprises and utilizing them as models in promoting competition advocacy.
- Phase 4: co-organizing seminars and workshops through business groups to promote industry self-compliance programs.

The Commission also offered related coordination and incentive measures to attract company participation in the program, including: establishing an information window for two-way exchange on legal affairs with enterprises, offering enterprises priority timely legal information services on the Fair Trade Act, providing free Fair Trade Act educational training courses or qualified instructors. Further, when announcing new policies or regulations affecting enterprises, the Commission proactively provides relevant information to participating businesses to establish excellent interactive relationships with the business community and indirectly achieve the objectives of knowledge and compliance to the law, and establishing and maintaining a fair competitive environment.

Since initiating the Motivating Corporate Competition Self-compliance Program in 2001 the Commission has assisted 16 enterprises across the petroleum products, banking, aviation, telecommunications, automobile, real estate agency, and distribution industries to establish self-compliance programs. This interim mission was concluded in 2005 upon achieving excellent results.

In addition to reinforcing the concept of legal compliance and helping mitigate the risk of violations among enterprises, the program enhanced corporations' reputations images as upstanding law-abiding

businesses, helped enterprises to swiftly and correctly make policy decisions, and reduce outlay costs for inadvertent transgressions. Nevertheless, the Commission faced some issues when undertook promotion of this program, such as lack of legal basis and regulatory force, and limited administrative resources at the Commission. What is more, coordinated measures proposed by the Commission lacked the substantial motivational effect, and given the additional operational expenditures of increased budgetary and personnel demands the program could no longer effectively operate indefinitely

However, in consideration that the continuation and expansion of the self-compliance spirit can enhance industry's knowledge of the law and legal conduct to achieve objectives via promotional efforts in lieu of punishment, from 2006 the promotion of program incorporated workshops on regulations for various industries held by the Commission. In the future further consideration shall be given to promotion of guidelines for self-compliance norms by industry associations in line with such factors as industry association status, manpower and resources, and force of restraint held by industry associations over members.

BIAC

1. Introduction

The Business and Industry Advisory Committee ("BIAC") to the OECD appreciates the opportunity to submit these comments to the Competition Committee on a matter of great practical significance to business. BIAC is firmly opposed to hardcore cartel behaviour and fully supports agency efforts to eliminate it. These efforts should involve not only active enforcement measures but also preventive measures including advocacy, education and vigorous efforts to promote compliance. BIAC believes that agencies should take active and effective steps to promote and encourage the compliance efforts of business as happens in other regulated areas of activity.

This submission addresses the questions raised by the Chairman of the Committee in his invitation letter, focusing on those issues in respect of which business has most direct experience.

2. Determinants of compliance

For the great majority of companies, BIAC is of the view that the strongest driver for compliance with competition law is the desire to conduct business ethically and to be recognised as doing so. A company's reputation is seriously damaged by the adverse publicity attracted by a decision that it has violated the law and this damage can extend across the group, impacting business divisions not directly involved in the infringement and even hitting the company's share price.

The spread of compliance requirements to reflect developing norms in a wide variety of areas – from bribery and corruption, through environmental law, health and safety, employment and human rights to data privacy -creates an environment in which businesses are developing increasingly sophisticated compliance procedures and are monitoring their performance with the help of external directors and audit committees. Effective corporate governance is the subject of increasing study and effort, reflected in standards and codes to improve governance.

Monetary sanctions on companies which violate the law and sanctions on individuals personally responsible for violations, including fines, disqualification and ultimately imprisonment, do also create real incentives to comply. Well-publicised sanctions can be particularly important when competition laws are first introduced, to draw attention to the seriousness with which the new laws are to be taken. Once sanctions are established at a reasonable level, compared to other serious breaches of economic law and business regulation, it does not appear that any further increase is either necessary or likely to improve compliance. BIAC considers that sanctions for breach of competition law have in many jurisdictions already reached, and in some cases may be in excess of, levels required for maximum deterrent effect. It is simply not the case, in BIAC's experience, that companies consider violating competition law and are prepared to go ahead even if sanctions are serious but are only deterred if sanctions would be even higher.

To the extent very high sanctions are imposed for conduct which is not clearly established and understood to be unlawful, this may make it even more difficult to instil the need for rigorous compliance. If the law appears capricious, hard to rationalise and to penalise behaviour which business people view as not only normal but pro-competitive, there is a risk that the law will lose respect and compliance be seen as unattainable, reducing the incentive to try to achieve it. BIAC would point to rules which treat parallel

market behaviour, without more, as probative of cartel activity and rules suggesting that normal negotiations with customers can be part of a hub and spoke cartel as the type of rules which could currently, in some jurisdictions, fall into this category. A major determinant of compliance is a body of competition law which is clearly established, understood and, as a consequence, well accepted. Where this is not the case, BIAC would urge competition agencies to review their rules and their advocacy towards and guidance to the business community, as well as advocacy towards society at large as discussed further below.

Business is also strongly motivated to comply with competition law by a desire to operate in well-functioning markets. Businesses suffer when others engage in anti-competitive conduct. They benefit as consumers themselves from a general culture of compliance and, where necessary, effective enforcement.

3. Recidivism

It is BIAC's experience that companies which have been subject to a competition law investigation are highly motivated to ensure compliance and avoid any recurrence. Added to the general drivers of compliance discussed above, there is, in this case, a clear understanding of the impact of an investigation in diverting management focus and disrupting the business. In BIAC's experience companies are generally unlikely to re-offend as a deliberate corporate strategy or through institutional recidivism.

In some cases, BIAC would note, what appears to be corporate recidivism is not in fact a knowing or reckless repeat offence. On occasion the timing of prosecutions can make concurrent problems, often generated by the same individual or small group of individuals, appear to be recidivism. In other cases, decades and changes of ownership may have passed between one violation and another in an entirely different division of the business, demonstrating no corporate intention to re-offend. Recidivism should indeed be punished, as a firm deterrent, but after a careful analysis of relevance, not by the blind application of a multiplying factor.

4. Promoting better compliance – what agencies can do to drive better compliance

BIAC appreciates and supports the efforts made by many agencies to dedicate effort and resource to driving better compliance in positive ways¹, helping companies to understand the law and comply with it, without losing sight of the need to investigate and sanction those who, nevertheless, fail to do so. After all, in many countries whose competition laws are recently introduced, including those which are relatively new to the concept of a market economy, ensuring that companies and their employees understand that competition law is an indispensable tool for the creation and functioning of markets still requires a conscious, concerted advocacy effort.

As regards the background referred to in the invitation to contribute to this roundtable discussion, according to which the fact that cartel prosecutions did not decline might imply that current agency efforts are not very effective, BIAC would suggest that, from a business perspective, the compliance culture and knowledge of competition law issues within businesses are definitely growing, both in depth and geographically. The vast majority of larger companies, and many not so large, have positive and actively managed compliance programmes in place. Trade association management is becoming more professional, at the insistence of member businesses. Zero tolerance for cartel behaviour is the norm. The statistics regarding cartel prosecutions referred to in the invitation to contribute may reflect not only the broader geographic sweep of cartel enforcement but also the fact that current cartel prosecutions extend well beyond classic hard-core cartels and include, for example, hub and spoke, pure information exchange and mere parallel pricing cases.

¹ Including by exchanging best practices, as occurred during the 10th Annual Conference of the ICN in the Hague in May 2011 and as is the objective of this roundtable.

Improving compliance depends on establishing and maintaining a culture of competition and compliance within the company, the industry and the country over an extended period of time. Creating this overall culture is a task in which the authorities and companies all have a role.² Specifically in respect of what agencies can do to drive better compliance, we suggest agencies consider the following:

- agencies can act as advocates to ensure that anti-competitive behaviour is understood to be morally wrong and unethical within the business community and to explain its adverse consequences in clear terms, for example by demonstrating its economic cost. Agencies already publicise their work and completed cases. Press releases on agency websites are useful for specialist lawyers but most business people do not regularly consult these websites and a more active and positive engagement with the media is needed to publicize effectively the need for compliance and issues involved. Agencies could also work with business organisations, trade groups, law schools and business schools to ensure that competition law topics are regularly covered in a lively, informative, economically relevant and engaging manner.
- recognise compliance programmes as a critical, if not infallible element of full compliance and integrate them into enforcement efforts, rather than viewing them as a smoke screen, potential sham or, even somewhat bizarrely, as an aggravating factor in the event of any infringement. Compliance programmes should be more actively encouraged as a tool in creating the necessary competition culture and should not be discouraged. BIAC is interested to note examples of agencies choosing to enforce mandatory compliance programmes in place of (simply) fining infringers, or to moderate sanctions in consideration of commitments to set up or reinforce compliance programmes³ and would encourage similar initiatives.
- study drivers of compliance within their own business environments and publish practical guidance on how businesses of every type can develop a culture of competition compliance and appropriate compliance policies.⁴
- provide incentives for business to invest in compliance efforts. Firms do not, in BIAC's experience, regard compliance investments as detrimental to their interests, as one of the roundtable questions suggests. But embedding and constantly renewing compliance knowledge requires significant expenditure on an ongoing basis and, when budgets are under pressure and being cut all around, compliance budgets will also be under pressure. The incentives should include recognising commitment to compliance and taking good faith, reasonable efforts to comply into account as a mitigating factor when considering sanctions (see further below).
- ensure that a clear distinction is drawn in the intensity of enforcement and sanctions between hard-core behaviour which is generally well understood to violate competition law on the one hand and more nuanced, newly identified violations involving conduct which only on balance crosses the line beyond legal behaviour. This will help to ensure that business education and understanding can keep up with legal developments. It will also help reinforce the credibility of public and private compliance efforts.

² Compare the approach to human rights issues, recognising that both governments and corporations have shared responsibility to achieve improvements, in the Ruggie Report on the issue of human rights and transnational corporations and other enterprises to the UN. Human Rights Council, 24 March 2011 and Guiding Principles Framework (open for comment).

³ See e.g. Netherlands authority – NMa – insurance market investigation, various decisions of the French authority - laundry cleaning and renting and temporary employment - and the Australian and US practice.

⁴ There is much good material already available including from US, Canadian, Australian and UK agencies. Guidelines from the French Authority are expected later this year.

- agency guidelines can help to supplement legal rules and case law in promoting understanding and compliance where they are clear and practical.
- act as advocates within government and towards regulatory agencies to ensure that conduct which the competition agencies consider violative is not condoned, much less actively encouraged or approved by government or regulators. Contradictory approaches to competition policy within government and agencies undermine compliance efforts by creating uncertainty and doubt as to what the law requires⁵.
- use their advocacy role to eliminate legislative obstacles to the implementation of certain aspects of effective compliance programmes (such as whistle blowing and data privacy).
- recognise that denying legal privilege to in-house lawyers is an impediment to efficient compliance programmes given the primary role of in-house lawyers in driving such programmes. Business people need to be able to rely on their in-house lawyers' professional secrecy and should not be discouraged from consulting lawyers because confidential deliberations risk being disclosed.
- extend competition advocacy beyond business to society at large so that the general public will recognise the importance of competitive markets and compliance. The more competition law is embedded in the moral fabric of society generally, the easier it will become for companies to instil competition law compliance as a part of their corporate culture. This may prove a particular challenge in countries which do not yet have a cultural background affirming the benefits of competition but more is needed even in countries with long-established competition law regimes. BIAC has noted with interest efforts by some agencies to use social media to reach out to the public⁶ and to create engaging learning tools.

5. Corporate competition compliance programmes

BIAC is strongly of the opinion that genuine, effective corporate compliance efforts will be strengthened if good faith, reasonable efforts to comply are taken into account as a mitigating factor when sanctions are under consideration. In any event, it is positively damaging for agencies to view the existence of a compliance programme as an aggravating factor, merely because an isolated infringement has occurred. The level and intensity of sanctions should be adjusted to recognise instances where a well-established compliance programme is in place and generally respected, has helped to detect the infringement or facilitated cooperation.

Compliance programmes are indispensable for employees to understand the often complex rules of competition law and to understand that while they are incentivised to maximize profit (especially through performance-based compensation systems) their companies will not tolerate this being achieved in an illegal manner. Approaching compliance efforts as an appropriate mitigating factor is likely to lead to more proportionate outcomes than striving for an appropriate "discount" figure to apply as a general reward for operating a compliance programme and so is likely to be more successful in encouraging effective compliance. Although the ideal outcome and benefit of effective compliance efforts will be the total elimination of violations, BIAC suggests that giving appropriate recognition to good efforts is not only deserved but will encourage further efforts to enhance actual compliance in practice. Such recognition will secure fairer outcomes, treating those who have made appropriate efforts to comply more favourably than those who neglected compliance. It may also help compliance officers and in-house legal departments to justify investments, to show a potential for concrete return on investment and so resist budget limitations.

⁵ See BIAC paper on the Regulated Conduct Defence, 11 February 2011: DAF/COMP/WP2/WD(2011)10.

⁶ See e.g. the Singapore Competition Commission Facebook page.

Agencies should also consider imposing an obligation to set up, or improve, a compliance programme as part of the remedy or settlement arrangement in appropriate cases.

Some legal systems provide for a defence in respect of other corporate infringements based on the defendant company proving that it had adequate compliance procedures in place⁷. This approach may lead to substantial additional and innovative compliance efforts, since the onus of proving adequacy will be firmly on the defendant, and BIAC commends consideration of the application of a corresponding defence in the competition law field.

The invitation to the roundtable asks how competition authorities can distinguish sham compliance programmes from genuine ones. In BIAC's experience businesses do not introduce and invest in sham programmes. While there may be cases where compliance programmes are inadequately supported, perhaps as a result of budget cuts driven by financial concerns, and even, in isolated cases, situations where a rogue individual may have used knowledge gained in compliance training to avoid detection, these are in BIAC's opinion the exception and BIAC does not consider that authorities need to be concerned about sham programmes as such⁸.

As to how authorities can distinguish between the best compliance programmes and those which require additional effort, BIAC considers the key criteria for a successful programme to be top level commitment, culture, compliance know-how and organisation controls, effective and active training and constant monitoring and improvement⁹.

Commitment and active involvement of senior management is a crucial cornerstone, creating the right tone at the top of the organisation on which commitment can be built throughout the business. This commitment to competition compliance is ideally, and in practice most often, an element of a broader compliance and ethics programme, covering the whole range of compliance challenges faced by the company, including anti-corruption, financial regulation, conflict of interest and insider trading, human rights and industrial relations, environmental controls, health and safety, export controls and consumer law.

Commitment from the top effectively communicated throughout the organisation will lead to creation of corporate values which are expected throughout the business' operation as part of the way business is done - a culture of compliance.¹⁰

The development of compliance know-how will start with a clear statement of the rules, tailored to the specific risks and challenges the business faces. So an initial step will always be a careful risk analysis of the competition law issues likely to arise, specific to the business and its employees. Training programmes then need to be developed and delivered to all the relevant individuals, tailored to their specific needs and risk profile. The most effective training is typically practical, addressing specific situations which may

⁷ For example s.7(2) Bribery Act 2010 (UK).

⁸ Of course, if a programme were proven to be demonstrably sham (for example, being used not to encourage compliance but knowingly to hide blatant violations), it would be a compliance programme in name only and an agency could always consider taking that into account in setting the appropriate level of the time.

⁹ See "Antitrust Compliance Programmes – Can Companies and Antitrust Agencies do More" by Anne Riley and Margaret Bloom in CLJ 2011 p21. These 5 Cs of compliance were originally articulated by Fiona Carlin of Baker & McKenzie, Brussels. Other ways of describing the process include the UK Office of Fair Trading's virtuous circle.

¹⁰ The Australian ACCC Guidance on Corporate Trade Practices Compliance Programmes (2005) notes three phases to institutionalise a compliance culture - commitment to comply, compliance know-how, integrated as part of the internal business practice.

confront the group and, where possible, interactive, permitting questions and concerns to be addressed and worked through. It must be seen as driven by management and their commitment to comply. Training needs to be reviewed and updated regularly to reflect changes in the business and the law and to ensure the message is kept fresh and engaging. The management of effective training programmes throughout a large business can require substantial organisation, cost and commitment.

Controls are needed to ensure that any business process is working properly and the compliance programme is no exception. Checking that all at-risk personnel have received training is a starting point. Some businesses require employees to confirm regularly that they understand the compliance programme and are not aware of any instances of non-compliance and some companies require employees to confirm following training that they understand the training and will comply with the law. Employees who have questions should be able to access legal advice and, where appropriate, a confidential helpline¹¹. Compliance violations should be sanctioned internally and, where possible without undermining the general expectation of full compliance, exceptional compliance efforts rewarded.¹²

Constant monitoring and improvement should be built into compliance efforts, as they are into other business processes. The processes should be audited regularly and updated to take account of audit findings. Some companies have attempted to audit substantive antitrust compliance but there are serious drawbacks to such audits¹³ and they are not and should not be considered as generally useful or standard.¹⁴

Agencies should be encouraged to promote the development and implementation of compliance programmes as a key factor in promoting compliance. There is already a great deal of useful material in this area. Working together, BIAC suggests that agencies use the opportunity not necessarily to attempt to develop a uniform approach, since there is no one-size-fits-all solution to this compliance challenge, but rather to develop a broad range of alternative materials to be made readily available to business to support a wide range of business needs. Guidance notes, specimens of alternative compliance policies and pro forma training materials, where possible adapted to specific business segments, starting with those perceived to be most at risk, are all useful. Training films and on-line materials which can be used as part of a business' tailored training may be particularly welcomed by small and medium sized businesses who would particularly benefit from this increased engagement. Agencies can usefully work with business groups and trade associates to ensure the materials developed are as relevant and practical as possible. A first step, which might readily be developed following this roundtable, could be a comprehensive index of all material currently made available on-line by the various agencies who have already committed resources to this effort.

¹¹ The divergence of national laws governing how a confidential helpline can be managed and reports followed up makes it difficult for companies operating internationally to operate this type of support. Competition authorities could help promote effective compliance efforts by lobbying to harmonise laws to permit such support efforts.

¹² Any disciplinary process needs to be sufficiently flexible to secure employee cooperation with a view to obtaining leniency should that prove necessary. Agencies should be willing to be flexible in their requirements to enable such cooperation to be delivered.

¹³ For example, an audit is unlikely to uncover violations which are hidden by the individuals concerned, producing false negative results and a risk of complacency as well as possible resistance to further necessary compliance efforts and investments.

¹⁴ BIAC thus strongly disagrees with the suggestion in para 74 of the OECD Secretariat paper that it might be fair to expect companies to include some mock surprise inspections as part of their compliance programmes.

6. Conclusion

BIAC supports vigorous efforts to promote compliance with competition law by the authorities strenuously enforcing the law with appropriate sanctions and making enhanced advocacy efforts in order to gain recognition for the importance of competition law and to create a culture of compliance in society at large. International agencies assist in this effort, as the OECD itself does when it encourages developing countries and other non-member countries to adopt effective competition laws. Our proposals for the recognition, encouragement and, where appropriate, reward of genuine compliance programmes implemented by businesses are a natural extension of these activities designed to spread the culture of compliance beyond national governments to the businesses which operate in their countries.

BIAC commends the Competition Committee's decision to focus on this crucial topic and looks forward to participating in the roundtable.

**PROMOTING COMPLIANCE WITH COMPETITION LAW: DO COMPLIANCE
AND ETHICS PROGRAMS HAVE A ROLE TO PLAY?**

*By Joseph Murphy **

1. Introduction: The role of compliance and ethics programs in promoting compliance with competition law

This paper is provided for purposes of facilitating a discussion of the possible role of compliance and ethics programs in promoting compliance with competition law. In this paper we first define, in section II, what is a modern compliance and ethics program, and distinguish this from older concepts of compliance. In section III we then pose the policy question on these programs: does even a small program effort merit a free pass for offending companies, should programs, no matter how diligent, be completely irrelevant, or is there a useful middle ground? We next propose in section IV, that the area of compliance relating to cartels may deserve different consideration from more sophisticated areas such as abuse of dominance and price discrimination.

Shifting the focus exclusively to cartels, in section V we raise the question whether current company¹ approaches to preventing cartels may have failed to develop or even atrophied from what should have been expected given the history of the development of these programs. In section VI we ask whether company compliance and ethics programs can actually have any effect against cartels, given the characteristics of these types of violations. In section VII we question whether small and medium-sized enterprises can really afford anti-cartel programs, and ask how to bring these companies into the fight against cartel behavior.

We then look at what has been happening among enforcement authorities in their approaches to compliance programs, covering first in section VIII competition law enforcers and then in section IX enforcers in other areas particularly corruption. If agencies are to consider compliance and ethics programs they need to be able to assess them; in section X we explore this issue. In section XI we ask how, if governments want to recruit the private sector into the battle against cartels they can do so. Section XII offers a list of possible follow-up action steps based on the topics discussed here. Section XIII briefly discusses the resources available on compliance and ethics programs. Appendix I experiments with the OECD Working Group on Bribery's "Good Practice Guidance" by adapting it to cartels instead. Appendix II is a quick list of sample questions an agency investigator could ask of company employees to begin an assessment of a claimed compliance and ethics program. Appendix III is an inventory of the ways governments can promote effective compliance and ethics programs.

* This note has been prepared by Mr. Joseph Murphy from Society of Corporate Compliance and Ethics, USA. The views reflected in this paper are the personal responsibility of the author. They should neither be attributed to the OECD Secretariat nor to OECD member countries.

¹ As used herein, "company," "corporation" and "organization" refer to all forms of organizations and undertakings.

2. What is a compliance and ethics program?

We begin with the question whether competition law and antitrust (hereinafter “competition law”) compliance and ethics programs have a significant role to play in promoting compliance in this important area of the law. But, of course, it is difficult to discuss this question without first agreeing on the meaning of basic terms.

As a starting point, the reference here is to “compliance and ethics programs.” There may be many ways to describe some or all of the means companies can use to prevent violations of law – e.g., compliance programs, internal controls, self-policing, diligence, ethics programs, compliance management systems, etc. – but we will use the reference to “compliance and ethics program” to capture what is state of the art today.

Modern programs reject old notions of simply throwing laws, booklets, and lawyers at employees and hoping that something actually works. In the past companies might have satisfied themselves that they were doing “all they could possibly do” by sending out codes and manuals, having employees sign certifications, and having lawyers give lectures on the statutes. But this is no longer considered an effective approach.

Nor is there acceptance of any check the box process. While there are a number of lists available of steps that should be in programs, none of these offers a magic formula for companies. The two most prominent standards are probably the US Organizational Sentencing Guidelines² and the OECD Working Group on Bribery’s Good Practice Guidance.³ The Sentencing Guidelines has a nominal list of seven elements; the Good Practice Guidance has twelve. But none of the items in either of these lists could be satisfied by simply filing out a form or checking a box. Why is this so?

Over the years, the most important transition in approaches to compliance and ethics is that today it is recognized that programs must employ all the management techniques that are used in organizations to get things accomplished. No company would rely on a code and training to sell its products, manage its costs, motivate its people, or develop innovative products and services. And no company can prevent and detect violations of law unless it uses effective management techniques. In short, a compliance program can be summed up as: 1) management commitment to do the right thing, and 2) effective management measures and steps to make that happen.

One additional point needs some explanation: the inclusion of the word “ethics.” There has been extensive debate over the years pitting the concept of law and rules-based compliance efforts versus ethics and values-based approaches. Lawyers are seen as taking a one-dimensional “follow the details of the law or go to jail” course, while values-based methodologies may tend to discount laws as formalities and to appeal to employees’ sense of ethics. Without delving into lengthy discussion of the merits of this debate, the concept of “compliance and ethics” synthesizes the two, recognizing that law and threats without values has little appeal to employees in companies, but values without law can be too subjective and vague, and even lead to rationalizing serious legal violations. We focus instead on getting employees to do the right thing through utilizing management techniques. In the context of competition law this would emphasize both what the law requires and the underlying value of free and fair competition.

² U.S.S.G. section 8B2.1(b). http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf.

³ OECD, Further Recommendations for Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation_Web_English.pdf.

Below we will discuss further the types of management steps that can be used to control what happens in companies, including hard core cartel conduct.

3. Competition law and programs: The policy questions

Should programs have a role from a policy perspective? One possibility is that companies could be given a complete “pass” from any enforcement actions just for having some form of compliance effort. Thus if there is a manual, some training, and a high-sounding policy, a company could avoid prosecution even if it committed a violation. In this scenario, it would be a complete defense simply to say, “but we told them not to.” But, of course, this would be a pass not based on having a program, but on merely going through the motions. In the research for this paper and in the author’s experience, government agencies do not endorse this type of approach. Nor would it be good policy, because it would breed sham programs that would not have any value at all.

A second alternative is that compliance and ethics programs should be completely ignored and irrelevant at all stages of the legal system no matter what level of diligence and effort the company has shown. In this scenario government takes no role promoting or assessing programs, and a corporation’s status as a good citizen is determined without reference to any effort made by the company to avoid violations. Companies that make no effort, those that do a small amount, and those who buy in completely to preventing violations stand equal in the legal system.

Between these two ends of the spectrum is the possibility of a middle ground. Then the question becomes one of degree. What types of corporate self-policing efforts should be recognized, and which ones ignored? If there is to be any recognition, then what recognition should governments consider providing? Must this be an all or nothing approach, or are there possible gradations? What steps can governments take to promote programs – is there a flexible range of tools available?

Once we move into the middle zone there is also the question of how governments – enforcement authorities, regulators, and courts - can assess the bona fides of a company’s compliance and ethics program. Is this practical, and what methods can be used? Have other government agencies done this, and what can be learned from their experiences? Is it possible for governments actually to have an effect on the development of compliance and ethics programs, and especially to improve their effectiveness? These are questions which can take a great deal of consideration, analysis and empirical work. In this paper we hope to offer some direction for pursuing this further.

4. Recognizing different aspects of competition law

Compliance and ethics programs are common in many types of industries and are used to address an enormous range of ethical and legal risks. It is worth considering first, in the broadest sense, the range of competition law risks a program could address. In this respect, competition law may be different from many other legal areas because of an unusual dichotomy in the range of misconduct that competition law addresses.

4.1 *Economically complex matters*

The first half of this picture looks at a zone of compliance more associated with large, powerful companies. Here we deal with such issues as abuse of dominance/ monopolization, tie-ins, distribution issues, and price discrimination. These are usually complex issues, typically addressed by managers with advice of counsel. Of course, companies may choose not to follow counsel’s advice, or counsel may only advise on the degree of risk associated with particular conduct, leaving decisions to the managers’ business judgment and risk tolerance.

In this area the conduct at issue tends to be at least somewhat visible and detectable. Decisions are based on calculated business risk decisions. Compliance for these risks typically means having legal counsel advise regarding difficult issues. There may also be a need for expert economists to analyze such factors as market shares, market definition, elasticity of demand, and ease of entry. Issues may be difficult, even gray, and companies may be willing to take that calculated and open risk going forward. These are also typically not criminal matters. In this zone, there is less of a focus on a company-wide compliance and ethics program; compliance may be more a matter of getting sound advice and following it.

A note of caution is in order here, however. These points are admittedly generalities, and there are certainly exceptions to these statements. While the risks in this zone are mostly associated with large companies, there are complex issues that even small companies can face. And compliance programs can, for example, play an important role in making sure that remote subsidiaries and business units in all parts of the world adhere closely to corporate policy. Thus, a dominant company should know that it needs to be more careful in its marketplace conduct than its smaller competitors, and this calls for an embedded compliance program and infrastructure. This is also the zone where compliance manuals are applicable – complex matters that require careful review of the circumstances. But in terms of the major cases and most serious, systemic issues, the decisions are typically made at the top, with advice of counsel, and the results are, relatively speaking, visible to the world.

4.2 *Cartels*

In the second zone are the hard-core violations – cartels or what are called “per se” violations. These are typically in the range of criminal enforcement in those jurisdictions that impose criminal penalties for competition law violations and are the offenses for which leniency programs are designed. They are not accidental, gray, or reasonable interpretations that go beyond the limits of the law. They are typically deliberate, conspiratorial violations. Legal counsel is not involved, and they are secretive by nature. Making sure that management has access to competent outside counsel will do nothing in this area of compliance; violators generally know they are breaking the law. Complex analyses of sophisticated issues provided in manuals are typically beside the point with respect to undercover cartel violations. They do not need economists or experts in competition law to tell them what they are doing is wrong. Unlike the first zone, this one is particularly similar to other legal areas involving conspiracy and fraudulent conduct, where deception is used to shield crime from public view. This is the area of the greatest compliance challenge, and the area for the greatest potential for compliance and ethics programs. It is also perhaps the area with the greatest opportunity to learn from the experiences in compliance and ethics efforts in other areas of criminal law dealing with fraud and conspiracies.

5. *What is wrong with company competition law programs today?*

5.1 *Questions about competition law compliance efforts*

Often times those who write about compliance and ethics programs will point to the US defense industry scandals of the 1980s as the beginning of the development of such programs. They are wrong. Most likely the real genesis was the electrical equipment antitrust conspiracy cases in the US in the 1950s and 1960s. After GE experienced the first serious criminal antitrust case it implemented a compliance program to prevent this from ever happening again. This was likely the first benchmark for corporate compliance programs. In the 1960s a literature started to develop dealing with antitrust compliance programs.⁴ In the 1970s the approach to all forms of compliance was jolted by the introduction of the first compliance docu-drama in this area, a movie/video called “The Price,” by Commonwealth Films. This

⁴ Federal Trade Commission, “FTC’s Model Antitrust Compliance Audit Program” fn * (listing sources dating back to early 1960s).

antitrust compliance film shifted the compliance approach from formalistic lawyers' lectures to dramatic, emotional media that reached people in a strong way. The author, who has been in this field for over 30 years, still remembers the impact of seeing this film for the first time.

Given this rich history, competition law compliance and ethics programs should lead the field in innovation, reach and effectiveness. In the author's experience, they do not. This is a disappointing development for those who view cartel behavior as a core criminal act no different from common theft.

This observation is based on the author's work on compliance and ethics programs touching on numerous compliance areas in a broad variety of industries on six continents. It is not, however, based on published research because it appears that no one is even asking questions in this area, much less conducting empirical research.

Nevertheless, there may be a pattern here that merits further study. Enforcement of competition law has ramped up substantially – penalties are at extraordinary levels with corporate fines reaching the hundreds of millions and individual offenders facing prison terms of 10 years in some jurisdictions. Competition law compliance programs had their genesis in large companies beginning decades ago. Yet there are unsatisfying patterns.

Why, given this strong upward trend in punishments has there been recidivism among large companies? Why, when there are well-publicized leniency programs and extreme penalties, do the cases show patterns of cartel behavior enduring for years, even as long as a decade? Why would well-paid business executives who have so much to lose, repeatedly risk so much in patterns of cartel behavior? If the patterns in the cases make anything clear, it is that these violations are not accidents, or the stray behavior of a few uninformed innocents. They are not misjudgments about complicated economic matters. These are malicious cartels of wealthy and well-educated business leaders, conducted under cover like thieves in the night. As the Lysine conspiracy videotapes illustrate, they even laugh arrogantly at the enforcement authorities.

What has happened to competition law compliance programs, which once led the way in the development of programs, and once moved the field with the use of then-advanced technology and effective drama? Have competition law programs possibly fallen behind efforts in other fields? Who runs competition law compliance efforts in companies? Have they become the exclusive domain of lawyers, while other areas focus on more effective management techniques? Is anyone even asking these questions today? Is it possible that competition law compliance programs have actually atrophied since the days of "The Price"?

5.2 *Leniency programs*

There is one additional question that has to be considered in this context. Competition law has led the world in developing the concept of corporate voluntary disclosure or leniency programs. Other areas of the law typically offer only lukewarm welcomes to those who disclose violations, often including the imposition of punishment for those who disclose. But in competition law the protection is firm: reveal your violation and that of your conspirators and there will be no punishment for your company or your employees who cooperate. This is the model used in the US and EU and generally by others.⁵ Given that a compliance and ethics program can help companies find internal violations and thus win the race to report,

⁵ Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades" (Feb. 2, 2010) (Remarks at the 24th Annual National Institute on White Collar Crime) <http://html.documation.com/cds/ABA10/PDFs/011.pdf>

could it be concluded that nothing more need be said about these programs, since the leniency offer covers all that is needed? A steady stream of violators seems to enter the government's doors; is this enough?

Here there is a threshold issue of the goals of enforcement. Notwithstanding the growth of penalties, and the flow of cases coming in through leniency programs, it can be difficult to make a convincing case that this is enough. If catching violations is the only goal, leniency certainly has an impressive track record. But if prevention and detection at the earliest possible stage are the goal then one is left with an uneasy sense that more should be possible. Is it the only measure of success in an enforcement program that fines and prison terms are increasing? Is it a success when a cartel that has thrived for a decade is finally unearthed? Or are there additional means to promote prevention other than finding and punishing large, global cartel violations?

Additionally, the history of repressing crime simply by imposing draconian penalties is not encouraging. In the US, for example, Arthur Anderson faced the corporate equivalent of capital punishment; ironically the firm's conviction was reversed after the figurative death penalty was inflicted and it went out of business. In the Enron era senior executives were sent to prison for the equivalent of life sentences. But one would look long for an American who would claim that these examples of strong penalties dramatically curbed corporate crime and misconduct generally in the business community. Penalties are a necessary part of the formula, but because human beings are not simply "econs⁶," sitting in quiet meetings rationally calculating the risks of being caught and the exact amount of fines, it appears that governments rely merely on penalties at their peril. It might be, for example, that the power and insularity of high corporate office breeds the arrogance that convinces these business leaders that they are too smart to ever be caught. Not even capital punishment deters those who believe they are invincible.

Moreover, another fundamental point in this analysis is that all punishment comes after the crime is committed. And in the case of cartels the crimes appear to extend for inordinately long periods of time.⁷ Discovery of the vitamins cartel is considered an enforcement victory, but for an entire decade consumers had their pockets picked by this nefarious cartel ring. When consumers are the victims the functioning of the legal system raises troubling questions. In most of the world there is no effective recourse to class actions to recover these losses to the consuming public. In the United States, where private actions are more common, Supreme Court precedent limits recovery to direct purchasers, who are often not the consumers.⁸ This environment adds to the concern about the duration of violations and the limits of the legal system in making the victims whole.

For companies there is no assurance that a compliance program, no matter how vigorous and expensive, will result in a company being first to disclose and reap the benefits of a governmental leniency program. Simple luck can be as important a factor in discovering cartels.⁹ In fact, companies using such common program elements as manuals and lectures may discover to their chagrin that this very training

⁶ "[T]he efficient calculators imagined in economic theory, able to weigh multiple options, forecast all the consequences of each, and choose rationally." Econs and Humans: A review of [Nudge: Improving Decisions About Health, Wealth, and Happiness](http://www.claremont.org/publications/crb/id.1616/article_detail.asp), by Richard Thaler & Cass R. Sunstein, http://www.claremont.org/publications/crb/id.1616/article_detail.asp

⁷ A cartel among producers of prestressing steel endured for an incredible 18 years. See "EU Imposes Fines of Over 269 Million [Euros] On 17 Steel Producers for 18-Year Cartel," 100 *Antitrust & Trade Reg. Report* 399 (Apr. 8, 2011).

⁸ [Illinois Brick Co. v. Illinois, 431 U.S. 720](#) (1977).

⁹ As an illustration of the role of luck and unpredictable factors in unearthing cartels, one need only read K. Eichenwald's *The Informant* (Broadway Books; 2000) for a memorable example of the types of bizarre circumstances that can motivate human behavior in this context.

caused their conspiring employees to take greater steps to cover their tracks (this is based on a client's actual experience). Given this pattern, a clever manager could decide to save the expense of pouring substantial resources into a competition law program, and just hope to be the first in the door if something happens, or at least to be the second in jurisdictions where that matters. It may even be possible that this environment has helped breed a sense of cynicism and futility regarding the value of programs, at least in jurisdictions where leniency seems to be the only significant policy.

Will leniency effectively reward and encourage compliance diligence consistently? There are typically certain conditions to immunity that could affect this position and undercut the basis for having a compliance and ethics program. Consider, for example, the standards set by the US Antitrust Division.¹⁰ One of the blockers for immunity is the following:

“whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity.”

From a policy perspective this certainly makes sense. Otherwise, a company could lead its competitors into a cartel and then turn them in. But consider the fact that corporations act through individual employees. A wrongdoing manager could, on his own, readily contact his or her peers in competitors and solicit them to join a cartel. The manager might even do this not initially realizing the gravity of the offense. The corporate compliance and ethics department then uncovers the misconduct in the course of an in-depth audit. Under the leniency guidelines, even if the manager was not an executive, the company is not eligible for leniency because of its manager's leadership role, and its program receives no credit, even though the program unearthed the violation.

Consider a second scenario. Assume a company manager has participated in, but not led or coerced others into joining, a cartel. After strong interactive training the manager realizes what she did was improper and calls the compliance and ethics department. While they start up their investigation she also calls her own legal counsel, and together they immediately call the Justice Department and provide all the information they have, including documents and detail about all collusive discussions. This is enough for the Department to begin its investigation. The company conducts its own prompt and in-depth investigation and then requests leniency. But by this time the Division has all the evidence and records it needs from the disclosing manager. Under the leniency program, there is no benefit for the company because of this blocker:

“2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;”

Again, from a policy perspective the Division's policy makes sense; it has what it needs. But the reason it has the information is because of the company's compliance and ethics program. Nevertheless, under the Division's approach to programs the company gets no credit.

Consider a third scenario. The company receives a helpline tip on its well-publicized compliance helpline. This is just based on a clerical employee's suspicion, so the company has no basis for going to the Division yet. It does, however, institute an investigation. At the first sign of an investigation a manager who was involved in the misconduct hears of the investigation and calls his counterpart and co-conspirator at a competitor's office. The two individual conspirators agree to “hang tough,” and the calling manager does nothing to assist the internal investigation. But the other company's manager had simply lied to his erstwhile co-conspirator and now runs to his company's lawyer and immediately confesses all. That second company, on the same day, calls the Antitrust Division and requests immunity, providing all the

¹⁰ U.S. Department of Justice, Corporate Leniency Program, <http://www.justice.gov/atr/public/guidelines/0091.pdf>

information and the documents the manager has. This second company does not have and never did have a compliance program because it did not want to spend the money. But it is first in the door to the Division as a result of the first company's program activities.

The first company must take longer to uncover what happened because its own manager fails to cooperate. When it does contact the Antitrust Division it is blocked from getting credit.

In the above scenarios a company may have invested substantial resources in good faith to have an effective compliance and ethics program. It may also have devoted serious management time and commitment to this effort. But because of circumstances that could readily occur, the existence of the leniency program offers it no benefit. Other companies, that made no such effort, would get credit because of factors beyond the control of the first company.

5.3 *Competition law compliance programs today*

It should be emphasized that much of this discussion is based on the author's personal observations and discussions with other practitioners, plus attention to the literature and presentations in compliance and ethics. And there is no doubt that much good work is done in competition law compliance and ethics programs. Companies do dedicate substantial resources to this area. The development of new, effective techniques in the broader world of compliance and ethics has certainly influenced compliance and ethics programs in the competition law area at least to some extent; as the saying goes, a rising tide lifts all boats. But there is nevertheless the sense that compliance and ethics efforts in competition law are not what they could or should be and no longer lead the way as they once did. What does this mean in practice?

Consider the findings of the American court in the Stolt-Nielsen¹¹ case, one of the few cases actually dealing with a compliance and ethics program. The Court there concluded that the defendant company had taken "prompt and effective action" to end its role in a cartel and was very impressed by the fact that the company, after finding a violation, took certain actions. These essentially consisted of senior management instructing employees to cease illegal conduct, conducting mandatory training, having a handbook, requiring employee certification, and informing competitors of its commitment.¹² While these were certainly seen as serious efforts by the court, the court could have written the same opinion based on the same set of facts as early as the 1960's; nothing much seemed to have changed in approaches to competition law compliance programs. The author has listened to presentations on antitrust compliance programs in the US - the discussions sounded starkly like the same discussions he heard when he started in this field in the 1970s (when the government was "sending a message" by sending individuals to prison for months, not years, and imposing fines in six figures, not nine). There was much talk in these presentations about policies and training, with the additional talismanic reference to "tone at the top." But "tone" typically translated into having the chief executive sign off on statements (almost always drafted by lawyers, a fact that employees know as well). There was discussion of "audits," but in fact these were really risk assessment exercises, not true audits. And no one seems to talk about how one actually conducts such audits, or what logistics would be involved to do one on an unannounced basis. Surveys, incentive programs, and empowered chief ethics and compliance officers, as well as other highly-regarded modern program steps, are mostly omitted from these sessions. These are in sharp contrast to programs like the Compliance Academies staged for compliance and ethics professionals presented by the SCCE, and in which the author is a faculty member. No Academy would last if it limited itself to policy statements, manuals, lawyers' speeches, and similar formalistic steps.

¹¹ United States v. Stolt-Nielsen S.A., No. 06-cr-466 (E.D. Pa. Nov. 29, 2007)(Memorandum and Order).

¹² United States v. Stolt-Nielsen S.A., No. 06-cr-466, at 14-15 (E.D. Pa. Nov. 29, 2007)(Memorandum and Order).

There is a need for current empirical work on what is actually in competition law compliance programs today. It should be noted, however, that this is extremely difficult to do with any level of accuracy, because those completing any form of survey will have a strong motivation to interpret questions to favor their companies.¹³ Absent such data, the author offers the following hypothesis on the weaknesses of competition law programs, both in practice and also in terms of what some government agencies and other competition law experts have often called for in programs. This is offered with the caveat that it reflects personal experience and observations; actual study of these hypotheses would be extremely valuable.

- Competition law programs may tend to be at least somewhat siloed and managed by lawyers, rather than fully integrated into a broader, empowered compliance and ethics program. As the OECD stated in the context of anti-corruption programs, “to be effective, such programmes or measures should be interconnected with a company’s overall compliance framework”;
- There is little understanding of the essential role of the chief ethics and compliance officer (“CECO”), despite the fact that serious violations most often involve executives; absence of empowerment and independence for the CECO is perhaps the most lethal weakness in any program.¹⁴ In the words of the OECD, again in the anti-bribery context, those running the program should be “senior corporate officers, with an adequate level of autonomy from management, resources, and authority”;
- “Tone at the top” is now much talked about but is typically translated into “talk at the top” and not action at the top;
- Compliance audits appear to exist more in talk than in implementation; some commentators even confuse them with risk assessment. They are not targeted using sophisticated screening techniques. Nor are the other common compliance and ethics measurement techniques such as focus groups, deep dives, exit interviews, etc., much discussed in the competition and ethics field;
- Little mention is ever made of the use of and control over incentives, although this is well covered in the Canadian Competition Bureau’s Bulletin;
- Little is said about disciplinary processes, and particularly disciplining managers for failure to take steps to prevent violations and the need to publicize actual disciplinary cases internally;
- Little is said about the use of controls – techniques that work as barriers to violations, sometimes almost mechanically, and often by removing the ability to commit improper acts; and,
- Training is much discussed, but not with a spotlight on the need to provide the most pointed, interactive and extensive (rather than the briefest) training sessions targeted at the senior executives, the ones most likely to break the law.

What we may be seeing is that competition law compliance tends to be more the domain of lawyers, perhaps becoming somewhat isolated from the broader and more dynamic community of compliance and ethics professionals. Competition law programs may be detached from experts who can focus on the types of things that can drive an effective program, like adult education and training, and the actual human motivations for doing the right (or wrong) thing. Compliance programs are arguably based on the lawyers’

¹³ In fact, in one reported survey of company compliance program elements, whenever two or more people in the same company were asked the same questions, there were always differences in their answers, suggesting a subjective element in unverified surveys.

¹⁴ On the essential role of the CECO and the dangers of under-positioning this key element in programs, see Leading Corporate Integrity: Defining the Role of the Chief Ethics and Compliance Officer (August 2007) http://www.corporatecompliance.org/Content/NavigationMenu/Resources/Surveys/CECO_Definition_8-13-072.pdf; Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds (RAND 2009) http://www.rand.org/pubs/conf_proceedings/CF258/

view of what employees need to know, like a law school course, with insufficient thought about management techniques or what actually motivates corporate behavior. What more can be done? We will discuss that below.

6. Can compliance and ethics programs have any effect in preventing cartels?

Limited though leniency may be, there can be no real argument that these government programs do surface cartels, even if this happens only after the cartel has thrived for years. But can the same be said of compliance and ethics programs? Do they have a place in the fight against cartels?

6.1 *The nature of cartels*

Here it is important to focus on the nature of these offenses. There are two salient characteristics that tie into any techniques used to control them. First, they are hidden. The perpetrators know they are doing something wrong and work to cover their tracks. This is not always the case, of course. The author has personally experienced business people (from small businesses) describing to him things they had done or were planning to do that would have been price fixing, and these individuals were completely unaware (these were casual discussions, not requests for legal advice). But this seemingly innocent conduct is not the pattern in the cases that make the newspapers and blogs.

The second outstanding characteristic is that the violators are typically senior managers. It is true that even a junior salesperson in a remote location could single-handedly commit a violation, e.g., agreeing with a former co-worker who now works for a competitor on who will handle which customers. But as was noted about “innocent” violations, high-level offenders are now what make up the major, most economically damaging and criminal cases.

How, then, can a company prevent and detect at an early stage a secret, high-level crime/cartel? We can start this analysis by looking at certain misconceptions about programs that would cause one to be skeptical about their value in dealing with cartels. Those unfamiliar with modern programs may mistake a few of the elements in a program for being the entire program – particularly the “paper and preaching” part. This consists of a policy, such as that found in a code of conduct. It may be more sophisticated and be spelled out in detail in a compliance manual. There would also be training. This might be small group discussions with a lawyer, or even lectures to large assemblies of employees.

If programs were nothing more than this, then they would very likely be ineffective against cartels. But then they would very likely be ineffective against any type of misconduct as well. Mere words do not control wrongdoing and they do not constitute a compliance and ethics program.

6.2 *Training*

We will discuss further the types of compliance and ethics program activities designed to deter and ferret out cartel behavior. But even training, which some might dismiss as ineffective because violators already know they are breaking the law, can nevertheless play an important role as part of an anti-cartel compliance and ethics program if, but only if, it is done well.

The first point of note is that training is not simply the transfer of information so that employees know what is covered by the letter of the law; training must also be motivational. Many businesspeople have a vague idea that pricefixing is illegal, but may not have been confronted with the reality of what this means. Effective motivational training will not likely convert the hard-boiled cartel participant, but it might reach the newest member of the cartel who is just continuing what his predecessor told him to do. It may reach the cartel participant who is angry about being passed over for a promotion, or who has a change of heart based on any number of possible personal reasons.

Moreover, as the Canadian Competition Bureau recognized in its guidance bulletin on compliance programs, training is not just for the perpetrators; it is also for the helpers and witnesses¹⁵. Experience with human nature teaches us that it is extraordinarily difficult for people to keep secrets; indeed, when most people say they will keep a secret they seem to mean only that they will try to limit the number of people they talk to about it. Secretaries, travel staff, assistants, subordinates and others often suspect something is “funny,” but only through training do they learn how serious it really is, and that there is something they can do about it. It appears that most people will not willingly go out of their way to report on their friends and colleagues, but if given the opportunity and especially if asked they will talk. Those in the compliance and ethics field have seen this over and over again. It may not seem logical to outsiders, but does seem to be part of human nature.

While it may appear to some that training is just the one-way communications of the compliance message, for those who have done training, especially with small groups on an interactive basis it is much more. In fact, a good training program often takes on elements of a compliance audit and review. An experienced compliance and ethics person familiar with competition law can detect patterns and unusual reactions in the training audience. For example, when the trainer talks about what is a conspiracy, how they are discovered, and what happens to violators, he or she may experience negative reactions from the audience. There may be extreme sarcasm, or panic, or uncertainty, but to the trained eye it is visible. Participants’ questions such as “what if a salesperson were doing x” or, “come on, they don’t really go after these types of cases, do they” can communicate important information that calls for follow ups.

On this point the author can speak from personal experience. As a result of providing actual company training sessions the author has had, more than once, company managers report violations or nascent violations that were surfaced directly as a result of interactive training sessions. These training experiences were not simple lectures, but involved interactive sessions with employees, and the use of dramatic videos to catch employees’ attention. It may well be that lectures in large halls (with the employees engrossed in their I-Phones and Blackberries) do not draw this response; the more intensive (but unfortunately more expensive) small group sessions with opportunities for informal chat with attendees, can surface a broad range of issues.

But if part of the purpose is to reach those who are not principals in a violation, how would staff and others know or suspect something was wrong? Some might believe that it is relatively easy to engage in cartel behavior; a few senior people meet discreetly a few times a year, and the cartel works. But cartels often require either a great deal of trust in competitors who are willing to engage in criminal collusion, or some form of policing. In the marine hose case competitors hired a cartel coordinator. In another case they made visits to competitors’ plants to police production limits. Moreover, effective cartels can produce tell-tale changes and patterns that can catch the attention of those in the company who know how the business had previously been conducted. To implement the cartel it can be difficult internally to control all the other players in the company whose cooperation is necessary to conform to the agreed-upon restrictions relating to such things as sales and production. Salespeople may not understand why they cannot pursue a lucrative deal and related commission; plant people may not see why they must shut down, even as sales have been increasing. They may not know all the facts or have enough information to meet governmental investigation thresholds, but for an in-house compliance and ethics professional it is exactly these types of red flag signals that determine how we allocate internal audit, review and investigation resources. Training, as well as other compliance and ethics program techniques, can reach these people.

¹⁵ In the words of the Competition Bureau, “staff at all levels who are in a position to potentially engage in, *or be exposed to*, conduct in breach of the *Acts*.” Competition Bureau Canada, Corporate Compliance Programs 9 (2010). [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf) (emphasis added).

6.3 *The harder edge*

Those who have not had first-hand experience implementing compliance and ethics programs may believe they are simply paper and formal matters: issue policies and a booklet, deliver a few presentations, and that is the program. But an effective compliance and ethics program must have much more, both to meet the generally accepted standards for such programs and to be effective. In dealing with cartels these aspects of programs are referred to here as the “harder edge” of compliance and ethics. In particular they would include:

- A strong, empowered and independent compliance and ethics infrastructure, led by an executive level chief ethics and compliance officer (CECO) directly responsible to (and removable only by) the board;
- Competition law compliance is integrated into the compliance and ethics infrastructure, not standalone and isolated
- Actual senior management support characterized by action, not just words¹⁶;
- Controls designed to raise barriers to engaging in violations, and even to make violations as close to impossible as a management system can get;
- Audits, monitoring and other techniques targeted to discover violations;
- Systems for employees and others to surface misconduct safely;
- Strong protections against retaliation for those who raise concerns;
- Ongoing evaluations of the implementation and effectiveness of the program;
- Discipline, including anti-scapegoating measures to discipline managers who fail to act to prevent violations and publicity for instructive disciplinary cases;
- Use of incentives to give the program potency; and
- Mechanisms for professional investigations, including root cause analyses to prevent recurrence of violations.

These types of techniques go beyond simply sending messages out to the employees and hoping they do the right thing. They do not depend on trust and good faith. Rather, they use management tools to ensure that people abide by the law.

We could discuss here at length what is involved in each of these techniques. In fact, there is an entire literature on most of these techniques, and they are often covered separately in training for compliance and ethics professionals.

6.4 *Screening*

There is one technique, however, that may deserve some special attention with respect to competition law compliance both because of its potential, and because it is likely never or rarely ever used in companies. This is the technique of screening, or using computer-based statistical analysis. In companies there may be a sense of fatalism about cartel behavior. The author has heard lawyers say, “we trained them, what more could we have done?” There are laments about how a large company could ever know, in its far-flung global outposts, whether a local manager was engaged in cartel behavior. The author believes that

¹⁶ For the author’s views on what executive action could look like, see Murphy, “How the CEO Can Make the Difference in Compliance and Ethics”, 20 *ethikos* 9 (May/June 2007).

the types of methods listed above, if done well, provide a very good avenue for surfacing even hidden misconduct. But there is one more step that can help uncover cartels and other conspiracies. The use of screening can find unusual competitive patterns that would not even be discernable to the unguided eye. But with the right systems and expertise, patterns can emerge. These could include market shares that are unusually stable, margins that are uncharacteristically high, even bidding numbers that raise questions under Benford's law. This technique does not, on its own, find enough information to determine that a violation has definitely occurred, but when used intelligently it can narrow the focus of audits and other detection techniques to allow them to be targeted on a cost-effective basis. Indeed, just the existence of sophisticated detection techniques can act as a serious deterrent to those who would otherwise believe their violations would be undetectable. For more on this technique, see Abrantes-Metz, Bajari & Murphy, "Enhancing Compliance Programs Through Antitrust Screening," 4.5 The Antitrust Counselor 4 (September 2010).¹⁷

7. Are compliance & ethics programs too expensive for small and medium-sized enterprises ("SMEs")?

Often when there is discussion of the role of compliance and ethics programs it is assumed that the place for such programs is only in large companies such as multinationals. Who else could afford the lawyers needed to analyze cases and statutes in order to draft the extensive competition law manuals? Who else could hire partners from leading law firms to present the law to the senior officers? Who else could have expensive legal counsel and economists by their side to determine the appropriate application of difficult economic concepts like barriers to entry and substitutability of demand?

But, in fact, this is one of the most important reasons for distinguishing cartels from other competition law compliance issues. When the issues are clarified and we look at cartel behavior, the "cost" issue takes on an entirely different hue. Here we are addressing fundamentally unlawful conduct without difficult shades of gray. And here we can also see that the issue is not cash, but commitment. Where the senior management believes something like compliance is important in a small business, it is far more likely that everyone who works there will also know this message. They will know it, because they each personally know the CEO and he or she knows them. The cost to the company is not a budget item, it is a personal item – will the CEO and the rest of the leadership step up to the level of commitment needed. In large companies budgets and financial resources may well be key to reaching thousands or hundreds of thousands of employees around the world. CEOs of these companies may not even know the names of all of their subsidiaries, let alone all of the employees. Commitment is also essential, but financial resources necessarily drive the wheels of large organizations.

7.1 *A dollar a day?*

The Society of Corporate Compliance and Ethics (SCCE) is a strong advocate of promoting effective compliance and ethics programs in small businesses. We do not believe that cost is the barrier. In fact, we have published a tract for practitioners on this point, Murphy, "A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs"¹⁸. This document provides on a detailed level the types (and cost – usually \$0) of steps a small and medium-sized enterprise can take to ensure its employees obey the law. The document is based on the commonly-used standards for compliance and ethics programs, including those of the Sentencing Guidelines and the OECD Good

¹⁷ More detail is provided in the same authors' "Antitrust Screening: Making Compliance Programs Robust," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648948

¹⁸ (SCCE; 2010) <http://www.corporatecompliance.org/AM/Template.cfm?Section=Surveys&Template=/surveyform.cfm&survey=DollarCompliance>.

Practice Guidance. But the source of the standards is not the issue; rather, the items included are also fundamental management steps that any competent manager would use to achieve any management objective. Implementing an effective compliance and ethics program is only “impossible” for those business managers who do not want the bother of taking the rules of the road seriously.¹⁹

In response to this thesis, however, one might object that if it is so easy, why do not smaller companies routinely do this? The first response is that having an effective program is never “easy,” because it requires serious management commitment. But it is not something unavailable to these companies for lack of funds. Why is it, then, that SMEs do not generally adopt programs? How can we reach them to recruit them into the fight against cartels?

Here the analysis can start with asking why an SME would take time and energy to address possible violations of the law.²⁰ The life of an SME manager or owner is typically very full. There is the tension and excitement of managing the business. At any given point the very survival of the business can be on the line. While a manager in a large business may think about future plans, promotions, and stock options, the small business owner has to think about whether he or she will make payroll. Will the business make its next production deadline; will it make that big sale that was proposed this week? This can be simultaneously nerve-wracking and exhilarating.

To the SME owner, bureaucracy is an enemy, and nimbleness an advantage the SME has over larger competitors. Bothering with laws, lawyers, and regulations is a distraction from the objective of surviving and beating out the competition. In this environment, from a policy perspective, we need to ask if the threats of big cases, fines and prison terms even reach the SMEs? Do their owners and managers ever read about these big cases? Do they think any of this applies to them, or that any regulator or enforcement authority will even care what they are doing? Typically the SME manager is not hunting for news about the government; he or she is hunting for customers, cost savings, and business advantages. This is why they went into business – to compete and win. Worrying about what might happen or could happen in some remote future pales in comparison to the day-to-day needs and excitement of the small and medium business.

What, then, would reach SMEs? To recruit SMEs it is necessary to meet them where they focus, in the marketplace. Bigger fines and longer jail terms simply do not matter if you do not bother to find out about them and do not think they are at all relevant. Nor will they seek out guides and tools relating to compliance even if free and readily accessible. Why distract management attention from the business, to pursue what is perceived as a bureaucratic diversion. But developments in the marketplace are the life blood of the business person. So what formula would work?

There is certainly room for intelligent experimentation on this mission. The author’s belief is that causing larger companies to make compliance and ethics programs a marketplace factor in their dealings with SMEs is the best strategy. How would this work? Many SMEs hope to sell to the larger companies. Anything that provides a competitive advantage for this purpose matters. If large companies considered the compliance and ethics programs of those bidding and selling to them as a serious competitive factor, this could cause the marketplace to promote programs. For example, large companies could make the existence of a compliance and ethics program a minimum requirement for submitting bids for their business. They

¹⁹ We do not address at all the “cost of compliance”, i.e., the cost to business of following the law, which is beyond the scope of this paper, only the cost of having a program.

²⁰ Here the author is speaking as one who co-founded a small business and who has worked as a board member in a business association of small businesses in the town where he resides.

could make the quality of a supplier's program a factor that counts very specifically in selecting suppliers. There are numerous steps larger companies could take in this regard.²¹

What, in turn, would drive larger companies to do this? Experience in the US indicates that merely suggesting that this would be a noble thing to do falls on relatively deaf ears. The Sentencing Guidelines has contained such a suggestion since 2004, with little if any noticeable response.²² Businesspeople know this advisory language is not considered by prosecutors or others in government in assessing their programs, so it is ignored. What method could be effective? Experience in this context tells us that companies, at least the larger ones that perceive themselves as more vulnerable to government attention, respond to tangible rewards and reasonably specific guidance on what needs to be done. The Sentencing Guidelines demonstrated the use of the carrot and stick, resulting in dramatic changes in the corporate world's approach to compliance programs. How could this lesson be applied?

If the governments that took compliance and ethics programs into account in positive ways – reductions in sentences and penalties, consideration in decisions whether to prosecute, etc. – made it clear that for programs to get credit they had to include outreach to suppliers, this would very likely get substantial and quick results. If standards like the Sentencing Guidelines in the US, the OECD Good Practice Guidance internationally, and program guidance like that provided in the UK by the Office of Fair Trading, make this a fundamental element of an effective program, the track record indicates that larger companies would follow this direction. This, in turn, could offer SMEs the kind of marketplace incentive they live for – a chance to open the sales door to the coveted blue chip market. But if governments do not offer these types of incentives to the larger companies, then there is likely no real leverage and no easy way to motivate SMEs.

8. What different approaches are taken to competition law compliance programs by authorities around the world?

To address the role of compliance and ethics programs in competition law enforcement it is useful to review what enforcement agencies have been doing in this field. The author is not aware of any published studies on this issue, so observations here are based on the author's own experience, research and familiarity with the literature and some agencies' practices.

8.1 The US

In the United States the Antitrust Division has taken the position that compliance programs are not taken into consideration in determining questions of corporate guilt, and are also not considered in determining whether to prosecute companies.²³ This view is confirmed in the US Department of Justice's

²¹ For example, once (but only once) the author had a client provide a workshop for suppliers on how to have their own compliance programs.

²² U.S.S.G. section 8B2.1 Commentary note 2(C)(ii) "As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs." http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf.

²³ Although Division representatives have reported that it is possible for programs to have an effect in enforcement decisions. See Block, "Antitrust Compliance Programs and Criminal Litigation: Myth and Reality," 7 *Antitrust* 10, 10 (1985) (reporting on one case where "a well-conceived and diligently enforced compliance program" had an effect on the Division's decision whether to indict a company for "isolated misconduct.").

US Attorneys' Manual, which carves out an exception from the Department's general policy considering programs in enforcement decisions.²⁴

Under the Organizational Sentencing Guidelines compliance programs are taken into account in determining sentences for corporations.²⁵ But there is a special provision significantly reducing the amount of benefit only in antitrust cases.²⁶ Moreover, in practice no company has ever received a reduction in fines for having a competition law compliance program in the 20 years that the Organizational Sentencing Guidelines have been in effect.

In the Antitrust Division's leniency program, the existence of a compliance and ethics program is not mentioned as a condition to admission to the program. Nor are companies that are admitted into the program required to institute such programs.²⁷

The Antitrust Division itself has not officially issued any guidance on what should be in compliance programs. However, spokespersons for the Division have provided advice²⁸. Representatives of the Division have also participated in continuing legal education programs dealing with compliance programs, explaining that the greatest benefit of a program, in addition to preventing violations, is enabling a company to be the first to report collusion and thus benefit from the leniency program. The Federal Trade Commission did issue a guidance on compliance programs based on a memorandum by Loftus Carson of the Bureau of Competition (February, 1979),²⁹ and the then-Assistant Director of the Bureau of Competition, Daniel Ducore, was quoted as saying in 1996 that for purposes such as compliance with FTC orders:

*“the more a company can tell the FTC about its efforts to keep its nose clean, the more likely the Commission is to see its actions as being in good faith and the more willing it is to permit mitigation, including mitigation down to zero penalties.”*³⁰

The author is aware of nothing official since that time. The FTC has, however, imposed compliance programs in the settlement of some of its cases, and these can contain significant detail. Some Antitrust Division cases have included settlement agreements that require a few compliance program steps, although these tend to be less detailed than is the case for settlement agreements in other areas of the law in cases settled by the US Department of Justice. As an aide for compliance programs, the Division has made available videos of the Lysine conspiracy which practitioners including the author have found useful in training company employees.

²⁴ United States Attorneys' Manual, 9-28.800 Corporate Compliance Programs, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (“In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.”)(No explanation is provided, and no other examples are given.)

²⁵ http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf.

²⁶ Federal Sentencing Guidelines Manual § 2R1.1(d)(2).

²⁷ <http://www.justice.gov/atr/public/guidelines/0091.pdf>.

²⁸ Roberts, “Antitrust Compliance Programs Under the Guidelines: Initial Observations From the Government's Viewpoint,” 2 *Corporate Conduct Quarterly* 1 (Summer 1992); Kolasky, “Antitrust Compliance: The Government's Perspective,” 16 *ethikos* 6 (Sept/Oct 2002).

²⁹ FTC, “Model Antitrust Compliance Audit Program”.

³⁰ Murphy, “An FTC View of Compliance Programs: Good Faith Efforts Can Mean No Penalties,” 4 *Corporate Conduct Quarterly* 53, 66 (1966) (interview by the author).

8.2 *The EU*

In the EU originally enforcement authorities took the somewhat unorthodox approach of giving companies credit for implementing programs after an offense had been found,³¹ subsequently the EU rejected requests for any benefit for having a program. The EU's penalty policy lists several factors that may be considered in determining penalties including financial weakness in the offending company, but there is no reference to compliance programs.³² Thus it appears programs play no role either in decisions to take enforcement action or in determining penalties. The author has been informed by practitioners that EU enforcement authorities do seek compliance program information to use against companies to establish that violations were willful and not negligent.

The EU does not require those admitted to the leniency program to have or institute compliance programs.³³ There is also no official guidance issued by the EU on what should be in compliance programs. The author is unaware of any statements by EU authorities offering guidance on what should be included in programs.

Member countries of the EU generally appear to follow the guidance of EU enforcement authorities in this area. Generally leniency programs do not require participants to institute programs, enforcement decisions are made without reference to the existence of a program, and penalty policies provide benefits for violators in weak financial condition (where a fine could cause a company to go out of business) but not for having a compliance program. However, while this description is generally true, there are exceptions, discussed below, among the member states that the author has reviewed.

8.3 *Other approaches*

It is not correct to conclude, however, that competition authorities consistently leave compliance programs out of the enforcement picture. One particularly interesting case is the Canadian Competition Bureau, which had in 1997 been a pioneer in issuing guidance on competition law compliance programs. More recently the Bureau decided to update its prior guidance and opened the draft for public comment. Based on comment from, among others, the American Bar Association, the Canadian Bar Association and the Society of Corporate Compliance and Ethics, the Bureau issued a quite detailed guide for programs. This Bulletin shares many of the features found in such standards as the US Organizational Sentencing Guidelines and the OECD Working Group's Good Practice Guidance.

The Bulletin also explains how programs may factor into various aspects of the enforcement picture, including decisions to proceed against companies, decisions on the remedies to be imposed, and decisions by courts in looking at companies. It also clarifies an often difficult point about the impact of a violation by a high-level official, providing that while the burden for a company would be more difficult in such a case, there could still be room for consideration of a company's program if it were sufficiently diligent. Unlike other jurisdictions that appear to omit reference to compliance and ethics programs in their approach to leniency for cartel offenses, the Canadians state:

³¹ See 31991D0532, 91/532/EEC: Commission Decision of 5 June 1991 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/32.879 - Viho/Toshiba).

³² Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT).

³³ Commission Notice on Immunity from fines and reduction of fines in cartel cases [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208\(04\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208(04):EN:NOT).

“The Bureau will strongly recommend that an immunity or a leniency applicant implement a credible and effective program using this Bulletin as a guide.”³⁴

In the EU, on paper at least, the Norwegian standard for imposition of penalties varies from the EU standard in permitting a company’s efforts to prevent cartel conduct to be taken into account, particularly if the conduct at issue was the type that a program could have prevented. In determining the penalty consideration is to be given to “whether the undertaking through guidelines, instruction, training, supervision or other actions could have prevented the infringement.”³⁵

In the UK the OFT has previously issued a guide on compliance programs.³⁶ In the past year it has reviewed this guide for possible revision and has opened the process up to public comment. It has also undertaken an extensive study of the subject, seeking input from those doing compliance work in corporations. The OFT has put up for consideration whether it should offer up to a 10% reduction in penalties for companies with diligent programs.

In France the competition authorities chartered a study of the subject of compliance programs. In settlement of cases French enforcement authorities have required the implementation of compliance programs, somewhat similar to the approach of the Criminal Division of the US Department of Justice. To the author’s knowledge the French authority is still considering what role programs should play in penalty decisions, and what kind of guidance to provide regarding what should be included in programs.

In Australia the competition authorities have a long history of actively participating in the development of the whole field of compliance in that country. The ACCC and its predecessor, the Trade Practices Commission, were the drivers of the Australian Standard for compliance programs, AS 3806, and can also be given much of the credit for the formation of the organization that became known as the Australasian Compliance Institute,³⁷ a membership organization dedicated to the compliance field.

The ACCC has provided detailed guides relating to compliance programs.³⁸ And while, on their face, not as incentive-oriented as the Canadians, they do acknowledge that courts may consider programs. It is also very clear that ACCC in resolving cases will require a diligent compliance program.

In this commentary the author has drawn on first-hand knowledge of the circumstances in Australia, participation in filings on the Canadian Bulletin, and review of English language reports on the actions of the French Competition authorities, and has followed and commented on behalf of SCCE to the OFT. For other parts of this discussion the author has relied on publicly available materials issued by the different national authorities and cannot comment on how they are implemented or their continued application.

³⁴ Competition Bureau Canada, Corporate Compliance Programs 15 (2010). [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf)

³⁵ [http://www.konkurransetilsynet.no/en/legislation/Regulation-on-the-calculation-of-and-leniency-from-administrative-fines-/](http://www.konkurransetilsynet.no/en/legislation/Regulation-on-the-calculation-of-and-leniency-from-administrative-fines/)

³⁶ Office of Fair Trading (UK), “How your business can achieve compliance: A guide to achieving compliance with competition law” (March 2005) http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guides/oft424.pdf

³⁷ http://www.compliance.org.au/www_aci/.

³⁸ Australian Competition and Consumer Commission, Corporate Trade Practices Compliance Programs (Nov. 2005). <http://www.accc.gov.au/content/item.phtml?itemId=717078&nodeId=0de4ca0a69fe9dde037bf81391b2cda&fn=Corporate%20trade%20practices%20compliance%20programs.pdf>.

For Singapore the Competition Commission has published a penalty policy, and included the existence of a compliance program as a factor. The brief definition of a compliance program suggests that only serious efforts are to be considered.

“2.12 Mitigating factors include:

... .

- adequate steps taken with a view to ensuring compliance with the section 34 prohibition or section 47 prohibition, for example, existence of any compliance programme;*

... .

2.13 In considering how much mitigating value to be accorded to the existence of any compliance programme, the CCS will consider:

- whether there are appropriate compliance policies and procedures in place;*
- whether the programme has been actively implemented;*
- whether it has the support of, and is observed by, senior management;*
- whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and*
- whether the programme is evaluated and reviewed at regular intervals.”³⁹*

The Israel Antitrust Authority has issued “Model Internal Compliance Program,” a guidance document on compliance programs covering such important points as the need to have the board of directors appoint the compliance officer. The guidance document explains that under Israeli law the diligence reflected in a compliance program would be part of a due diligence defense for officers who could otherwise face liability for a corporate offense. There is also an affirmative incentive offered to companies with programs:

*“First, the IAA will give **priority** to answering questions regarding its areas of expertise which are asked by corporations that carry out an internal compliance program. This priority will take the form of a relatively shortened schedule for providing ongoing assistance to these corporations as compared to the schedule for other corporations.”⁴⁰*

In India the Competition Commission issued “Competition Compliance Programme for Enterprises” which both explains the law and provides detailed how-to guidance on programs. For example on auditing it advises:

“While auditing the procedures, documents and emails of each and every employee may be a herculean task it would be always possible to identify those individuals who are most at risk and to conduct an audit of a “snap shot” of their emails on a given day.”⁴¹

It also advises not to do the program in isolation, but that:

“It would be advisable to integrate the competition “Compliance Programme” into the overall compliance programmes of the enterprise.”⁴²

³⁹ http://app.ccs.gov.sg/cms/user_documents/main/pdf/CCSGuideline_Penalty_20071033.pdf

⁴⁰ Israel Antitrust Authority, Model Internal Compliance Program 7 (Nov. 1998), <http://www.antitrust.gov.il/Files/HPLinks/Internal%20Compliance.pdf>.

⁴¹ Competition Commission of India, Competition Compliance Programme for Enterprises 26 (June 2008) http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppsta7Rf00.

Like the Israeli guidance it recognizes the role of the compliance officer as an essential element. And without additional detail it offers the following comment on the value of programs:

“The existence of a strong Compliance Programme reflecting the eagerness of the management to comply may temper the severity of the punishment that may be meted out for violation.”

*“The benefits of compliance include the following
Helps avoid fines or mitigate the level of the fine”⁴³*

For those considering this policy issue it may be worthwhile to commission a more thorough-going review of the topic, to see what other authorities have done in this area, what the experiences have been, and what options might be suggested by those experiences.

9. Are there possible insights from approaches taken to compliance and ethics programs in other areas of the law?

There may be potential to learn more about government approaches to compliance and ethics programs from studying the experiences of competition law enforcement authorities, but compliance and ethics is not a field confined to this one area of the law. Rather, these programs are used to control corporate and other organizations’⁴⁴ conduct across a broad spectrum of legal areas. While each area of the law may have its own distinctive elements, the components of an effective compliance and ethics program are remarkably similar no matter what legal area is involved. This is not surprising given that effective program steps are essentially adaptations of management techniques that would apply in any organization. The emphasis and techniques vary, but the fundamentals remain essentially the same. Given this observation there may be much potential to learn from the experiences of enforcement authorities in other areas of the law in considering how to address the issues that arise in the area of compliance and ethics.

9.1 US DOJ Criminal Division

In the US, the Department of Justice is divided into major divisions, including the Antitrust Division. That Division has exclusive jurisdiction within the Department for all antitrust law matters. But in general for other criminal matters the Criminal Division is responsible for enforcement. The Criminal Division, and particularly the Fraud Section, has responsibility for criminal enforcement of the Foreign Corrupt Practices Act. (The Securities and Exchange Commission also enforces the FCPA.)

The Department of Justice, in its guidance to the US Attorneys’ offices around the US, has instructed them to consider the existence of a compliance program in all decisions on whether to prosecute a company⁴⁵,

⁴² Competition Commission of India, Competition Compliance Programme for Enterprises 32 (June 2008) http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00.

⁴³ Competition Commission of India, Competition Compliance Programme for Enterprises 15-16 (June 2008) http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00.

⁴⁴ Compliance and ethics programs have even been adopted by government agencies. In the US, both the FBI and the SEC have compliance programs. Rutgers University has a center dedicated to the study of governmental compliance and ethics programs, the Rutgers Center for Government Compliance and Ethics, <http://rcgce.camlaw.rutgers.edu/>.

⁴⁵ Except for antitrust cases.

and has provided some detail on how to assess programs.⁴⁶ Similarly, enforcement officials in the Department's headquarters have been public about the fact that programs will matter in enforcement decisions.

The Department has also provided guidance on what should be in compliance programs through its settlement procedures.⁴⁷ When companies voluntarily disclose criminal violations they will receive, as appropriate, reductions in their penalties (although unlike the Antitrust Division there is no guarantee of complete leniency). But in settling cases companies are required to reform their practices and implement diligent programs. The Criminal Division does not leave this to chance or the company's own judgment; there are specific program elements spelled out by the Division (in FCPA cases drawing on the OECD Good Practice Guidance), and often a monitor required to ensure the program is implemented properly.

Thus programs matter both at the beginning of cases and at their end, and it has been very clear that only serious efforts at compliance will be credited. Recently the Criminal Division has indicated that it will consider providing even more guidance on what types of programs will be given credit, so that practitioners can use this guidance in convincing managers to implement more effective programs.

In the United States a number of other regulatory and enforcement authorities have pursued similar policies to promote compliance and ethics programs. The Criminal Division is discussed here because it appears to be the closest analogy to the Antitrust Division.

9.2 *World Bank Leniency program*

A second interesting model comes from the World Bank, which may have the only full leniency program in the field of anti-corruption enforcement. Those performing contract work for the World Bank who voluntarily disclose to the Bank their involvement in corruption can avoid debarment through the Bank's leniency program. But unlike the leniency programs in the competition field, the World Bank requires all those admitted to the program to implement compliance programs. And like the US Criminal Division, the Bank does not trust those admitted to do this; the programs must be monitored.

"2. Program Summary

The VDP gives firms, other entities, or individuals who have entered into or been a party to contracts related to projects financed or supported by the IBRD, IDA, IFC, or MIGA the opportunity to confidentially partner with the World Bank and:

- a. Cease corrupt practices;*
- b. Voluntarily disclose information about Misconduct that is sanctionable by the Bank (e.g., fraud, corruption, collusion, coercion) by conducting internal investigations at the Participant's cost; and*
- c. Adopt a robust "best practice" corporate governance Compliance Program which is monitored for 3 years by a Compliance Monitor.*

In exchange, the Bank does not publicly debar Participants for disclosed past Misconduct and keeps their identities confidential.

⁴⁶ United States Attorneys' Manual, 9-28.800 Corporate Compliance Programs, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

⁴⁷ See, e.g., *US v. Metcalf & Eddy, Inc.*, CA No. 99CV-12566-NG (D. Mass. Dec. 14, 1999), Consent and Undertaking Of Metcalf & Eddy, Inc., offers examples of the types of program steps required by the Fraud Section. Recently these compliance program requirements have been enhanced by including language from the OECD Good Practice Guidance. See, e.g., *In re Noble Corporation, Non-Prosecution Agreement* (Nov. 4, 2010), Attachment B <http://www.justice.gov/criminal/fraud/fcpa/cases/noble-corp/11-04-10noble-corp-npa.pdf>

If, however, a Participant does not disclose all Misconduct voluntarily, completely, and truthfully; continues to engage in Misconduct; or violates other material provisions of the Terms & Conditions of the VDP, that Participant faces mandatory 10-year public debarment in accordance with regular World Bank procedures.”⁴⁸

9.3 **OECD Working Group on Bribery**

A third, international model, is offered by the OECD Working Group on Bribery, which is dedicated to fighting corruption globally. As part of these efforts the Working Group conducted a public review of how to recruit the private sector to the fight against bribery, and focused on the role of compliance and ethics programs. The 38 national signatories to The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997, in 2009 issued a recommendation to its members focused on pursuing this mission.⁴⁹ It states that the Working Group:

*“III. **RECOMMENDS** that each Member country take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas:*

... .

v) company and business accounting, external audit, as well as internal control, ethics, and compliance requirements and practices, in accordance with section X of this Recommendation;

... .

*X. **RECOMMENDS** that Member countries take the steps necessary, taking into account where appropriate the individual circumstances of a company, including its size, type, legal structure and geographical and industrial sector of operation, so that laws, rules or practices with respect to accounting requirements, external audits, and internal controls, ethics and compliance are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business, according to their jurisdictional and other basic legal principles.*

... .

Internal controls, ethics, and compliance

Member countries should encourage:

i) companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II hereto, which is an integral part of this Recommendation;

ii) business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular small and medium size enterprises, in developing internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II hereto;

⁴⁸ The World Bank, Voluntary Disclosure Program, http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.

⁴⁹ OECD, Further Recommendations for Combating Bribery of Foreign Public Officials in International Business Transactions http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation_Web_English.pdf.

iii) company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery;

iv) the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards;

v) companies to provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting;

vi) their government agencies to consider, where international business transactions are concerned, and as appropriate, internal controls, ethics, and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits.”

Here all 38 countries have endorsed the importance of compliance programs as a weapon against illegal conduct, and called for the signatory countries to take actions to promote such programs. Governments are advised to consider these programs in their “decisions to grant public advantages” including licenses and public procurement. In addition, the Working Group issued a set of 12 principles called the Good Practice Guidance, to assist companies in designing effective programs to combat bribery.⁵⁰ The 12 principles of the Good Practice Guidance are mostly familiar points to compliance and ethics professionals because they reflect common management principles. The author has provided, in Appendix I, an edited version of the Good Practice Guidance that could be used for anti-cartel compliance and ethics programs.

As noted, the US Department of Justice’s US Attorneys’ Manual distinguished antitrust enforcement from other areas of the law, but does not provide any further analysis. The model in fighting corruption appears to suggest an important role for the private sector, and also a role for government in promoting company compliance and ethics programs. The author, as a practitioner with experience both in competition law and anti-corruption law, has not seen any distinguishing characteristic that would explain the differences in approach to compliance and ethics programs between the law related to cartels and the law relating to the other forms of conspiracies and fraud. If there is a strong difference it would be very helpful for competition law authorities to provide an analysis of those differences so that practitioners can understand the differences in approach and explain them to company managers.

10. How can governments practically assess how diligent a compliance and ethics program really is?

When enforcement authorities consider the role and significance of compliance and ethics programs, they must then address a very difficult question: how does one distinguish diligent, good faith programs from sham ones? This is extremely important for all concerned, because mistakes in this assessment would allow malefactors to escape, and can discredit the whole field of compliance and ethics. Compliance and ethics professionals, who want their companies to take the function seriously and implement diligent

⁵⁰ OECD, Further Recommendations for Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II
http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation_Web_English.pdf.

programs, will in the long run lose out if government fails in this mission. Moreover, for compliance and ethics professionals, much of their authority and standing turns on the credibility of government as an evaluator of programs.

10.1 *Burden of proof*

To address this task there are two essential pieces to the picture; without these the process is very likely to fail. The first is burden of proof and the second is expertise. On the burden of proof it is critical that the burden always be on the company. It would be extremely difficult and time-consuming for government to prove the absence of a program. Rather, the company which is claiming that it has a program should be the one to prove that the program was real and creditworthy. In a context where the government is exercising discretion in its determination of how to treat a company there can be great flexibility in how the process goes forward, and how high the standard of proof would be.

10.2 *Expertise*

The question of expertise also calls for careful consideration. As noted above, the field of compliance and ethics is a multi-disciplinary field, and is distinct from the practice of law. The fact that an enforcement lawyer may have years of experience investigating and prosecuting cases does not mean that he or she will have the expertise to assess a program and to spot its flaws. But for an experienced compliance and ethics professional there are definite questions and techniques to get to the truth. As in any field, to those outside it can appear murky; for those in the field there are steps that can get to the real picture.

The author has had the opportunity to participate in presentations and training for enforcement officials on assessing programs, and along with a colleague has previously been retained by a US Attorney for exactly this purpose. In the latter case a company subject to criminal prosecution was given the opportunity to present the facts of its program and we, as outside professionals, conducted the review and reported our conclusions back to the prosecutors. The company agreed to this process and paid the expenses.

For a training presentation to the US Securities and Exchange Commission's FCPA Task Force the author produced a series of questions that could be asked of a program, along with an analysis of what would constitute a sham, what would meet the minimum standards, and what factors would be clear signals of strong programs. Similar materials could readily be provided for any competition enforcement authorities interested in this issue. For example, in Appendix II the author has provided sample questions that can be asked of any company employee in the course of an investigation. These are fairly simple questions that can lead to very rapid initial assessment of a company's program, even in the absence of formal presentations by a company. In order to keep this paper reasonable in length the author has not included more extensive materials on how to conduct program assessments, but is willing to do so for anyone wishing to have more guidance on this topic.

For any government authority interested in this issue, perhaps the most efficient approach is to designate, at least initially, one expert in the unit who would become familiar with compliance and ethics programs. This individual could keep current with developments in the field, help develop tools to assist in conducting program assessments, and handle or advise on all matters relating to compliance and ethics programs including assessments.

11. How can governments promote effective compliance & ethics programs?

As indicated in the examples above, effective company compliance and ethics programs have been recognized by policy makers as a useful tool in the fight against corporate crime and wrongdoing. This

leads to the questions whether and how government can promote such programs, and how to promote programs that actually work.

11.1 Will businesses do this on their own?

If we accept that programs have value, even if they may also need to be enhanced, the next question is whether government has a role to play. There are certainly some in the business community who believe that companies can and do implement programs because it makes business sense, and/or is the right thing to do. For these optimistic people government action is not necessary; all that is needed is to make the “business case” and appeal to the better nature of business people. The author is not among these optimists and has seen mostly weak responses to such appeals. If programs were simply a response to normal business impulses then excellent programs would arise *sua sponte*. Managers may say they do this, but the author has for the most part not seen it happen and the history of the development of compliance and ethics programs provides little support for the thesis that good management intentions will suffice. Nor will they drive programs to use increasingly effective crime prevention and detection methods; it may indeed be the right thing for managers to do, but if it has not happened spontaneously by now there is little reason to believe it ever will.

11.2 Will businesses do this in response to enforcement?

A second theory is that government need only apply a large enough stick, and companies will be frightened into finding and implementing the most effective, innovative methods to police themselves. When companies become the direct targets of threatening and embarrassing government enforcement action there certainly do seem to be eruptions of compliance activities. But does this actually work and is it a complete solution? It appears that there are a number of currents that undercut this approach. People in businesses and in organizations in general seem to have an astonishing ability to distinguish other companies and situations from their own. The fact that a competitor may have been prosecuted may nevertheless not arouse a second competitor to take preventive steps. Company A may have faced investigations and suffered scandals, but to the managers in Company B this is probably because “those A managers are just stupid enough to make those mistakes; but we are too smart for that.” Until the wolf is actually at the door, business people are often in denial, or do not even hear the message the government is sending out. As discussed above, there is also the fact that enforcement, by its nature, always occurs after the crime is committed and the victims have suffered. Enforcement may work for getting managers’ attention, but only after the harm is done.

Finally, there are often limits to institutional memory. Right after the shock of the enforcement action, previous non-believers now become true believers. All managers swear a mighty oath never to sin again. But a few business cycles later, the formerly empowered compliance officer is now reporting to a junior lawyer in the legal department, and the competition law training is now confined only to those poor souls unable to escape. With no other active encouragement, with no monitoring, with no other specific guidance, short-term enforcement hits can remain just that – short term. Again, the author wants to be careful about generalizations. While what is described here is the general pattern the author has observed, there are always exceptions. Perhaps the most notable was the long term impact on GE of being the target of the Electrical Equipment Conspiracies prosecution; this appears to have lasted for generations. Ironically, the penalties imposed on GE would appear trivial today; yet massively larger penalties imposed in recent years do not always seem effective in preventing recidivism in the same company.

11.3 Why would companies adopt strong and durable programs?

What does cause companies to implement programs that are designed to be effective and enduring? Here the experience with the US Organizational Sentencing Guidelines is a highly useful guide. Prior to

the issuance of the Guidelines in 1991, there was very little sense of compliance and ethics as a field of study, and there were few if any practitioners who would have described themselves as compliance and ethics specialists.⁵¹ In most areas and for most purposes, compliance was about sending a message out to employees and hoping that some of it had an impact. “Compliance” was the exclusive domain of lawyers; “ethics” was a quasi-mystical concept for a few idealists who believed companies should be values oriented. None of this seemed to work particularly well. Compliance was also practiced almost exclusively in silos; environmental compliance people had no reason to talk with antitrust compliance people. Those fighting foreign corruption were on a different plane from those concerned with protecting consumers.

But in 1991 the Sentencing Commission issued standards for sentencing of organizations in federal cases that changed all this. It provided that corporate sentences would be reduced under certain circumstances, including cases where companies had previously implemented effective programs to prevent criminal violations. Compliance, for almost the first time, was treated as a specific field. The Commission followed a formula that had remarkable success: it set a flexible but very practical formula for determining whether a program was effective (the seven steps), and it offered a commitment for those companies that followed that formula. The impact has been electrifying. Since that date companies and enforcement authorities around the world have built on this standard and the model of approach. Whereas previously programs were typically confined to a few lawyer-designed modest steps, companies now must be committed to meaningful management steps. For example, a program that does not include audits, does not impose discipline for managers’ failure to take reasonable steps to prevent and detect violations, and does not have serious managerial oversight, simply receives no credit.

Interestingly, in the antitrust field, exactly this same formula is what drove the success of leniency programs. While the Antitrust Division had had a somewhat weak disclosure program prior to 1993, as soon as it shifted to setting an understandable and practical standard for leniency, and added a guarantee of better treatment, the program took off with astonishing success.

Based on these two dramatic successes, following the same formula, the author posits that nothing will work as effectively as this simple, incisive formula: set forth a practical standard and offer a commitment. The extremes of gentle appeals to good will and enormous sticks and corporate capital punishment do not have this record. The enforcement stick can even come with unwelcome collateral damage to employees, suppliers, customers and other constituents, and even to marketplace competition by removal of a competitor; this reality is apparently evidenced by those competition law enforcement authorities who reduce penalties for financially weak violators.

Should governments act to promote compliance and ethics programs? In the author’s experience government pressure to implement effective programs is what drives corporate behavior. And increased and pointed pressure will be needed to cause companies to make these programs more effective. There is certainly an established track record of government having successfully started down this track, but there is also a great deal more needed to maximize these programs.

If government is the essential driver, and if compliance and ethics programs have the potential to be effective in preventing and detecting cartels at an early stage, can competition law enforcement authorities assume that initiatives in other parts of the legal system will achieve the desired results, as long as they continue the current enforcement campaigns? Or in words more familiar to economists, can competition law authorities benefit as free riders on the actions of other governmental authorities fighting corruption, fraud and other violations of public policy?

⁵¹ The author, with Rutgers University Professor Jay Sigler, wrote what is probably the first book on compliance programs generally in 1988 ([Interactive Corporate Compliance: An Alternative to Regulatory Compulsion](#) (Greenwood Press; 1988), and is addressing this topic from personal experience.

Again, looking at the track record, it appears highly unlikely that enforcement authorities unfamiliar with competition law will promote the types of programs that would have maximum effectiveness in fighting cartels. There is even the distinct possibility that resources, innovation and empirical work will be redirected into other compliance areas, with only incidental benefits to competition law compliance. (The author suspects, but cannot practically determine, that this is in fact happening, and that more compliance resources are currently devoted to other areas such as anti-corruption, at least in those jurisdictions where government ignores competition law compliance and ethics programs.) If the competition law enforcers do not devote attention to this field and do not take meaningful actions to promote programs designed to fight cartels, the author is not at all optimistic about the results from abandoning the field to initiatives by others not familiar with cartels, such as the OECD Working Group on Bribery. If prevention of cartels is the objective, then who better to lead this fight than those whose dedicated mission is to eradicate this form of theft?

11.4 *How can enforcement authorities promote more effective competition law programs?*

If competition law officials do believe programs are a useful tool in fighting cartels, or still need to consider the viability of taking action to promote programs, an essential question is what can enforcement authorities do specifically to promote programs? On this point Appendix III provides a list of possible options. This list was originally submitted by the author to the OECD Working Group on Bribery, but for the most part the options listed there could be used in most areas of compliance including competition law. Appendix III makes clear that far more can be done than simply telling companies they need programs or giving them a complete and unwarranted pass for having even anemic programs.

11.5 *Offering guidance to companies.*

In the range of options, one that is relatively obvious is to offer advice to companies on what should be in programs. Is this an effective and viable option? The options range from giving absolutely no guidance, to giving guidance with the caveat that programs do not matter to the government, to giving practical advice that builds on existing standards like the Sentencing Guidelines. With the availability of excellent core standards such as the Working Group on Bribery's Good Practice Guidance, it is now much easier to build on those, adding extra insight appropriate for attacking cartels.

What will industry do with this guidance? Here there is a useful and familiar analogy – the way enforcement authorities treat company compliance programs. Real programs that use management tools and reflect senior executive support get a response. Sham programs that are no more than talk get no respect. The same is true for government “programs” offering advice to companies. If it is just talk there is little reason to expect rational managers to respond. If promotion of compliance programs by government is nothing more than talk, then government has no real leverage in getting companies to enhance their programs. If program guidance is actually backed up with meaningful action, however, then the regulated community will respond. Sham programs do not count – to government or to management. Meaningful, practical programs get results.

Some in the enforcement community may be concerned that any guidance on programs could be used against the government. Will business people claim “You told us this was what we were supposed to do; how can you now prosecute us after we followed your advice?” No litigation lawyer wants to hear this. But there are several responses to this. One is to have the types of caveats lawyers do very well, for example noting that the any guidance provided is not legally binding on the enforcement authority, and that the facts of each case determine what is appropriate. It is also helpful for this purpose, and also for practical reasons, that the government not try to give detailed rules on programs; it is better to use the Sentencing Guidelines and the Good Practice Guidance's approach – important, practical guidance and principles, but not micro-

managed blueprints and checklists. Also, it should remain clear that all matters relating to compliance and ethics programs are subject to the company's carrying the burden of proof.

There should be no mistake, however, that the objective is not simply to have more company "programs" regardless of how well they work. Poor programs simply waste corporate resources and the time of enforcers in reviewing them. The objective needs to be development of programs that are serious and effective. Is this something government can do? Can government get companies to institute no-nonsense and sometimes intrusive programs that can prevent and detect violations at an early stage? It is not easy, but the answer is "yes." In fact, government may be the only one that can achieve this result.

11.6 *The rationale for carrot and stick*

The formula is the simple one discussed above: make a commitment and provide a useful set of standards. A combination of carrot and stick is needed. Enforcement must be tough and a credible threat. But threats alone simply do not drive effective preventive efforts, and certainly do not drive enduring programs. The carrot – the use of incentives – does get the attention of management and corporate boards. Why is this so? There could certainly be an enormous amount of debate and analysis on this topic, but here is one simple analysis. Fear is not the only motivator in business and is probably not even the most important one. But even if it is, the fear of the remote threat of enforcement and penalties will almost always be more distant than the immediate threats posed by business circumstances. If the only factor driving program development is the perceived remote threat of a large fine, this will not drive companies to devote the management attention necessary to institute strong programs. And this analysis does not even take into account the reality of large, publicly-traded firms. With respect to fines, managers in these companies arguably pay the fines with other peoples' money (the shareholders) and when they make the payment are immediately rewarded in the stock market with a jump in the share price for removing the uncertainty of governmental enforcement. One-off events generally do not affect the ongoing price of stocks. So unless the fine is enough to kill the business and thus likely reduce competition (and penalty policies frequently are designed to prevent this), the expected deterrent effect is remarkably diminished.

If the senior managers do not face imprisonment or personal, non-reimbursable fines, they may be less deterred by the penalty structure; but more to the point, government actions typically appear more remote than immediate marketplace threats. Moreover, even if individual managers face imprisonment as is the case in the US and some other jurisdictions, this also can be diminished in impact for similar reasons:

- the enforcement threat is inherently remote when compared to day-to-day events and business threats;
- outside threats appear remote because of the insular nature of large organizations; and,
- the threat is often diminished by the apparently common phenomenon of white collar criminal offenders simply believing they are too smart to get caught.

None of this is to say that penalties are inappropriate, but just that they are frustratingly limited in the context of organizational crime.⁵²

In contrast, effective compliance programs are immediate in their impact on everyone in a corporation, not remote like government and other outside forces. If the program, led by an executive level chief ethics and compliance officer, is empowered, connected, independent and professional it can do internally what the government attempts to do externally, but with much more presence, credibility and organizational insight. Internal investigators do not need probable cause, they do not have a legally-

⁵² See Stone, Where the Law Ends: The Social Control of Corporate Behavior (Harper; 1975).

dictated burden of proof, and they do not need legal process to review the conduct of businesspeople. But what compliance people often lack is power. For this, the government can shift the balance.

11.7 Government leverage

Government cannot empower compliance people by mere words. But if government makes it clear that compliance programs matter, then compliance people take on a real importance. It is at this point that government can ratchet up the quality of compliance programs. If government leaves no doubt, for example, that companies with no empowered compliance officer, no real auditing, and no effort to detect cartels, will, in turn, get no credit, companies listen. The reason they listen is that their internal compliance and ethics professionals deliver this message from the government to them, and help make it clear what needs to be done. As a compliance and ethics professional who has done this for decades, it has consistently been my experience that this government leverage is a powerful tool.

What tools does government have at its disposal? In Appendix III we have provided an inventory of possible techniques. The possibilities are quite flexible, and certainly call for experimentation. Some techniques will appeal more to certain constituencies than others. For example, if compliance and ethics programs offer any form of incentive relating to litigation and penalties, government can count on the lawyers to bring this message to all their clients. Positive incentives relating to expanded business opportunities may appeal more to business managers. The potential is enormous. However, just as there were strong skeptics when the US Antitrust Division first initiated its enhanced leniency program and tested out the “commitment/reasonable standards” formula, so too there are likely to be skeptics when this same approach is applied to promote internal corporate self policing. But as was true for the leniency program, the threat of cartels deserves the best prevention and detection methods that we can devise.

12. What further steps might be considered?

For those interested in recruiting the private sector into the fight against anti-competitive and collusive conduct, there are many models of approach to consider. There are some steps that could be taken that are relatively simple and straightforward and require little commitment. Some are simply exploratory to gain more background and perspective on the field. Others are directed toward finding solutions for specific questions. The following options are offered for consideration by the OECD collectively, and/or by individual members and the EU.

- Establish an OECD working group on recruiting the private sector to the fight against cartels through compliance and ethics programs.
- Individual country members can designate a compliance and ethics expert/liaison in their competition law enforcement agency.
- Commission a study of what companies actually are doing in their competition law compliance and ethics programs, with verification of the information. Possible sources include academic institutions and compliance and ethics professional organizations.
- Form a Working Group to address methods for reaching small and medium-sized enterprises (SMEs). Because this can be a challenge that cuts across different legal areas, consider pursuing this jointly with other enforcement bodies and agencies. Also consider including other types of governmental agencies that deal with SMEs and private sector organizations, including possibly some that represent SMEs.
- Issue a competition-law focused guidance on compliance and ethics programs similar to the OECD Working Group on Bribery’s Good Practice Guidance.

- Develop model tools/guides to assist enforcement agencies in assessing company compliance and ethics programs in the cartel area.
- Commission a more comprehensive study of how competition law authorities have been approaching compliance and ethics programs.
- Stage roundtable discussions with representatives of the private sector regarding anti-cartel compliance and ethics programs, to establish a dialog. These should include those who do the day-to-day work, not necessarily the defense litigation bar.
- Member countries can hold public hearings/workshops on compliance and ethics programs, to learn more about what can and should be done in these programs to make them more effective.
- Consider testing out the World Bank model in corporate leniency programs, requiring those admitted to such programs to institute compliance programs and to have the programs monitored.
- Solicit those interested in compliance programs to become consultative partners to any working group on compliance and ethics programs. SCCE has this role in the OECD Working Group on Bribery's programs on the role of the private sector.
- Establish an OECD Competition Law compliance and ethics network among enforcement agencies and designated officials with interest or responsibility related to private sector compliance and ethics programs.

13. What sources are available to learn more about compliance and ethics programs?

To find additional guidance in the field of compliance and ethics it is essential to start with an understanding of what the field is not. It is not the practice of law. It is not a simple matter of lawyers analyzing cases and then responding to client requests for advice. Rather, it is a multidisciplinary field that addresses this question: how do we assure that those acting for organizations act ethically and legally. In a sense, this field translates the legal advice into management action.

Compliance and ethics draws on a number of fields, including communications, human resources, auditing, motivational theory, organizational dynamics, ethics, adult learning, statistical analysis, information technology, risk and law. One cannot be effective in this field simply by focusing on law or the literature of law. A thorough understanding of the statutes, cases and legal interpretations of competition law are just as likely to mislead a compliance program manager as they are to be helpful.

The SCCE has available on its web site information about resources in this field at www.corporatecompliance.org. There is also an SCCE social network where those interested in compliance and ethics can raise questions and exchange resources. This is open to all viewers; those wishing to file comments and resources are required to register, but there is also no charge for this. SCCE provides a four-day Academy on compliance and ethics practice, as well as shorter programs, webinars, books and a magazine.

For those interested in the range of actions that can be taken in a compliance and ethics program, the author has written, 501 Ideas for Your Compliance and Ethics Program: Lessons from 30 Years of Practice (SCCE; 2008). In a book co-authored with Jeffrey Kaplan, the authors have provided a bibliography of compliance resources in Chapter 12, Appendix 12-B, Kaplan & Murphy, Compliance Programs and the Corporate Sentencing Guidelines (1993 & ann'l supp; Thomson/West). The author is also willing to provide additional bibliographical references on request.

APPENDIX I

Note: The following is an adaptation of the OECD Working Group on Bribery's Good Practice Guidance on fighting corruption. This version has been altered to address the fight against cartels. The edits were by Joe Murphy, and are not from the Working Group on Bribery.

Good practice guidance on ethics and compliance programs to fight cartels

This Good Practice Guidance acknowledges the relevant findings and recommendations of the Competition Division, Directorate for Financial and Enterprise Affairs in its ongoing programme to combat cartels; contributions from the private sector and civil society through the Competition Division's consultations; and previous work on preventing and detecting cartels by the OECD as well as international private sector and civil society bodies. It also acknowledges the groundbreaking work of the Working Group on Bribery in International Business Transactions in developing a guidance for the analogous fight against foreign bribery.

Introduction

This Good Practice Guidance (hereinafter "Guidance") is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting cartels, and to business organisations and professional associations, which play an essential role in assisting companies in these efforts. It recognises that to be effective, such programmes or measures should be interconnected with a company's overall compliance framework. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting cartels.

This Guidance is flexible, and intended to be adapted by companies, in particular small and medium sized enterprises (hereinafter "SMEs"), according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.

A) Good Practice Guidance for Companies

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting cartels should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the cartel risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.

Companies should consider, *inter alia*, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting cartels:

6. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting cartels;
7. a clearly articulated and visible corporate policy prohibiting cartel behavior;
8. compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the company;
9. oversight of ethics and compliance programmes or measures regarding cartels, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;
10. ethics and compliance programmes or measures designed to prevent and detect cartels, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, *inter alia*, the following areas:
 - i) pricefixing;
 - ii) market and customer allocation;
 - iii) bid rigging;
 - iv) collusive restrictions on production; and
 - v) collusion regarding other possible areas of competition.
11. ethics and compliance programmes or measures designed to prevent and detect cartels applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, *inter alia*, the following essential elements:
 - i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;
 - ii) informing business partners of the company's commitment to abiding by laws on the prohibitions against cartels, and of the company's ethics and compliance programme or measures for preventing and detecting such cartels; and
 - iii) seeking a reciprocal commitment from business partners.
12. a system of internal controls, compliance audits, monitoring, and other steps reasonably designed to detect and reduce the opportunities for collusive conduct and cartels;
13. measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding cartels, as well as, where appropriate, for subsidiaries;

14. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programmes or measures against cartels, at all levels of the company;
15. appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against cartels, and the company's ethics and compliance programme or measures regarding cartels;
16. effective measures for:
 - i) providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations;
 - ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and
 - iii) undertaking appropriate action in response to such reports;
17. periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting cartels, taking into account relevant developments in the field, and evolving international and industry standards.

B) Actions by Business Organisations and Professional Associations

Business organisations and professional associations may play an essential role in assisting companies, in particular SMEs, in the development of effective internal control, ethics, and compliance programmes or measures for the purpose of preventing and detecting cartels. Such support may include, *inter alia*:

1. dissemination of information on issues related to cartels and collusive conduct, including regarding relevant developments in international and regional forums;
2. making training, prevention, due diligence, and other compliance tools available;
3. general advice on diligence in carrying out compliance and ethics programmes; and
4. general advice and support on resisting opportunities for collusive conduct.

APPENDIX II

Sample Assessment Questions

The following are sample questions for the purpose of assessing a company's compliance and ethics program to be asked of company employees in the course of an investigation:

1. What does the person know about the company's compliance and ethics program (remember, each company may use its own name for the program, e.g., integrity, ethics, business practices, etc.)
2. Who was the compliance officer? If people don't know this, especially those at executive level, that tells you something very important about the program's lack of impact.
3. Did they have a code of conduct? Did the person ever read it? Can the person remember anything at all about it?
4. Was there a system for reporting concerns? It is not important at all that anyone actually memorize the number, as long as they knew there was a system for bypassing local management if needed.
5. Was there a system for getting advice in the risk area at issue in this case? The traditional provision of corporate legal services can be a key part of compliance, especially in certain complex areas. If there is an available business unit lawyer who can provide advice on competition law, this is an important sign of commitment to compliance, even if the person is not formally designated as part of the compliance program. But it is useful to distinguish just having a business or deal lawyer from one whose focus is ensuring that people follow the rules in competition law.
6. Did the person have training on the risk area? If they don't remember if they had the training then that is about the same as having no training.
7. Was there anything in the person's annual assessment, evaluation or objectives related to compliance and ethics? Again, if they don't remember that pretty much tells you it was not taken seriously.
8. Did the person's boss/supervisor ever say anything about the code of conduct or compliance? Did the boss ever say anything about compliance related to the area under investigation?
9. Did the person personally know anyone associated with the compliance and ethics program? The better, more serious programs will have local representatives in the business units. These don't have to be full time, but compliance should be a serious part of what they do, and the people in the business unit should at least know the person is there.

APPENDIX III.

How Government Can Promote Compliance and Ethics Programs

By Joe Murphy, CCEP

Here is a list of things governments can do to promote effective compliance and ethics programs. There is simply no question: when governments become serious about this they can make it happen:

1. Take effective programs into account in decisions to prosecute.
2. Offer a reduction in penalties for those with effective programs.
3. Publicize the actual benefits given to companies with good programs.
4. Use practical, flexible standards in assessing programs.
5. Publish a strong governmental policy favouring effective compliance and ethics programs as in the public interest.
6. Offer a benefit for effective programs in government procurement.
7. Include compliance programs in settlement agreements/enforceable undertakings.
8. Encourage stock exchanges to include effective programs in listing standards.
9. Have effective programs be a factor in voluntary disclosure programs.
10. Offer reduced regulatory requirements for those with effective programs.
11. Provide that programs may be a defence to related civil liability.
12. Provide that programs may also be a due diligence defence for directors' liability.
13. Encourage larger companies to promote programs in their supply chains.
14. Offer tax credits for initial program costs.
15. Make this a condition for government bailout money.
16. Have government officials actively participate in the compliance and ethics field, including conferences and seminars.
17. Get training on compliance and ethics for government officials.
18. Make the growth of compliance and ethics programs a measure of government success.
19. Work against other governmental actions and court rulings that hurt compliance and ethics program efforts.
20. Offer legal protection for compliance and ethics program efforts.
21. Provide a role model of a robust compliance and ethics approach through government agency compliance and ethics programs.
22. Make very specific commitments to reward compliance and ethics efforts.
23. Have an internal governmental official as compliance and ethics liaison.
24. Have a system for credible program assessment by the government.

We are happy to provide more details, citations and examples to elaborate on these steps.

For any of this to be effective, however, there are several conditions. First is that the burden of proof must always be on the company. A compliance and ethics program is an internal effort, and only a company can demonstrate what it has done. Second, the government must actually understand the field of compliance and ethics. There are many resources available for governments to do this. It is essential that benefits only be given for real programs with empowered compliance and ethics officers, not simply paper elements like codes and policies. But on the other hand, the benefits should not be an illusion that impossible government standards make unattainable. Third, government's commitment to recognize compliance and ethics program has to be real and not a "paper" effort. Enforcement authorities should be very public about granting benefits for good programs, and explain which elements of company programs are not considered effective and which ones are.

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PROMOUVOIR LA CONFORMITÉ AUX RÈGLES DE LA CONCURRENCE: LES PROGRAMMES DE CONFORMITÉ ONT-ILS UN RÔLE À JOUER?

*Par Joseph Murphy**

1. Introduction : le rôle que peuvent jouer les programmes de conformité pour favoriser la conformité au droit de la concurrence

Nous avons rédigé la présente note dans le but de faciliter une discussion sur le rôle que peuvent jouer les programmes de conformité pour promouvoir la conformité au droit de la concurrence. Dans ce document, nous définirons en premier lieu, dans la section II, ce qu'est un programme de conformité moderne, et le distinguerons des anciennes notions de conformité. Dans la section III, nous poserons la question de fond concernant ces programmes : de maigres efforts en la matière justifient-ils d'accorder une immunité aux entreprises contrevenantes, les programmes, quel que soit leur sérieux, doivent-ils être ignorés, ou existe-t-il un juste milieu efficace ? Nous avancerons ensuite, dans la section IV, que le problème de la conformité, s'agissant des ententes, ne devrait pas être abordé de la même manière que d'autres sujets plus complexes comme l'abus de position dominante ou la discrimination tarifaire.

Nous concentrant ensuite spécifiquement sur les cartels, nous soulèverons, dans la section V, la question de savoir si les méthodes actuellement employées par les entreprises¹ pour empêcher la formation d'entente ont connu le moindre développement ou ont même régressé par rapport à ce que l'on aurait pu attendre compte tenu de l'histoire du développement de ces programmes. Dans la section VI, nous nous demanderons si les programmes de conformité mis en place par les organisations peuvent avoir un quelconque effet sur les cartels, eu égard aux caractéristiques de ce type d'infraction. Dans la section VII, nous nous interrogerons pour savoir si les petites et moyennes entreprises ont vraiment les moyens de mettre en place des programmes de lutte contre les ententes et comment amener ces sociétés à s'intéresser à ces questions.

Nous nous pencherons ensuite sur la manière dont les services répressifs envisagent les programmes de conformité, nous intéressant tout d'abord dans la section VIII aux autorités chargées de faire respecter le droit de la concurrence puis, dans la section IX, aux autorités qui disposent d'un pouvoir répressif dans d'autres domaines, notamment la lutte contre la corruption. Si les autorités sont amenées à prendre en compte les programmes de conformité, elles doivent être capables de les évaluer. Nous examinerons cette question dans la section X. Dans la section XI, nous nous demanderons comment les États peuvent inciter le secteur privé à lutter contre les ententes. La section XII présente une liste de démarches possibles pour prolonger les sujets abordés ici. La section XIII expose brièvement les ressources disponibles concernant les programmes de conformité. L'annexe I tente d'adapter le « Guide de bonnes pratiques » du Groupe de travail de l'OCDE sur la corruption à la lutte contre les cartels. L'annexe II est une liste sommaire d'exemples de questions qu'un enquêteur peut poser aux salariés d'une entreprise lorsqu'il commence

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¹ Dans le présent document, les termes « entreprise », « société » et « organisation » désignent toutes les formes d'organisation et d'entreprise.

l'examen d'un programme de conformité. L'annexe III recense les moyens dont disposent les États pour promouvoir des programmes de conformité efficaces.

2. Qu'est-ce qu'un programme de conformité ?

Nous commencerons par nous demander si les programmes de conformité aux règles de la concurrence ont un rôle significatif à jouer pour promouvoir la conformité avec cette branche importante du droit. Mais il est bien entendu difficile de débattre de cette question avant de s'être mis d'accord sur le sens des termes de base.

Pour commencer, nous faisons ici référence aux « programmes de conformité ». Il existe bien des manières de décrire tout ou partie des moyens dont disposent les entreprises pour prévenir les infractions (programme de conformité, contrôle interne, autodiscipline, diligences, charte éthique, gestion de la conformité, etc.) mais nous ferons référence aux « programmes de conformité » pour décrire la situation actuelle en la matière.

Les programmes modernes écartent l'idée qu'il suffit de déverser des lois et des brochures sur les salariés ou de leur envoyer des juristes pour que cela fonctionne. Autrefois, les entreprises estimaient qu'elles avaient fait « tout leur possible » si elles envoyaient des codes et des manuels, faisaient signer des certificats aux salariés et invitaient les juristes à donner des conférences sur la législation. Aujourd'hui, ces méthodes ne sont plus jugées efficaces.

On n'accepte pas non plus les recettes toutes faites. Même si les programmes doivent comprendre un certain nombre d'éléments, aucun d'entre eux ne constitue une solution-miracle pour les entreprises. Les deux normes les plus répandues sont sans doute les *US Organizational Sentencing Guidelines*² et le Guide de bonnes pratiques³ du Groupe de travail de l'OCDE sur la corruption. Les *Sentencing Guidelines* contiennent une liste théorique de sept critères tandis qu'il y en a douze dans le Guide de bonnes pratiques. Mais aucun d'entre eux ne peut être satisfait en se contentant de remplir un formulaire ou de cocher une case. Pourquoi en est-il ainsi ?

Au fil des ans, la principale évolution qu'ont connue les méthodes de conformité et la déontologie, c'est qu'aujourd'hui, il est entendu que les programmes doivent employer toutes les techniques de gestion utilisées par les organisations pour arriver à leurs fins. Aucune entreprise ne compte sur des codes ou des formations pour vendre ses produits, gérer ses coûts, motiver son personnel ou développer des produits ou des services innovants. De même, aucune société ne peut prévenir et détecter des infractions sans avoir recours à des techniques de gestion efficaces. En bref, un programme de conformité peut se résumer à : 1) un engagement des cadres à bien agir et 2) des mesures de gestion efficaces afin que cela soit effectivement le cas.

Pendant des années, les partisans d'une conformité reposant sur la loi et les règlements se sont opposés à ceux qui privilégiaient l'éthique et les valeurs. On pense en général que les juristes se contentent de dire : « « Respectez la loi à la lettre sinon vous irez en prison » alors que les méthodes basées sur les valeurs peuvent avoir tendance à considérer les lois comme un simple formalisme et à faire appel au sens de l'éthique des salariés. En évitant de rentrer dans une longue discussion sur le bien-fondé de ce débat, la notion de « conformité et d'éthique » opère une synthèse entre les deux courants en prenant acte de ce que la loi et les menaces sans faire appel des valeurs présentent peu d'attraits pour les salariés et que les valeurs sans la loi peuvent être trop subjectives et trop vagues et peuvent même conduire à justifier de graves

² U.S.S.G. section 8B2.1(b) : http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf.

³ OCDE, Recommandation visant à renforcer la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, annexe II <http://www.oecd.org/dataoecd/31/53/44229684.pdf>.

infractions. Ce qui nous intéresse davantage, c'est d'amener les salariés à bien agir en utilisant des techniques de gestion. Dans le cadre du droit de la concurrence, cela consiste à insister à la fois sur ce que la loi exige et sur les valeurs de concurrence libre et loyale qui la sous-tendent.

Nous examinons plus loin les types de mesures de gestion que l'on peut employer pour contrôler ce qui se passe au sein des entreprises, y compris pour empêcher les ententes injustifiables.

3. Droit de la concurrence et programmes : quelle orientation adopter ?

Les programmes doivent-ils jouer un rôle dans les orientations définies par l'État ? Une première solution consiste à accorder une immunité complète aux entreprises uniquement parce qu'elles ont fait des efforts en matière de conformité. Dans ce cas, si un manuel, des formations et des principes proclamés haut et fort existent, une entreprise peut éviter les poursuites même si elle a commis une infraction. Dans cette hypothèse, l'entreprise n'aurait qu'à affirmer « nous leur avons dit de ne pas le faire » pour être mise hors de cause. Bien sûr, l'immunité ne reposerait pas sur le fait d'être doté d'un véritable programme, mais sur un simulacre. D'après les recherches effectuées pour rédiger la présente note et notre propre expérience, ce n'est pas l'approche retenue par les États. Cela ne serait guère judicieux, car cela susciterait de faux programmes qui n'auraient absolument aucune valeur.

L'autre solution possible consiste à ignorer complètement les programmes de conformité à tous les niveaux d'un système juridique quels que soient la diligence et les efforts dont l'entreprise a fait preuve. Dans cette hypothèse, les pouvoirs publics n'encouragent ni n'évaluent les programmes et l'on juge l'honorabilité d'une entreprise sans tenir compte des efforts que celle-ci a engagés pour éviter les infractions. Les organisations qui ne font rien, celles qui font peu et celles qui font tout pour empêcher que des manquements ne soient commis sont traitées par la loi de la même manière.

Entre ces deux extrêmes, il existe un juste milieu. La question qui se pose alors est celle de la position du curseur. Quels types d'efforts d'autodiscipline prendre en compte, lesquels ignorer ? Si prise en compte il y a, quelle forme doit-elle prendre ? S'agit-il d'un tout ou rien ou y a-t-il une gradation possible ? Quelles mesures l'État peut-il prendre pour promouvoir les programmes, existe-t-il une liste d'outils adaptables ?

Dès que l'on cherche à trouver un juste milieu, se pose également la question de savoir comment les pouvoirs publics — services répressifs, autorités de régulation et tribunaux — peuvent évaluer le sérieux du programme de conformité d'une entreprise. Est-ce réaliste et, si oui, avec quelles méthodes ? D'autres organismes publics l'ont-ils fait et quels enseignements peut-on tirer de leur expérience ? Les pouvoirs publics peuvent-ils réellement contribuer au développement des programmes de conformité, notamment pour ce qui est de leur efficacité ? Toutes ces questions peuvent nécessiter un examen approfondi et de nombreuses études empiriques. Dans la présente contribution, nous présenterons quelques pistes pour avancer sur ces sujets.

4. Discerner différents aspects du droit de la concurrence

Les programmes de conformité sont monnaie courante dans un grand nombre de secteurs et servent à se protéger contre toute une série de risques éthiques ou juridiques. Il convient en premier lieu de s'intéresser à l'ensemble des risques liés au droit de la concurrence qu'un programme peut prendre en compte. À cet égard, le droit de la concurrence diffère sans doute d'autres branches du droit en raison de la dichotomie inhabituelle qui existe au sein des infractions.

4.1 Des sujets complexes sur le plan économique

D'un côté, il y a la conformité qui concerne davantage les grandes entreprises puissantes. Ici, il est question d'abus de position dominante, de monopolisation, de ventes liées, de problèmes de distribution et de discrimination tarifaire. Ces questions sont en général complexes et le plus souvent traitées par des cadres conseillés par des avocats. Bien sûr, les organisations peuvent décider de ne pas suivre les conseils de leurs avocats ou ceux-ci peuvent se contenter de ne donner des conseils que sur le niveau de risque correspondant à un comportement particulier en laissant à l'encadrement le soin de trancher en fonction de son sens des affaires et de sa tolérance au risque.

Dans ce domaine, les comportements répréhensibles sont en général visibles et détectables. Les cadres prennent leurs décisions en calculant les risques que cela représente pour l'entreprise. Pour ce type de risque, l'application d'un programme de conformité implique de faire appel aux conseils d'un juriste pour les questions délicates. Il peut également être nécessaire de faire intervenir des experts économistes afin d'analyser des critères comme les parts de marché, la définition du marché, l'élasticité de la demande et la facilité d'entrée sur le marché. Ces problèmes peuvent être difficiles, voire impossibles à résoudre de manière certaine et les entreprises peuvent souhaiter prendre un risque calculé et manifeste pour avancer. Le plus souvent cela ne relève pas du droit pénal et, en la matière, on s'intéresse moins au programme de conformité applicable à toute l'organisation. Se conformer au droit de la concurrence consiste alors davantage à obtenir des conseils avisés et à les suivre.

Toutefois, une mise en garde est ici nécessaire. Il faut bien admettre que ces éléments ne sont que des généralités et qu'il y a certainement des exceptions à ces affirmations. Même si ce type de risque concerne surtout les grandes entreprises, les petites sociétés peuvent aussi être confrontées à certains problèmes complexes. De plus, les programmes de conformité peuvent également permettre de s'assurer que les filiales et les centres de profits situés aux quatre coins du monde respectent scrupuleusement la politique du groupe. Ainsi, une société en position dominante doit être plus prudente quant à son comportement sur le marché que ses concurrentes plus petites, ce qui nécessite de mettre en place un programme et un dispositif de conformité bien intégré à l'entreprise. C'est également dans ce type de situation, qui sont complexes et nécessitent un examen attentif, que les manuels de conformité sont utiles. Mais, s'agissant des questions les plus importantes, les plus graves et les plus générales, les décisions sont en générales prises au plus haut niveau, après avoir consulté des juristes, et leurs conséquences sont, si l'on peut dire, visibles par tout le monde.

4.2 Les ententes

De l'autre côté, on trouve les ententes, qui constituent des violations caractérisées. Dans les pays qui imposent des sanctions pénales en cas de non-respect du droit de la concurrence, ces infractions relèvent en général du droit pénal et c'est pour elles que les programmes de clémence sont conçus. Il ne s'agit pas ici d'une interprétation fortuite, discutable ou raisonnable qui tombe sous le coup de la loi. Ce sont le plus souvent des infractions délibérées commises en réunion. Les conseillers juridiques ne sont pas impliqués dans ce genre d'affaires, lesquelles sont secrètes par nature. S'assurer que l'encadrement a accès à des conseils juridiques externes compétents n'a dans ces situations aucun effet : les contrevenants savent en général qu'ils enfreignent la loi. Les analyses complexes de questions délicates qui sont proposées par les manuels sont le plus souvent inadaptées s'agissant des ententes secrètes : les responsables n'ont pas besoin d'économistes ou d'experts en droit de la concurrence pour savoir qu'ils sont en infraction. Contrairement au premier cas de figure, ces situations sont tout à fait similaires à celles d'autres situations juridiques où des agissements frauduleux sont commis en réunion et dans lesquelles la tromperie sert à dissimuler le délit. C'est là où se situent les plus graves problèmes de conformité et où les programmes de conformité peuvent rendre les plus grands services. C'est aussi dans ces affaires que l'on peut le mieux tirer les leçons des efforts menés en matière de conformité et d'éthique dans d'autres domaines du droit pénal qui concernent la fraude et les infractions commises en réunion.

5. Quels sont aujourd'hui les défauts des programmes d'entreprise qui visent à faire respecter le droit de la concurrence ?

5.1 *Des interrogations concernant les efforts menés en matière de conformité au droit de la concurrence*

Souvent, les personnes qui écrivent sur les programmes de conformité citent les scandales de l'industrie de défense américaine des années 80 comme point de départ de ces programmes. Ils ont tort : il est très probable que l'origine de ces programmes est plutôt à rechercher du côté des affaires d'ententes anticoncurrentielles dans le secteur des équipements électriques, affaires qui ont eu lieu dans les années 50 et 60. Après avoir été impliqué dans la première affaire importante de droit pénal de la concurrence, General Electric a mis en place un programme de conformité afin que cela ne se reproduise plus jamais. Il s'agit sans doute du premier exemple de programme de conformité au sein d'une entreprise. Dans les années 60, plusieurs publications ont commencé à aborder la question des programmes de conformité aux règles de la concurrence⁴. Dans les années 70, toutes les démarches en matière de conformité ont été bouleversées par la diffusion de « The Price », premier docudrama portant sur ce thème, produit par Commonwealth Films. À cause de ce film, qui traitait de la conformité aux règles de concurrence, on est passé d'une approche basée sur des conférences guindées animées par des avocats à des moyens audiovisuels qui jouaient sur le spectaculaire et l'émotionnel pour toucher fortement le public. L'auteur de ces lignes, qui travaille dans ce domaine depuis plus de 30 ans, se souvient encore de l'effet qu'a eu sur lui ce film lorsqu'il l'a vu pour la première fois.

Compte tenu de ce riche passé, les programmes de conformité aux règles de la concurrence devraient occuper la première place en termes d'innovation, de périmètre et d'efficacité. D'après notre expérience, tel n'est pas le cas. C'est une évolution décevante pour ceux qui estiment que les ententes sont une infraction pénale semblable au vol.

Cette remarque repose sur des travaux de l'auteur relatifs aux programmes de conformité, travaux qui ont abordé nombre d'aspects de la conformité dans des secteurs très divers sur les cinq continents. Elle ne s'appuie donc pas sur des travaux de recherche publiés, car il apparaît que personne ne pose de questions ni donc évidemment ne mène de recherches empiriques dans ce domaine.

Toutefois, il y a une tendance qui mérite que l'on s'y arrête. La répression des infractions au droit de la concurrence s'est substantiellement accrue : les peines atteignent des niveaux exceptionnels, les amendes infligées aux entreprises pouvant s'élever à plusieurs centaines de millions de dollars et les contrevenants encourant jusqu'à dix ans de prison à titre individuel dans certains États. Les programmes de conformité aux règles de concurrence sont apparus dans les grandes entreprises il y a plusieurs décennies. Malgré tout, certaines tendances ne sont pas satisfaisantes.

Pourquoi, compte tenu de cette tendance au durcissement des peines, observe-t-on des récidives dans les grandes organisations ? Pourquoi, alors qu'il existe des programmes de clémence et des peines très sévères qui font l'objet d'une large publicité, les dossiers traités par la justice révèlent-ils des ententes qui ont duré des années, voire parfois une décennie ? Pourquoi des cadres supérieurs bien payés et qui ont tant à perdre prennent-ils si souvent tant de risques pour mettre en place un cartel ? S'il y a une leçon que l'on peut tirer de toutes ces affaires, c'est que ces infractions ne sont pas des cas isolés et ne traduisent pas l'égaré de quelques innocents mal informés. Il ne s'agit pas d'erreurs de jugement sur des questions économiques complexes, ce sont des ententes illicites conclues par des dirigeants d'entreprise riches et

⁴ Federal Trade Commission, note de bas de page * du « FTC's Model Antitrust Compliance Audit Program » (qui cite des sources datant du début des années 60).

bien formés qui agissent clandestinement comme des voleurs dans la nuit. Comme l'illustrent les cassettes vidéo de l'affaire de la lysine, ces dirigeants se moquent souvent avec arrogance des services répressifs.

Qu'est-il advenu des programmes de conformité aux règles de concurrence, programmes qui montraient autrefois la voie à suivre aux autres et faisaient avancer les choses en utilisant des techniques qui étaient alors à la pointe et une théâtralisation efficace ? Est-il possible que ces programmes aient pris du retard par rapport aux efforts engagés dans d'autres domaines ? Qui est à l'origine des actions engagées en matière de conformité aux règles de concurrence dans les entreprises ? Sont-elles exclusivement réservées aux juristes, tandis que d'autres domaines ont recours à des techniques de gestion plus efficaces ? Est-il possible que les programmes de conformité au droit de la concurrence aient régressé depuis l'époque de « The Price » ?

5.2 Programmes de clémence

Dans ce cadre, une autre question se pose. Le droit de la concurrence a joué un rôle moteur dans le développement des déclarations spontanées effectuées par les entreprises et des programmes de clémence. D'autres branches du droit réservent un accueil mitigé aux organisations qui révèlent des infractions et infligent souvent une sanction à ces organisations. En revanche, en droit de la concurrence, la protection est solide : si vous révélez une infraction que vous avez commise et celles commises par les entreprises avec lesquelles vous avez conclu une entente, aucune sanction ne sera infligée à votre organisation ni aux salariés qui coopèrent avec la justice. Telle est le dispositif applicable aux États-Unis, dans l'Union européenne (UE) et en général dans d'autres espaces juridiques⁵. Comme un programme de conformité peut aider les entreprises à découvrir des infractions en interne et donc à gagner la course à celui qui les signalera en premier, peut-on en conclure qu'il n'y a rien de plus à dire sur ces programmes, étant donné que la clémence offre toutes les garanties nécessaires ? Des contrevenants franchissent régulièrement la porte de l'administration, est-ce suffisant ?

Ici se pose la question des seuils quant aux objectifs de la répression. En dépit de l'augmentation du nombre de sanctions infligées et du nombre d'affaires traitées via les programmes de clémence, il est difficile d'avancer avec certitude que cela est suffisant. Si leur seul objectif est de détecter les infractions, les résultats obtenus par les programmes de clémence sont impressionnants. Mais si l'objectif est de prévenir et de détecter les infractions le plus tôt possible, alors on a le sentiment diffus qu'il doit être possible de faire plus. Le fait que les amendes et les durées d'emprisonnement augmentent est-il le seul critère de réussite d'un programme visant au respect de la loi ? Est-ce un succès lorsqu'une entente qui a prospéré pendant une décennie est enfin mise au jour ? Y-a-t-il d'autres moyens de favoriser la prévention que de découvrir et de punir des ententes illicites de grande ampleur ?

De plus, en termes de répression, le résultat obtenu en infligeant des sanctions draconiennes est peu probant. Ainsi, aux États-Unis, Arthur Andersen s'est vue infliger l'équivalent de la peine capitale pour les entreprises. Ironie du sort, la condamnation du cabinet a été annulée après que cette peine de mort au sens figuré a été appliquée et que le cabinet a cessé ses activités. À l'époque d'Enron, des cadres dirigeants ont été condamnés à la réclusion criminelle à perpétuité. Mais l'on aura du mal à trouver un Américain qui affirme que ces exemples de peines sévères ont spectaculairement freiné la criminalité économique et les comportements répréhensibles en général au sein des entreprises. Les peines font partie de l'équation, mais comme les êtres humains ne sont pas de simples homo œconomicus⁶ tranquillement assis dans des salles de

⁵ Hammond, « The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades » (2 février 2010) (Observations présentées lors de la 24^e session annuelle de l'Institute on White Collar Crime) <http://html.documation.com/cds/ABA10/PDFs/011.pdf>.

⁶ « [C]alculatrices efficaces imaginées par la théorie économique capables de soupeser plusieurs solutions, de prévoir toutes les conséquences pour chacune et d'effectuer un choix rationnel. » Econs and Humans: A

réunion à calculer le risque d'être pris et le montant exact des amendes, il apparaît que les pouvoirs publics prennent des risques à ne s'en remettre qu'aux sanctions. Il peut arriver, par exemple, que la puissance et l'isolement des dirigeants nourrissent l'arrogance qui les convainc qu'ils sont trop intelligents pour être pris. Même la peine capitale n'est pas dissuasive pour ceux qui croient qu'ils sont invincibles.

De plus, autre élément fondamental de cette analyse, la sanction intervient après que l'infraction a été commise et dans le cas des ententes, il apparaît que l'infraction s'étend sur des périodes de temps excessivement longues⁷. La découverte du cartel des vitamines est considérée comme une victoire du droit alors que pendant toute une décennie cette entente illicite a permis à certaines entreprises de faire les poches des consommateurs. Lorsque les victimes sont des consommateurs, le fonctionnement du système judiciaire soulève des questions inquiétantes. Dans la plupart des pays, il n'existe pas d'action de groupe qui permette à l'ensemble des consommateurs d'obtenir réparation pour le préjudice subi. Aux États-Unis, où les actions privées sont courantes, la jurisprudence de la Cour suprême limite les dommages-intérêts aux acheteurs directs, lesquels, le plus souvent, ne sont pas des consommateurs⁸. Cette situation s'ajoute à la préoccupation concernant la durée des infractions et les difficultés du système juridique à rendre justice aux victimes.

Les entreprises ne sont pas assurées qu'un programme de conformité, quels que soient sa dynamique et son coût, leur permettra d'être les premières à révéler une entente et donc à pouvoir bénéficier d'un programme officiel de clémence. Un simple coup de chance peut être un élément tout aussi important pour découvrir un cartel⁹. De fait, les organisations qui ont recours à des composantes de programmes courantes, comme des manuels ou des conférences, peuvent découvrir à leur grande déception que ce sont ces formations qui ont amené leurs salariés contrevenants à prendre davantage de précautions afin de brouiller les pistes (cette constatation repose sur l'expérience réelle d'un client). Compte tenu de cette situation, un cadre intelligent pourrait décider de se dispenser du coût élevé d'un programme de conformité aux règles de concurrence et espérer être le premier à prévenir les autorités si quelque chose survenait ou au moins le second dans les pays où cela a une influence. Il est même possible que cette situation ait contribué à nourrir le cynisme et un sentiment d'inutilité quant à l'intérêt des programmes, tout au moins dans les États où la clémence semble être la seule stratégie réelle.

La clémence récompense-t-elle et encourage-t-elle systématiquement ceux qui font preuve de diligence en matière de conformité ? En réalité, certaines conditions d'immunité peuvent remettre en cause cette idée et diminuer l'intérêt de se doter d'un programme de conformité. Considérons par exemple les règles édictées par la division antitrust américaine¹⁰. L'une des conditions qui empêchent de bénéficier d'une immunité est la suivante :

« Si la société a contraint une autre partie à participer à l'activité illicite ou était manifestement le chef de file ou à l'origine de cette activité. »

review of [Nudge: Improving Decisions About Health, Wealth, and Happiness](#), par Richard Thaler et Cass R. Sunstein, http://www.claremont.org/publications/crb/id.1616/article_detail.asp.

⁷ Il est incroyable qu'une entente entre les fabricants d'acier de précontrainte ait duré 18 ans. Voir « EU Imposes Fines of Over 269 Million [Euros] On 17 Steel Producers for 18-Year Cartel, » 100 *Antitrust & Trade Reg. Report* 399 (8 avril 2011).

⁸ [Illinois Brick Co. v. Illinois, 431 U.S. 720](#) (1977).

⁹ Pour avoir conscience du rôle du hasard et des facteurs imprévisibles dans la mise au jour des ententes, il suffit de lire *The Informant* (Broadway Books ; 2000) de K. Eichenwald, ouvrage qui offre un exemple mémorable de circonstances étranges qui peuvent influencer un comportement humain dans ces situations.

¹⁰ Ministère américain de la Justice, Programme de clémence pour les entreprises, <http://www.justice.gov/atr/public/guidelines/0091.pdf>.

Du point de vue des principes, cela semble logique, sinon, une entreprise pourrait entraîner ses concurrents dans une entente puis les dénoncer. Mais n'oublions pas que les entreprises agissent au travers de leurs salariés pris individuellement. Un cadre malhonnête pourrait facilement, de son propre chef, contacter ses homologues chez les concurrents et les inviter à participer à une entente. Ce cadre pourrait même agir ainsi initialement sans avoir conscience de la gravité de l'infraction. Le département conformité et éthique d'entreprise découvre ensuite le comportement répréhensible lors d'un audit approfondi. En vertu des lignes directrices sur la clémence, même si le cadre n'était pas un dirigeant, l'organisation ne peut bénéficier d'aucune mesure de clémence en raison du rôle moteur du salarié concerné et son programme n'en tire aucun avantage alors qu'il a permis de mettre au jour l'infraction.

Considérons un deuxième cas de figure. Supposons que le cadre d'une entreprise ait participé à une entente mais n'ait pas été à sa tête ni n'ait contraint d'autres organisations à s'y joindre. Après une solide formation interactive, le cadre se rend compte que ce qu'il a fait était illicite et appelle le département conformité et éthique. Tandis que ce dernier commence à étudier la situation, le cadre contacte également son propre conseil juridique et ensemble ils appellent immédiatement le ministère de la Justice et fournissent toutes les informations dont ils disposent, y compris des documents et des données détaillées sur toutes les discussions relatives à la collusion. C'est suffisant pour que le ministère ouvre la phase d'instruction. L'entreprise mène sa propre enquête, rapide et en profondeur puis demande la clémence. Mais à ce moment-là, la division antitrust dispose de toutes les preuves et de tous les documents dont elle a besoin grâce au cadre qui lui a transmis ces informations. L'entreprise n'en tire aucun avantage dans le cadre du programme de clémence en raison de la limitation suivante :

« 2. La division, au moment où l'entreprise se manifeste, ne dispose pas encore, contre cette entreprise, de preuves susceptibles d'entraîner une conviction durable ; »

Encore une fois, la stratégie de la division antitrust paraît raisonnable, elle a prévu les dispositions nécessaires. Mais elle a obtenu des informations grâce au programme de conformité de l'entreprise. Il n'en reste pas moins que, d'après les principes appliqués par la division en matière de programmes, l'organisation n'en tire aucun avantage.

Envisageons maintenant un troisième cas de figure. Sur la ligne d'assistance téléphonique pour les questions de conformité qu'elle a mise en place et dont elle a fait la promotion, l'entreprise obtient un renseignement sur un éventuel problème. Cela ne repose que sur les soupçons d'un employé de bureau, l'organisation ne peut donc pas encore s'adresser à la division antitrust. En revanche, elle ouvre une enquête. Dès que celle-ci débute, un cadre impliqué dans l'infraction l'apprend et appelle son homologue qui a participé à l'affaire et qui travaille chez un concurrent. Ils conviennent tous deux de tenir bon et le cadre qui a appelé ne collabore en rien à l'enquête interne. Mais son homologue lui avait tout simplement menti et se précipite au cabinet d'avocats de l'entreprise pour tout avouer. Cette deuxième organisation, le même jour, appelle la division antitrust et demande l'immunité, en fournissant toutes les informations et les documents dont son salarié dispose. Cette société n'est pas et n'a jamais été dotée d'un programme de conformité, car elle ne voulait pas dépenser l'argent nécessaire. Mais elle est la première à contacter la division antitrust grâce au programme de la première entreprise.

La première organisation met plus de temps à découvrir ce qui s'est passé, car son propre salarié n'a pas coopéré. Lorsqu'elle contacte la division antitrust, elle n'en retire aucun avantage.

Dans les cas de figure envisagés ci-dessus, une entreprise peut avoir investi de bonne foi des sommes importantes pour se doter d'un programme de conformité efficace. Elle peut aussi avoir consacré sérieusement du temps et de l'énergie de ses cadres à cet effet. Mais du fait de circonstances parfaitement plausibles, l'existence du programme de clémence lui en retire tout le bénéfice. D'autres sociétés, qui n'ont pas engagé de tels efforts, sont récompensées en raison de paramètres sur lesquels la première entreprise n'a aucune influence.

5.3 Les programmes de conformité aux règles de concurrence aujourd'hui

Il convient de souligner qu'une grande part de l'exposé qui va suivre repose sur nos observations personnelles et sur des discussions avec d'autres spécialistes de ce domaine, en plus de l'attention portée aux publications et aux présentations orales dans le domaine de la conformité et de l'éthique. Il n'y a aucun doute que dans le domaine des programmes de conformité aux règles de concurrence, dans de nombreux cas, le travail effectué est de qualité. Le développement de techniques nouvelles et plus efficaces dans le cadre plus large de la conformité et de l'éthique a sans aucun doute eu une certaine influence sur les programmes de conformité et d'éthique dans le domaine du droit de la concurrence : la marée montante soulève tous les bateaux. On a néanmoins l'impression que les efforts entrepris dans le domaine de la conformité et de l'éthique en droit de la concurrence ne sont au niveau souhaitable ou possible et ne sont plus à la pointe comme auparavant. Quels en sont les conséquences pratiques ?

Examinons la décision du tribunal américain dans l'affaire Stolt-Nielsen¹¹, une des rares où un programme de conformité entre en jeu. Le juge y a conclu que la société mise en examen avait pris « des mesures rapides et efficaces » afin de cesser de participer à une entente et a été très impressionné par le fait que l'entreprise, après la découverte de l'infraction, avait pris certaines décisions. Cela se traduisait essentiellement par le fait que l'état-major avait ordonné aux salariés de cesser toute activité illicite, avait assuré une formation obligatoire, avait créé un manuel, avait fait signer une attestation aux salariés et avait informé ses concurrents des engagements pris¹². Même si le tribunal a certainement jugé qu'il s'agissait là d'efforts importants, il aurait pu écrire la même chose dans les mêmes circonstances dès les années 60 ; peu de choses semblaient avoir changé quant à la conception des programmes de conformité aux règles de concurrence. L'auteur de ces lignes a assisté à des présentations sur les programmes de conformité aux règles de concurrence aux États-Unis. Il était frappant de constater à quel point les propos tenus ressemblaient à ceux qu'il a entendus lorsqu'il a commencé à travailler sur ces questions dans les années 70 (lorsque les pouvoirs publics « faisaient passer un message » en envoyant des personnes en prison pour des mois, et non des années, et infligeaient des amendes à six chiffres et non à neuf). Lors de ces présentations, on parlait beaucoup de principes généraux et de formation, sans oublier la formule magique, le « comportement exemplaire de la direction ». Mais ce « comportement » se résume en général à la signature du PDG sur des déclarations (presque toujours rédigées par des juristes, ce que les salariés savent très bien). On évoquait également des « audits », mais en réalité il s'agissait d'évaluation des risques et non de véritables audits. De plus, personne ne se demandait comment l'on mène réellement ce type d'audit, ni quels étaient les moyens nécessaires afin d'effectuer un audit surprise. Les enquêtes, les programmes d'incitation et les responsables éthique et conformité dotés de réels pouvoirs, ainsi que d'autres démarches modernes et très appréciées sont pour la plupart absents de ces discussions. Quel contraste frappant avec des programmes comme les *Compliance Academies* organisées par la SCCE, destinées aux professionnels de la conformité et de l'éthique et au cours desquels l'auteur de ces lignes dispense des formations ! Aucune session de formation n'existerait durablement si elle se limitait à des déclarations de principe, à des manuels, à des discours de juristes et à d'autres démarches formelles du même type.

Il faudrait mener des travaux empiriques sur ce que contiennent réellement les programmes de conformité aux règles de concurrence aujourd'hui. Il convient toutefois de relever que cette tâche est extrêmement difficile à effectuer avec une quelconque précision, étant donné que tous ceux qui répondront à une enquête auront fortement intérêt à interpréter les questions dans un sens favorable à leur entreprise¹³.

¹¹ United States v. Stolt-Nielsen S.A., No. 06-cr-466 (E.D. Pa. Nov. 29, 2007) (Memorandum and Order).

¹² United States v. Stolt-Nielsen S.A., No. 06-cr-466, p 14-15 (E.D. Pa. Nov. 29, 2007) (Memorandum and Order).

¹³ En réalité, une étude portant sur le contenu des programmes de conformité des entreprises qui a été publiée montre, que dès l'on posait la même question à deux personnes ou plus dans la même entreprise, leurs réponses n'étaient jamais identiques, ce qui laisse supposer l'existence d'une part de subjectivité dans les enquêtes qui ne font pas l'objet d'une vérification.

En l'absence de telles données, nous avançons les hypothèses suivantes pour expliquer les faiblesses des programmes relatifs au droit de la concurrence, que ce soit en pratique ou s'agissant de ce que certains organismes publics et des experts en droit de la concurrence ont souvent préconisé concernant ces programmes. Précisons toutefois que ces idées reflètent notre expérience et nos observations personnelles : réaliser une véritable étude sur ces hypothèses serait extrêmement utile.

- Les programmes relatifs au droit de la concurrence peuvent être parfois un peu cloisonnés et gérés par des juristes plutôt que pleinement intégrés de manière plus vaste à un programme de conformité. Comme l'a énoncé l'OCDE pour les programmes de lutte contre la corruption, « pour être efficaces, ces programmes ou mesures doivent être liés au cadre général de conformité de l'entreprise ».
- Le rôle essentiel du responsable éthique et conformité est peu compris, en dépit du fait que les infractions graves sont le plus souvent commises avec la participation d'un dirigeant de l'entreprise ; le fait de ne pas donner de réels pouvoirs ni d'indépendance à ces responsables est sans doute le défaut le plus grave de tout programme¹⁴. Comme l'affirme l'OCDE, à nouveau dans le cadre de la lutte contre la corruption, les personnes responsables des programmes doivent être « de hauts responsables, disposant d'un degré d'autonomie adéquat par rapport aux dirigeants, de ressources et de prérogatives appropriées ».
- On parle aujourd'hui beaucoup du « comportement exemplaire de la direction », mais cela se traduit le plus souvent par « des bavardages au sein de la direction » et non par une action au plus haut niveau.
- Les audits de conformité semblent exister davantage sur le papier que dans la réalité, certains commentateurs les confondent même avec l'évaluation des risques. Ils ne sont pas ciblés en utilisant des techniques sophistiquées de ciblage. Les autres techniques courantes de mesure de la conformité et de l'éthique, comme les groupes de réflexion, les examens approfondis, les entretiens de sortie, etc. ne suscitent pas un grand intérêt dans le domaine de la concurrence et de l'éthique.
- On parle très peu de l'utilisation et du contrôle des mesures incitatives, même si ces questions sont bien traitées dans le Bulletin du Bureau canadien de la concurrence.
- On s'intéresse peu aux procédures disciplinaires, notamment celles qui visent à sanctionner les cadres qui n'ont pas pris des mesures pour empêcher les infractions, et à la nécessité de donner de la publicité aux affaires disciplinaires en interne.
- On évoque peu le recours aux contrôles, qui font obstacle aux infractions, quelquefois presque automatiquement, et souvent en éliminant la possibilité de commettre des actes illicites.
- On parle beaucoup de formation, mais sans insister sur la nécessité de dispenser des sessions de formation les plus pointues, les plus interactives et les plus longues (et non les plus brèves) possibles aux cadres dirigeants, qui sont les plus susceptibles d'enfreindre la loi.

¹⁴

Sur le rôle essentiel du responsable éthique et conformité et sur les dangers qui résultent d'une prise en compte insuffisante de cet élément clef dans les programmes, voir *Leading Corporate Integrity: Defining the Role of the Chief Ethics and Compliance Officer* (août 2007) ; http://www.corporatecompliance.org/Content/NavigationMenu/Resources/Surveys/CECO_Definition_8-13-072.pdf ; *Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds* (RAND 2009) http://www.rand.org/pubs/conf_proceedings/CF258/.

On observe que la conformité au droit de la concurrence est davantage l'apanage des juristes et est peut-être quelque peu isolé par rapport au milieu plus large et plus dynamique des professionnels de la conformité et de l'éthique. Les programmes de droit de la concurrence sont retirés à des experts susceptibles de se concentrer sur le type d'éléments qui peuvent rendre un programme efficace, comme l'enseignement et la formation pour adultes, et sur les motivations réelles qui poussent l'homme à faire ce qui est bien (ou non). Les programmes de conformité reposent probablement sur ce que les juristes pensent que les salariés ont besoin de savoir, comme s'il s'agissait d'un cours de droit, sans s'intéresser suffisamment aux techniques de gestion ou aux raisons du comportement d'une entreprise. Que peut-on faire de plus ? Nous y reviendrons plus loin.

6. Les programmes de conformité peuvent-ils contribuer à empêcher la formation d'ententes ?

Quelles que soient les limites des programmes de clémence, on ne peut guère contester que ces programmes permettent de mettre au jour des cartels, même si cela se produit seulement après que l'entente a fonctionné pendant des années. Mais peut-on en dire des même des programmes de conformité ? Ont-ils leur place dans la lutte contre les cartels ?

6.1 Nature des ententes

Il importe ici de s'intéresser à la nature de ces infractions. Il y a deux caractéristiques marquantes qui sont liées à toutes les techniques utilisées pour les contrôler. En premier lieu, elles sont dissimulées. Les auteurs de ces infractions savent qu'ils font quelque chose d'illicite et tentent de dissimuler leurs activités. Ce n'est pas toujours le cas, bien sûr. L'auteur de ces lignes a eu personnellement l'occasion de voir des hommes d'affaires (travaillant dans de petites entreprises) lui décrire ce qu'ils avaient fait ou envisageaient de faire, actions qui constituaient une entente sur les prix alors que ces personnes n'en avaient absolument pas conscience (il s'agissait de discussions informelles, pas d'une demande pour un conseil juridique). Mais ce comportement apparemment innocent n'est pas celui que l'on observe dans les affaires qui font la une des journaux et des blogs.

La seconde caractéristique remarquable des ententes est que les contrevenants sont les plus souvent des cadres supérieurs. Il est vrai que même un jeune commercial travaillant sur un site éloigné pourrait commettre une infraction tout seul, par exemple en se mettant d'accord avec un de ses anciens collègues qui travaille maintenant chez un concurrent pour savoir qui gèrera quels clients. Mais comme pour les infractions « innocentes », dans les grandes affaires pénales les plus dommageables sur un plan économique, les contrevenants sont situés au sommet de la hiérarchie.

Comment une entreprise peut-elle donc prévenir et détecter une entente ou une infraction secrète commise à un haut niveau dès ses débuts ? On peut commencer cette analyse en examinant certaines idées fausses concernant les programmes, idées qui pourraient conduire à douter de leur intérêt pour lutter contre les ententes. Ceux qui connaissent mal les programmes modernes pourraient prendre quelques éléments d'un programme comme étant le programme entier (surtout la partie documents et recommandations). Ceux-ci consistent en une ligne de conduite comme on en trouve dans un code de déontologie. Elle peut être plus élaborée et explicitée en détail dans un manuel de conformité. Il y a aussi des formations. Celles-ci peuvent prendre la forme de petits groupes de discussion avec un juriste ou même de conférences données devant un grand nombre de salariés.

Si les programmes se limitaient à ces éléments, ils seraient très certainement inefficaces contre les ententes, mais aussi contre tous les autres types de comportements répréhensibles. Les mots ne suffisent pas à empêcher les méfaits et ils ne constituent pas à eux seuls un programme de conformité.

6.2 Formations

Nous examinerons ultérieurement les types d'activité des programmes de conformité conçus pour dissuader les salariés de former une entente et pour les découvrir. Cela étant, les formations, que certains jugent inefficaces car les contrevenants savent déjà qu'ils enfreignent la loi, peuvent néanmoins jouer un rôle important dans un programme de conformité visant à lutter contre les cartels à condition qu'elles soient bien réalisées.

Le premier point à souligner est qu'une formation ne se résume pas à un transfert d'informations afin que les salariés connaissent la lettre de la loi, elle doit aussi être motivante. De nombreux hommes d'affaires sont vaguement conscients que les ententes sur les prix sont illicites, mais n'ont peut-être pas été confrontés à ce que cela signifie dans la réalité. Une formation motivante et efficace ne convertira sans doute pas un participant résolu à conclure une entente, mais elle pourra infléchir le membre le plus récent du cartel, membre qui se contente de faire ce que son prédécesseur lui a dit. Elle peut influencer le participant à une entente qui est en colère parce qu'on ne lui a pas accordé la promotion qu'il attendait ou qui a changé son fusil d'épaule pour toute une série de raisons personnelles possibles.

De plus, comme le constate le Bureau canadien de la concurrence dans son bulletin d'orientation sur les programmes de conformité, la formation ne s'adresse pas qu'aux contrevenants, mais aussi aux complices et aux témoins¹⁵. L'expérience de la nature humaine nous enseigne que les gens ont beaucoup de mal à garder un secret. De fait, la plupart des individus, quand ils disent qu'ils garderont un secret, semblent vouloir dire qu'ils essayeront de limiter le nombre de personnes auxquelles ils en parleront. Les secrétaires, le personnel qui se déplace, les assistantes, les subordonnés et d'autres soupçonnent souvent qu'il y a quelque chose de « drôle », mais c'est seulement grâce à une formation qu'ils prennent conscience de la gravité des faits et de ce qu'ils peuvent intervenir. Il apparaît que la plupart des gens ne vont pas volontiers faire des efforts pour dénoncer leurs amis et leurs collègues, mais s'ils en ont l'occasion et surtout si on leur demande, ils parlent. Les personnes qui travaillent dans le domaine de la conformité et de l'éthique ont connu cela à maintes reprises. Cela peut ne pas paraître logique aux personnes qui ne connaissent pas ce domaine mais semble faire partie de la nature humaine.

Même si certains pourraient penser qu'une formation se résume à une transmission à sens unique de la bonne parole sur la conformité, pour ceux qui ont dispensé des formations, surtout à des petits groupes sous forme interactive, cela va beaucoup plus loin. En fait, un bon programme de formation s'inspire des audits et des examens de la conformité. Une personne expérimentée dans le domaine de la conformité et de l'éthique et rompue au droit de la concurrence peut détecter des attitudes et des réactions inhabituelles dans son auditoire. Ainsi, lorsque le formateur explique ce qu'est une infraction en réunion, comment ce type d'infraction est découvert et ce qu'il advient des contrevenants, il peut ressentir une réaction négative dans l'auditoire. Cela peut se traduire par des sarcasmes violents, de la panique ou de l'incertitude, mais un œil averti ne s'y trompe pas. Des questions des participants comme « que se passerait-il si un commercial faisait ceci » ou « allons, ils ne s'intéressent pas à ce type d'affaires, n'est-ce-pas ? » peuvent donner des informations importantes qui appellent des prolongements.

Sur ce sujet, nous pouvons parler de notre expérience personnelle. Lorsque nous avons assuré des sessions de formation concrète dans des entreprises, nous avons plus d'une fois vu des cadres signaler des infractions commises ou sur le point de l'être grâce à l'interactivité de ces sessions. Ces sessions n'étaient

¹⁵ Comme l'indique le Bureau de la concurrence, « [les] employés de tous les échelons qui pourraient se livrer à des activités illégales [souligné par nos soins] ou être exposés à de telles activités ». Bureau de la concurrence Canada, Les programmes de conformité d'entreprise 9 (2010). [http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-f.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-f.pdf](http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-f.pdf/$FILE/CorporateCompliancePrograms-sept-2010-f.pdf)

pas de simples conférences, elles impliquaient une interaction avec les salariés et le recours à des vidéos spectaculaires afin d'attirer leur attention. Il est fort probable qu'une conférence dans une grande salle (où les salariés sont concentrés sur leur iPhone ou sur leur Blackberry) ne conduira pas au même résultat. Des sessions plus intensives (mais malheureusement plus chères) en petits groupes, sessions qui offrent la possibilité d'avoir des discussions informelles avec les participants, peuvent faire émerger toute une série de problèmes.

Mais, si l'objectif consiste en partie à s'adresser à ceux qui n'ont pas directement participé à l'infraction, comment le personnel de l'entreprise ou d'autres personnes peuvent-ils savoir ou soupçonner qu'il y a un problème ? On pourrait penser qu'il est relativement facile de mettre en place un cartel : quelques cadres supérieurs se rencontrent discrètement un petit nombre de fois par an et l'entente fonctionne. Mais les cartels nécessitent souvent une bonne dose de confiance dans les concurrents qui souhaitent commettre une infraction pénale de ce type ou une forme de contrôle. Dans l'affaire des câbles de marine, les concurrents ont engagé une personne pour coordonner l'entente. Dans une autre affaire, ils visitaient les usines des concurrents afin de vérifier le respect des limites de production convenues. De plus, une entente efficace peut entraîner des changements et des comportements révélateurs susceptibles d'attirer l'attention des membres de l'entreprise qui savent comment les affaires étaient menées auparavant. Lorsque l'on met en place un cartel, il peut s'avérer difficile de contrôler tous les autres membres de l'entreprise dont la coopération est nécessaire afin de respecter les restrictions convenues sur certains paramètres, par exemple les ventes et la production. Les commerciaux peuvent ne pas comprendre pourquoi il leur est interdit de conclure une affaire lucrative et de toucher la commission associée. Les salariés d'une usine peuvent ne pas voir pourquoi ils doivent arrêter la production, alors que les ventes ont augmenté. Il est possible qu'ils n'aient pas connaissance de tous les faits ou ne disposent pas de suffisamment d'informations pour satisfaire les critères fixés pour que les autorités ouvrent une enquête, mais pour un professionnel de la conformité et de l'éthique interne à l'entreprise, c'est exactement ce type de signaux d'alerte qui détermine la manière dont sont alloués les moyens pour les audits, les examens et les enquêtes internes. La formation, au même titre que d'autres techniques des programmes de conformité, permet de s'adresser à ces personnes.

6.3 *Les grands moyens*

Les personnes qui n'ont pas une expérience personnelle de mise en place d'un programme de conformité peuvent penser qu'il ne s'agit que de papier et de questions formelles : édicter des principes, publier une plaquette et effectuer quelques présentations, c'est tout. Mais un programme efficace contient beaucoup plus que cela, à la fois pour satisfaire le niveau généralement attendu et pour être efficace. S'agissant de la lutte contre les ententes, nous qualifierons ici ces aspects des programmes de « grands moyens » en matière de conformité et d'éthique. Ils comprennent notamment :

- une organisation forte, dotée de pouvoirs indépendants pour les questions de conformité et d'éthique ; elle doit être dirigée par un responsable éthique et conformité qui soit un dirigeant de l'entreprise et rende compte directement au conseil d'administration (qui est le seul à pouvoir le révoquer) ;
- une conformité aux règles de concurrence intégrée à cette organisation, et non indépendante et isolée ;
- un soutien réel de l'état-major de l'entreprise, qui se traduit par des mesures, et non seulement par des mots¹⁶ ;

¹⁶ Pour connaître notre avis sur ce que pourraient être les mesures prises par la direction, voir Murphy, « How the CEO Can Make the Difference in Compliance and Ethics », 20 *ethikos* 9 (mai/juin 2007).

- des contrôles conçus pour faire obstacle aux infractions et même les rendre pratiquement impossibles dans la limite des mécanismes de gestion ;
- des audits, une surveillance et d'autres techniques visant à découvrir des infractions ;
- des mécanismes permettant aux salariés et à d'autres de détecter des comportements répréhensibles en toute sécurité ;
- de solides protections contre les représailles pour les personnes qui donnent l'alerte ;
- une évaluation continue de la mise en œuvre et de l'efficacité du programme ;
- des sanctions, y compris des mesures visant à éviter de créer des boucs émissaires pour sanctionner les cadres qui n'agissent pas afin de prévenir les infractions et le fait de donner de la publicité aux affaires disciplinaires ;
- des mécanismes incitatifs afin de renforcer le programme ;
- des méthodes d'enquête professionnelles, comprenant une analyse de la cause première afin d'empêcher que les infractions ne se reproduisent.

Ces types de techniques ne se contentent pas d'envoyer des messages aux salariés en espérant qu'ils agiront bien. Ils ne dépendent pas de la confiance et de la bonne foi. En revanche, ils utilisent des outils de gestion afin de s'assurer que les salariés respectent les règles.

Nous pourrions développer plus largement ce que chacune de ces techniques met en jeu. De fait, pour la plupart d'entre elles, il existe de nombreuses publications et elles sont souvent abordées séparément lors des formations destinées aux professionnels de la conformité et de l'éthique.

6.4 Le ciblage

Il y a cependant une technique qui mérite que l'on s'y attarde, s'agissant de la conformité aux règles de concurrence, d'une part en raison de son intérêt, et d'autre part car elle n'est sans doute que rarement ou jamais utilisée dans les entreprises. Il s'agit de la technique du ciblage, qui consiste à effectuer une analyse statistique par ordinateur. Dans certaines entreprises, les ententes inspirent un certain fatalisme. Nous avons entendu des juristes dire : « Nous les avons formés, que pouvions-nous faire de plus ? » Certains se plaignent qu'il est impossible à une grande entreprise de savoir que, sur un site lointain, un responsable local a mis en place une entente. Nous pensons que les méthodes énumérées ci-dessus, si elles sont correctement appliquées, constituent un moyen très efficace pour mettre au jour des comportements répréhensibles cachés. Mais il existe une autre démarche qui peut contribuer à découvrir des ententes et d'autres infractions en réunion. Le recours au ciblage peut permettre de mettre en évidence des caractéristiques inhabituelles en termes de concurrence, caractéristiques indiscernables sans son aide. Mais si l'on dispose des bons systèmes et de la bonne expertise, ces caractéristiques peuvent apparaître. Il peut s'agir de parts de marché anormalement stables, de marges trop élevées, voire de montants d'enchères surprenants au regard de la loi de Benford. Cette technique ne permet pas, à elle seule, de trouver suffisamment d'informations pour établir avec certitude qu'une infraction a été commise, mais, utilisée intelligemment, elle permet de mieux cibler les audits et d'autres méthodes de détection des infractions afin qu'ils puissent être pratiqués à un coût avantageux. Qui plus est, l'existence même de techniques de détection pointues peut dissuader ceux qui sinon penseraient que leurs infractions sont indétectables. Pour en savoir plus sur cette méthode, voir Abrantes-Metz, Bajari et Murphy, « Enhancing Compliance Programs Through Antitrust Screening, » 4.5 *The Antitrust Counselor* 4 (septembre 2010)¹⁷.

¹⁷ Plus de détails par les mêmes auteurs dans « Antitrust Screening: Making Compliance Programs Robust, » http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648948.

7. Les programmes de conformité sont-ils trop coûteux pour les petites et moyennes entreprises (PME) ?

Souvent, lorsque l'on évoque le rôle des programmes de conformité, on suppose que ces programmes n'ont leur place que dans de grandes entreprises comme les multinationales. Qui d'autre peut s'offrir les juristes nécessaires à l'analyse de la jurisprudence et des lois afin de rédiger des manuels complets relatifs aux règles de concurrence ? Qui d'autre peut faire appel aux associés de cabinets d'avocats prestigieux afin d'expliquer la loi à des cadres supérieurs ? Qui d'autre peut avoir à ses côtés des conseils juridiques coûteux et des économistes afin d'appliquer correctement des notions économiques délicates comme les barrières à l'entrée et la substituabilité de la demande ?

Or, en réalité, il s'agit d'une des raisons les plus importantes qui amènent à distinguer les ententes des autres problèmes de respect du droit de la concurrence. Lorsque les choses sont clarifiées et que l'on ne s'intéresse qu'aux cartels, la question du coût ne se pose plus du tout de la même façon. Dans ce cas de figure, on s'intéresse à des actes qui sont, sans ambiguïté, fondamentalement illicites. On voit ici que ce n'est pas une question d'argent, mais de volonté. Lorsque les dirigeants d'une petite entreprise pensent que la conformité est importante, il est fort probable que tous les salariés de la société le savent. Ils le savent parce qu'ils connaissent tous personnellement le PDG et que ce dernier les connaît. Ce n'est pas un problème de budget mais une question d'implication personnelle : le PDG et son état-major ont-ils la volonté nécessaire pour soutenir cet objectif ? Dans les grandes entreprises, les budgets et les ressources financières peuvent fort bien être essentiels pour atteindre des milliers voire des centaines de milliers de salariés répartis dans le monde entier. Il arrive que les PDG de telles organisations ne connaissent pas le nom de toutes leurs filiales et encore moins le nom de tous leurs salariés. La volonté est essentielle, mais les ressources financières sont le moteur des grandes organisations.

7.1 Un dollar par jour ?

La Society of Corporate Compliance and Ethics (SCCE) est une fervente partisane des programmes de conformité dans les petites entreprises. Nous ne pensons pas que le coût soit un obstacle. De fait, nous avons publié un petit texte sur cette question à l'intention des professionnels concernés : Murphy, « A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs »¹⁸. Ce document présente de manière détaillée les types (et le coût, en général 0 \$) de mesure qu'une PME peut prendre afin de s'assurer que ses salariés respectent la loi. Il s'appuie sur les normes les plus souvent utilisées pour les programmes de conformité, y compris celles des *Sentencing Guidelines* et du Guide de bonnes pratiques de l'OCDE. Mais le problème n'est pas celui de l'origine des normes. Les éléments qui y figurent sont des mesures de gestion fondamentales que tout cadre compétent utiliserait afin d'atteindre un objectif. Mettre en œuvre un programme de conformité efficace n'est impossible que pour les responsables qui ne veulent pas se donner le mal de prendre les règles au sérieux¹⁹.

En réponse à cette idée, on pourrait toutefois objecter que si cela était si facile, pourquoi les petites entreprises disposent-elles rarement de tels programmes ? La première réponse, c'est que se doter d'un programme efficace n'est jamais « facile », car cela implique une volonté résolue de la direction. Mais ce n'est pas hors de portée de ces entreprises pour des questions financières. Pourquoi donc, alors, les PME ne disposent-elles pas, en général, de programme ? Comment les atteindre et les amener à lutter contre les ententes ?

¹⁸ (SCCE ; 2010)
<http://www.corporatecompliance.org/AM/Template.cfm?Section=Surveys&Template=/surveyform.cfm&Survey=DollarCompliance> .

¹⁹ Nous ne traitons pas ici du « coût de la conformité », c'est-à-dire le coût que représente pour une entreprise le fait de respecter la loi, ce qui dépasse le cadre de la présente contribution, mais seulement du coût résultant de l'existence d'un programme.

Dans ce contexte, on peut commencer par se demander pourquoi une PME consacrerait du temps et de l'énergie pour éviter d'éventuelles infractions²⁰. La vie de dirigeant ou de propriétaire de PME est en général bien remplie. Il y a la tension et l'excitation de diriger une entreprise. A n'importe quel moment, la survie même de la société peut être en jeu. Tandis qu'un dirigeant de grande entreprise peut réfléchir à de futurs projets, à des promotions, à des options de souscription ou d'achat d'actions, le propriétaire d'une petite entreprise se préoccupe d'abord de savoir s'il est en mesure de payer les salaires. L'entreprise réussira-t-elle à tenir les délais de production, gagnera-t-elle l'offre importante déposée cette semaine ? Cela peut être à la fois angoissant et exaltant.

Pour le propriétaire de PME, la bureaucratie est un ennemi et la souplesse peut être un avantage vis-à-vis de concurrents plus grands. Perdre son temps avec les lois, des avocats et la réglementation détourne de l'objectif qui consiste à survivre et à battre la concurrence. Dans ce contexte, du point de vue des mesures adoptées, il convient de se demander si la menace de grands procès, de lourdes amendes et de peines de prison sévères a le moindre effet sur les PME. Leurs propriétaires et leurs dirigeants s'intéressent-ils seulement aux affaires importantes ? Pensent-ils que cela s'applique également à eux et qu'une autorité de la concurrence ou un service répressif prendra le temps de se pencher sur leurs activités ? Le plus souvent, le PDG de PME n'est pas à l'affût de nouvelles en provenance des pouvoirs publics : il cherche des clients, veut réaliser des économies et obtenir un avantage concurrentiel. C'est dans ce but qu'il a fondé une entreprise : il veut se mesurer à des concurrents et gagner. S'inquiéter de ce qui peut ou pourrait se passer dans un futur lointain paraît bien terne comparé aux besoins quotidiens et à l'excitation de la PME.

Comment donc amener les PME à s'intéresser à ces questions ? Pour les convaincre, il faut se placer sur leur terrain, le marché. Des amendes plus lourdes et des peines de prison plus longues n'ont aucun impact si l'on ne se donne pas la peine de s'y intéresser et si l'on pense qu'elles ne vous sont applicables en aucune manière. Les PME ne vont pas non plus se pencher sur des guides et des outils pour la conformité même s'ils sont gratuits et facilement accessibles. Pourquoi détourner son attention de la direction des affaires, opérer ce qui est perçu comme une perte de temps bureaucratique. En revanche, ce qui se passe sur le marché intéresse au plus haut point le chef d'entreprise. Alors, quelle est la bonne solution ?

Il est certainement possible d'effectuer des expériences intelligentes dans ce domaine. Nous pensons que la meilleure stratégie consiste à faire des programmes de conformité un des critères de sélection des PME pour les grandes entreprises. Comment cela se traduirait-il ? Nombre de PME désirent travailler pour des sociétés plus grosses. Dans ce cadre, tout ce qui permet d'obtenir un avantage concurrentiel est bon à prendre. Si les grandes entreprises faisaient des programmes de conformité des sociétés qui leur font des offres et travaillent pour elles un critère de sélection important, le marché favoriserait le développement de tels programmes. Les grosses sociétés pourraient faire de l'existence d'un programme de conformité une obligation pour les entreprises qui leur soumettent des offres. Elles pourraient faire de la qualité du programme d'un fournisseur un critère de sélection très important. À cet égard, les grandes entreprises pourraient prendre de nombreuses initiatives²¹.

Mais qu'est-ce qui pourrait amener les grosses sociétés à agir ainsi ? L'expérience américaine montre que se contenter de dire que ce serait louable de leur part n'a que très peu d'effets. Une telle déclaration figure dans les Sentencing Guidelines depuis 2004 et n'a donné pratiquement aucun résultat²². Les

²⁰ Ici, l'auteur de ces lignes parle en tant que cofondateur d'une petite société et administrateur d'une association professionnelle de petites entreprises de la ville où il habite.

²¹ Ainsi, cas unique, un de nos clients a organisé un atelier à l'intention des fournisseurs en vue de leur expliquer comment mettre en place leur propre programme de conformité.

²² U.S.S.G. section 8B2.1 Commentary note 2 C) ii) « S'il y a lieu, une grande organisation doit encourager les petites organisations (surtout celles qui ont, ou cherchent à avoir, une relation commerciale avec elle) à

dirigeants savent que ce type de conseil n'est pas pris en compte par le ministère public ou d'autres services répressifs lorsqu'ils évaluent un programme, alors ils n'en tiennent pas compte. Quelles méthodes seraient efficaces ? Notre expérience dans ce domaine nous apprend que les entreprises, tout du moins les plus grandes, lesquelles s'estiment davantage surveillées par les pouvoirs publics, se montrent sensibles à des récompenses tangibles et à des orientations raisonnablement précises, s'agissant des mesures à mettre en place. Les *Sentencing Guidelines* ont montré l'intérêt de la carotte et du bâton, ce qui a conduit à des changements spectaculaires dans la manière dont le monde de l'entreprise considérait la conformité. Comment tirer profit de cette expérience ?

Si les États qui ont encouragé les programmes de conformité (diminution des sanctions et des amendes prononcées, prise en compte dans la décision d'engager des poursuites, etc.) imposaient aux programmes, pour bénéficier de telles mesures, de s'appliquer également aux fournisseurs, les résultats seraient certainement rapides et importants. Si des règles comme les *Sentencing Guidelines* aux États-Unis, le Guide de bonnes pratiques de l'OCDE dans de nombreux pays et les conseils sur les programmes semblables à ceux fournis par l'Office of Fair Trading au Royaume-Uni en faisaient un élément essentiel de tout programme efficace, l'expérience montre que les grandes entreprises suivraient. Cela donnerait alors aux PME le genre d'incitation auquel elles ne résistent pas : la possibilité d'accéder au marché tant convoité des grosses sociétés. Mais si les pouvoirs publics n'offrent pas de tels avantages aux grandes entreprises, il sera difficile d'influer sur le comportement des PME.

8. Quelles sont les différentes stratégies adoptées par les pouvoirs publics en matière de programmes de conformité aux règles de concurrence dans le monde ?

Pour examiner le rôle joué par les programmes de conformité dans l'application du droit de la concurrence, il est intéressant de regarder les actions engagées par les services répressifs dans ce domaine. À notre connaissance, aucune étude n'a été publiée sur cette question, les observations qui figurent ci-dessous reposent donc sur notre expérience personnelle, des recherches et une bonne connaissance des publications et des pratiques de certaines autorités.

8.1 États-Unis

Aux États-Unis, la division antitrust a décidé de ne pas prendre en compte les programmes de conformité lorsqu'il s'agit de juger de la culpabilité d'une entreprise ou de décider d'engager des poursuites²³. On retrouve la même position dans le manuel destiné aux procureurs fédéraux publié par le ministère de la Justice, manuel qui crée une exception par rapport aux principes généraux du ministère en matière de prise en compte des programmes pour les décisions de sanctions²⁴.

mettre en place des programmes de conformité efficaces. »
http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf.

²³ Même si des personnes représentant la division ont indiqué que les programmes peuvent avoir un effet sur les décisions de sanctionner une entreprise. Voir Block « Antitrust Compliance Programs and Criminal Litigation: Myth and Reality », 7 *Antitrust* 10, 10 (1985) (en examinant une affaire dans laquelle « un programme de conformité bien conçu » et rigoureusement appliqué avait eu un effet sur la décision de la division de mettre ou non en examen une société pour « conduite répréhensible isolée »).

²⁴ Manuel des procureurs fédéraux, 9-28.800 Programmes de conformité au sein des entreprises, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (« De plus, la nature de certaines infractions, notamment en matière de concurrence, peut être telle que les lois pénales nationales imposent de poursuivre les entreprises en dépit de l'existence d'un programme de conformité ») (aucune explication n'est fournie et aucun autre exemple n'est donné).

Dans les *Organizational Sentencing Guidelines*, les programmes de conformité sont pris en compte pour déterminer la sanction infligée aux entreprises²⁵, mais une disposition spécifique limite fortement les avantages obtenus dans les affaires de concurrence²⁶. De plus, en pratique, cela fait 20 ans que les *Organizational Sentencing Guidelines* sont en vigueur et aucune entreprise n'a obtenu une diminution de l'amende infligée du fait qu'elle disposait d'un programme de conformité aux règles de concurrence.

L'existence d'un programme de conformité ne fait pas partie des conditions nécessaire pour bénéficier du programme de clémence de la division antitrust. Les entreprises admises au programme ne sont pas tenues de mettre en place de tels programmes²⁷.

La division antitrust elle-même n'a pas officiellement publié de recommandations sur le contenu des programmes de conformité. Cela étant, des porte-parole de la division ont donné des conseils²⁸. Des représentants de la division ont également participé à des formations juridiques continues concernant les programmes de conformité et ont expliqué que le principal avantage d'un programme, outre la prévention des infractions, est de permettre à une entreprise d'être la première à faire état d'une collusion et donc à bénéficier du programme de clémence. La Federal Trade Commission a publié des orientations relatives aux programmes de conformité en s'appuyant sur une note rédigée par Loftus Carson, du bureau de la Concurrence (février 1979),²⁹ et Daniel Ducore, directeur adjoint du bureau de la Concurrence en 1996, a déclaré cette année-là que pour ce qui est de la prise en compte de la conformité dans les décisions de la FTC :

« plus une société montre à la FTC qu'elle a fait des efforts pour être irréprochable, plus la Commission considère qu'elle a agi de bonne foi et est favorable à une réduction de la peine, réduction qui peut aller jusqu'à l'absence d'amende³⁰. »

À notre connaissance, aucun autre document officiel n'a été publié depuis cette époque. La FTC a toutefois imposé la mise en place de programmes de conformité dans des procédures négociées, programmes qui peuvent être assez détaillés. Dans certaines affaires traitées par la division antitrust, la procédure négociée imposait quelques éléments de programme de conformité, même s'ils étaient en général moins détaillés que pour les procédures négociées dans d'autres branches du droit par le ministère américain de la Justice. Pour aider les entreprises à mettre en place des programmes de conformité, la division a rendu publiques des vidéos de l'affaire de la lysine que les professionnels, y compris nous-mêmes, avons jugé utiles pour former les salariés des entreprises.

8.2 Union européenne

Dans l'Union européenne (UE) les services répressifs avaient initialement adopté une démarche peu orthodoxe qui consistait à avantager les entreprises qui avaient mis en œuvre des programmes après la

²⁵ http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf.

²⁶ Federal Sentencing Guidelines Manual § 2R1.1(d)(2).

²⁷ <http://www.justice.gov/atr/public/guidelines/0091.pdf>.

²⁸ Roberts, « Antitrust Compliance Programs Under the Guidelines: Initial Observations From the Government's Viewpoint, » 2 *Corporate Conduct Quarterly* 1 (été 1992); Kolasky, « Antitrust Compliance: The Government's Perspective, » 16 *ethikos* 6 (sept/oct 2002).

²⁹ FTC, « Model Antitrust Compliance Audit Program ».

³⁰ Murphy, « An FTC View of Compliance Programs: Good Faith Efforts Can Mean No Penalties, » 4 *Corporate Conduct Quarterly* 53, 66 (1966) (entretien réalisé par l'auteur).

découverte d'une infraction³¹ ; ultérieurement, l'UE a rejeté toute demande visant à obtenir un avantage du fait de l'existence d'un programme. Le régime des sanctions de l'UE énumère plusieurs facteurs qui peuvent être pris en compte pour déterminer les peines infligées y compris les difficultés financières de l'entreprise contrevenante, mais les programmes de conformité n'en font pas partie³². Il apparaît donc que ces programmes ne jouent aucun rôle que ce soit dans la décision d'instruire une affaire ou dans la détermination des sanctions. Nous avons appris par des professionnels du secteur que les services répressifs de l'UE cherchent des informations provenant de programmes de conformité, informations qu'ils utilisent contre les entreprises afin d'établir que les infractions étaient délibérées et n'ont pas eu lieu par négligence.

L'UE n'impose pas aux sociétés qui bénéficient d'un programme de clémence de disposer de programmes de conformité ou d'en mettre en place³³. L'Union n'a pas non plus publié de recommandations officielles sur le contenu des programmes de conformité.

Dans ce domaine, les pays membres de l'UE suivent en général les recommandations des services répressifs de l'Union. Le plus souvent, les programmes de clémence n'imposent pas à leurs participants de mettre en place des programmes, les décisions de sanctions ne tiennent pas compte de l'existence d'un programme et le régime des amendes favorise les contrevenants qui sont dans une situation financière difficile (lorsque l'amende peut entraîner le dépôt de bilan de la société) mais pas ceux qui sont dotés d'un programme de conformité. Néanmoins, il s'agit d'un tableau général qui comporte des exceptions (étudiées ci-dessous) parmi les États membres dont l'auteur a examiné la situation.

8.3 *Autres démarches*

Il serait cependant faux de conclure que les autorités de la concurrence se désintéressent systématiquement des programmes de conformité. L'exemple du Bureau canadien de la Concurrence, qui a, le premier en 1997, publié des recommandations sur les programmes de conformité aux règles de concurrence. Plus récemment, le Bureau a décidé de mettre à jour ses recommandations et de permettre au public de commenter le document de travail. Grâce aux remarques de l'American Bar Association, de l'Association du Barreau canadien et de la Society of Corporate Compliance and Ethics, le Bureau a publié un guide assez détaillé pour les programmes. Ce bulletin contient une bonne partie des éléments que l'on trouve dans des normes comme les *Organizational Sentencing Guidelines* américaines ou le Guide de bonnes pratiques du Groupe de travail de l'OCDE.

Le bulletin explique également comment les programmes peuvent intervenir à plusieurs niveaux en phase répressive, y compris pour des décisions d'engager des poursuites contre une entreprise, des décisions concernant les corrections à apporter, et des décisions rendues par les tribunaux qui jugent des sociétés. Il clarifie également un point difficile relatif aux conséquences d'une infraction commise par un haut responsable et considère que, puisque dans un tel cas, le coût pour l'entreprise est plus lourd, il serait possible de tenir compte du programme d'une entreprise s'il est suffisamment efficace. Contrairement à ce qui se passe dans d'autres pays, qui ne prennent pas en considération les programmes de conformité pour déterminer si l'entreprise peut bénéficier de la clémence en cas d'entente, les Canadiens déclarent :

³¹ Voir 31991D0532, 91/532/CEE : décision de la Commission, du 5 juin 1991, relative à une procédure d'application de l'article 85 du traité CEE (Affaire n° IV/32.879 - Viho/Toshiba).

³² Lignes directrices pour le calcul des amendes infligées en application de l'article 23, paragraphe 2, sous a), du règlement (CE) n° 1/2003 [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):FR:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):FR:NOT)

³³ Communication de la Commission sur l'immunité d'amendes et la réduction de leur montant dans les affaires portant sur des ententes [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208\(04\):FR:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208(04):FR:NOT) .

« Le Bureau recommandera fortement qu'une entreprise présentant une demande d'immunité ou de clémence mette en œuvre un programme crédible et efficace s'appuyant sur le présent bulletin³⁴. »

En Europe, sur le papier du moins, les règles norvégiennes qui servent à déterminer le montant des amendes diffèrent de celles de l'UE en ce qu'elles permettent de prendre en compte les efforts d'une société pour empêcher la formation d'ententes, surtout s'il est possible de prévenir les pratiques en question grâce à un programme. Pour fixer la sanction, il faut tenir compte du « fait de savoir si l'entreprise, grâce à des lignes directrices, des instructions, de la formation, une surveillance ou d'autres mesures aurait pu empêcher la commission de l'infraction³⁵. »

Au Royaume-Uni l'OFT a publié un guide pour les programmes de conformité³⁶. L'année dernière, il a décidé de réviser ce guide et a ouvert une consultation publique sur ce document. Il a également entrepris une étude complète de ce sujet, en cherchant à obtenir des informations auprès des personnes qui travaillent sur la conformité dans les entreprises. L'OFT examine également la possibilité de faire bénéficier les entreprises dotées de programmes efficaces d'une réduction de 10 % de la sanction.

En France, l'Autorité de la concurrence a commandé une étude sur les programmes de conformité. Lors de procédures négociées, elle a ordonné la mise en place de programmes de conformité, démarche quelque peu similaire à celle de la division criminelle du ministère américain de la Justice. À notre connaissance, l'Autorité française étudie encore le rôle que les programmes pourraient jouer s'agissant des décisions de sanction et le type de recommandations à fournir pour ce qui est du contenu des programmes.

En Australie, les autorités de la concurrence ont de longue date participé activement au développement de la conformité dans le pays. L'ACCC et son prédécesseur, la Trade Practices Commission, ont été à l'origine des normes australiennes pour les programmes de conformité, l'AS 3806, et sont aussi pour beaucoup dans la création de l'organisation qui est devenue l'Australasian Compliance Institute³⁷, spécialisée dans la conformité.

L'ACCC a publié des guides détaillés sur les programmes de conformité³⁸. Même s'ils sont apparemment moins incitatifs que les guides canadiens, ils reconnaissent que les tribunaux peuvent tenir compte des programmes. Il est également très clair que l'ACCC, lorsqu'elle prend une décision, impose la mise en place d'un programme de conformité efficace.

Pour ces remarques, l'auteur de ces lignes s'est appuyé sur des sources de première main pour ce qui est de la situation australienne, sur sa participation à des affaires s'agissant du bulletin canadien, sur un examen des rapports d'activité de l'Autorité française de la concurrence en anglais, et a suivi et commenté

³⁴ Bureau de la concurrence Canada, les programmes de conformité d'entreprise 15 (2010). [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-f.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-f.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-f.pdf/$FILE/CorporateCompliancePrograms-sept-2010-f.pdf).

³⁵ <http://www.konkurransetilsynet.no/en/legislation/Regulation-on-the-calculation-of-and-leniency-from-administrative-fines/>.

³⁶ Office of Fair Trading (UK), "How your business can achieve compliance: A guide to achieving compliance with competition law" (mars 2005) http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guides/oft424.pdf.

³⁷ http://www.compliance.org.au/www_aci/.

³⁸ Australian Competition and Consumer Commission, Corporate Trade Practices Compliance Programs (nov. 2005) <http://www.accc.gov.au/content/item.phtml?itemId=717078&nodeId=0de4ca0a69fe9dde037bf81391b2cdab&fn=Corporate%20trade%20practices%20compliance%20programs.pdf>.

l'évolution de la situation au nom de la SCCE pour l'OFT. Pour les autres parties de cet exposé, nous nous sommes basés sur des documents publiés par les différentes autorités nationales et ne pouvons pas nous prononcer sur la manière dont elles sont mises en œuvre ou sur leur application constante.

À Singapour, la Commission de la concurrence a édicté un régime de sanctions qui intègre comme paramètre l'existence d'un programme de conformité. La brève définition du programme de conformité qui y figure montre que seuls les efforts soutenus doivent être pris en compte.

« 2.12 Les circonstances atténuantes comprennent :

...

- le fait d'avoir pris des mesures appropriées en vue de s'assurer du respect de l'interdiction mentionnée dans la section 34 ou de l'interdiction de la section 47, par exemple, existence d'un programme de conformité ;

...

2.13 Lorsqu'il étudie le crédit qu'il convient d'accorder à l'existence d'un programme de conformité, le CSS examine :

- si des mesures et des procédures de conformité adaptées sont en place ;
- si le programme a été activement mise en œuvre ;
- s'il est soutenu et respecté par la direction ;
- si les salariés qui travaillent dans des domaines où le droit de la concurrence intervient peuvent bénéficier, quel que soit leur niveau, d'une formation active et continue ;
- si le programme fait régulièrement l'objet d'une évaluation et d'une révision. »³⁹

L'Autorité de la concurrence israélienne a publié un « Model Internal Compliance Program », document d'orientation sur les programmes de conformité qui aborde des points importants, comme la nécessité que le conseil d'administration nomme le responsable conformité. Ce document explique qu'en droit israélien, l'efficacité d'un programme de conformité sert d'argument de défense pour des dirigeants qui pourraient sinon être accusés d'infraction au droit des sociétés. Les entreprises qui sont dotées de programmes bénéficient également d'un avantage :

« Tout d'abord, l'IAA répondra **en priorité** aux questions portant sur ses domaines d'expertise posées par les entreprises qui disposent d'un programme de conformité interne. Cette priorité se traduira par la mise en place d'une assistance régulière d'une manière plus rapide pour ces sociétés par rapport aux autres entreprises⁴⁰. »

En Inde, la Commission de la concurrence a publié le « Competition Compliance Programme for Enterprises », lequel, tout en expliquant la réglementation, donne des recommandations détaillées pour la mise en œuvre des programmes. Voici par exemple ses suggestions en matière d'audit :

« Alors qu'auditer les procédures, les documents et les courriels de tous les salariés peut s'avérer herculéen, il est toujours possible d'identifier les individus qui sont les plus suspects et d'effectuer un audit d'un instantané de ses courriels un certain jour⁴¹. »

³⁹ http://app.ccs.gov.sg/cms/user_documents/main/pdf/CCSGuideline_Penalty_20071033.pdf

⁴⁰ Autorité de la concurrence israélienne, Model Internal Compliance Program 7 (nov. 1998), <http://www.antitrust.gov.il/Files/HPLinks/Internal%20Compliance.pdf>.

⁴¹ Commission indienne de la concurrence, Competition Compliance Programme for Enterprises 26 (juin 2008) http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppsta7Rf00.

Elle recommande également de ne pas isoler le programme :

« Il est conseillé d'intégrer le « programme de conformité » aux règles de concurrence aux programmes de conformité généraux de l'entreprise⁴². »

De la même manière que le document d'orientation israélien, elle considère que le rôle du responsable de la conformité est essentiel. Sans plus de détails, elle commente également la qualité des programmes :

« L'existence d'un programme de conformité solide qui reflète le désir de la direction de respecter la loi peut tempérer la sévérité de la sanction qui peut être infligée en cas d'infraction. »

*« Parmi les avantages des programmes de conformité, on peut citer :
contribuent à éviter les amendes ou à limiter le montant d'une amende⁴³ »*

Ceux qui s'intéressent à cette question auraient avantage à commander une étude plus approfondie sur ce sujet, afin de savoir ce que les autres autorités ont fait dans ce domaine, quelles expériences ont été menées et quelles conclusions on peut en tirer.

9. Les programmes de conformité relatifs à d'autres branches du droit offrent-ils un éclairage intéressant ?

Il est possible d'en savoir plus sur la démarche des pouvoirs publics en matière de programmes de conformité à partir de l'expérience des autorités de la concurrence, mais la conformité et l'éthique ne se limitent pas à cette branche du droit. Ces programmes servent à contrôler les activités des entreprises et d'autres organisations⁴⁴ sur toute une série de questions juridiques. Alors que chaque branche du droit a ses spécificités propres, les éléments d'un programme de conformité efficace sont remarquablement similaires quel que soit le droit concerné. Cela n'est pas surprenant étant donné que les composantes d'un programme efficace sont par essence une adaptation de techniques de gestion qui s'appliquent à toute organisation. Les priorités et les techniques peuvent varier mais les principes fondamentaux restent pratiquement les mêmes. Dès lors, il peut s'avérer très utile de connaître l'expérience des services répressifs dans d'autres branches du droit si l'on souhaite traiter les problèmes de conformité et d'éthique.

9.1 La division criminelle du ministère américain de la Justice

Aux États-Unis, le ministère de la Justice est constitué de divisions principales et notamment de la division antitrust. Au sein du ministère, cette division est seule compétente pour toutes les affaires de droit de la concurrence, mais c'est la division criminelle qui est chargée d'instruire les autres dossiers pénaux. La

⁴² Commission indienne de la concurrence, Competition Compliance Programme for Enterprises 32 (juin 2008)
http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00.

⁴³ Commission indienne de la concurrence, Competition Compliance Programme for Enterprises 15-16 (juin 2008)
http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00.

⁴⁴ Même des organismes publics ont mis en place des programmes de conformité. Aux États-Unis, le FBI, tout comme la SEC, est doté d'un programme de conformité. L'université Rutgers dispose d'un centre consacré à l'étude des programmes de conformité des organismes publics, le Rutgers Center for Government Compliance and Ethics, <http://rcgce.camlaw.rutgers.edu/>.

division criminelle, surtout la section des fraudes, engage les poursuites en cas d'infraction au Foreign Corrupt Practices Act (la Securities and Exchange Commission peut également engager des poursuites à ce titre).

Le ministère de la Justice, dans son document d'orientation envoyé à tous les bureaux des procureurs fédéraux, leur a demandé de tenir compte de l'existence d'un programme de conformité lorsque se pose la question de poursuivre une entreprise⁴⁵, et a donné quelques détails sur la manière d'évaluer les programmes⁴⁶. De même, des responsables des services répressifs qui travaillent au siège du ministère ont déclaré publiquement qu'il est tenu compte des programmes lorsqu'une décision de sanction est rendue.

Le ministère a également publié un document d'orientation sur le contenu des programmes de conformité dans le cadre de ses procédures négociées⁴⁷. Lorsqu'une entreprise révèle volontairement une infraction pénale, elle bénéficie d'une réduction de peine adaptée (même si, contrairement à ce qui se passe avec la division antitrust, il n'y a aucune garantie de clémence complète). Mais, dans le cadre de la procédure négociée, la société doit changer ses pratiques et mettre en place des programmes efficaces. La division criminelle ne compte pas sur la chance ou l'appréciation de l'entreprise : elle impose la mise en place de composantes de programme précises (en cas d'infraction au Foreign Corrupt Practices Act, en s'appuyant sur le Guide de bonnes pratiques de l'OCDE) et souvent une surveillance afin de s'assurer que le programme est correctement mis en œuvre.

Les programmes ont donc de l'importance au début comme à la fin des affaires et il a été dit explicitement qu'en matière de conformité, seuls les efforts sérieux seront pris en compte. Récemment, la division criminelle a indiqué qu'elle comptait donner plus d'informations sur les types de programmes permettant de bénéficier d'une réduction de peine afin que les professionnels se servent de ces informations pour convaincre les dirigeants d'entreprise de mettre en place des programmes plus efficaces.

Plusieurs autres services répressifs ou de contrôle américains ont adopté une démarche similaire pour promouvoir les programmes de conformité. On a évoqué ici le cas de la division criminelle car c'est le plus proche de celui de la division antitrust.

9.2 *Le programme de clémence de la Banque Mondiale*

Le deuxième exemple intéressant vient de la Banque Mondiale, laquelle dispose peut-être du seul programme de clémence complet dans le domaine de la lutte contre la corruption. Les sous-traitants de la Banque Mondiale qui lui révèlent spontanément leur implication dans une affaire de corruption peuvent éviter l'exclusion grâce au programme de clémence de la Banque. Mais, contrairement à ce qui se passe pour les programmes de clémence mis en place dans le domaine de la concurrence, la Banque Mondiale impose à tous ceux qui bénéficient du programme de mettre en place des programmes de conformité. Comme la division criminelle américaine, la Banque ne fait pas confiance à ces sous-traitants : les programmes font l'objet d'une surveillance.

« 2. Résumé du programme

⁴⁵ Sauf pour les affaires de concurrence.

⁴⁶ United States Attorneys' Manual, 9-28.800 Corporate Compliance Programs, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

⁴⁷ Voir par exemple, *US v. Metcalf & Eddy, Inc.*, CA No. 99CV-12566-NG (D. Mass. 14 déc 1999), *Consent and Undertaking Of Metcalf & Eddy, Inc.* Ces affaires offrent des exemples des types de composantes de programmes exigés par la section des fraudes. Récemment, ces obligations en matière de programmes de conformité ont été renforcées par l'ajout de principes provenant du Guide de bonnes pratiques de l'OCDE. Voir, par exemple, *In re Noble Corporation, Non-Prosecution Agreement* (4 nov. 2010), Attachment B <http://www.justice.gov/criminal/fraud/fcpa/cases/noble-corp/11-04-10noble-corp-npa.pdf>.

Le programme de déclaration spontanée donne à des entreprises, à d'autres entités ou à des personnes physiques qui ont conclu des contrats (ou ont été partie à des contrats) relatifs à des projets financés ou soutenus par la BIRD, l'IDA, l'IFC, ou l'AMGI la possibilité de s'associer à la Banque Mondiale et :

a. de cesser leurs pratiques de corruption ;

b. de communiquer spontanément des informations sur les comportements répréhensibles qui peuvent être sanctionnés par la Banque (notamment la fraude, la corruption, la collusion et la coercition) en effectuant des investigations internes à ses frais ;

c. d'adopter un programme de conformité et de gouvernance d'entreprise solide, qui s'appuie sur les meilleures pratiques. Ce programme fait l'objet d'une surveillance par un responsable de suivi du programme pendant trois ans.

En échange, la Banque n'exclut pas publiquement celui qui participe au programme à cause des comportements répréhensibles qu'il a révélés et garde secrète son identité.

Si toutefois, un participant ne dévoile pas tous les actes illicites spontanément, complètement et sincèrement, continue à agir de manière répréhensible ou ne respecte pas d'autres dispositions importantes du programme de déclaration spontanée, ce participant risque dix ans d'exclusion (annonce publique) conformément aux procédures habituelles de la Banque Mondiale⁴⁸. »

9.3 Le Groupe de travail de l'OCDE sur la corruption

Troisième exemple international, le Groupe de travail de l'OCDE sur la corruption, qui s'attache à lutter contre ce fléau dans le monde entier. Le Groupe de travail a mené une réflexion publique sur la manière de faire participer le secteur privé à la lutte contre la corruption et s'est intéressé au rôle des programmes de conformité. En 2009, les 38 signataires nationaux de la Convention du 21 novembre 1997 sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales ont envoyé une recommandation⁴⁹ à leurs membres. Cette recommandation les invite à poursuivre leur mission et déclare que le Groupe de travail :

« III. RECOMMANDE que chaque pays Membre prenne des mesures concrètes et significatives en conformité avec ses principes en matière de compétence et ses autres principes juridiques fondamentaux, pour examiner ou examiner plus avant les domaines suivants :

...

v) les normes et pratiques comptables des entreprises et les normes et pratiques des entreprises en matière de vérification externe, ainsi que de contrôle interne, de déontologie et de conformité, conformément à la section X de la présente Recommandation ;

...

X. RECOMMANDE que les pays Membres prennent les mesures nécessaires, en tenant compte, en tant que de besoin, des circonstances propres à chaque entreprise, y compris sa taille, sa forme, sa structure juridique et son secteur d'exploitation géographique et industrielle, pour que les lois, réglementations ou pratiques concernant les normes comptables, la vérification externe, le contrôle interne, la déontologie et la conformité soient conformes aux principes suivants et soient pleinement utilisées pour prévenir et détecter la corruption d'agents publics étrangers dans les transactions commerciales internationales, conformément à leurs principes en matière de compétence et leurs autres principes juridiques fondamentaux

⁴⁸ Banque Mondiale, programme de déclaration spontanée, http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.

⁴⁹ OCDE, Recommandation visant à renforcer la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, <http://www.oecd.org/dataoecd/31/53/44229684.pdf>.

...
Contrôles internes, déontologie et conformité

Les pays Membres devraient encourager:

- i) les entreprises à mettre au point et adopter des programmes ou mesures de contrôle interne, de déontologie et de conformité adéquats en vue de prévenir et de détecter la corruption transnationale, en tenant compte du Guide de bonnes pratiques pour les contrôles internes, la déontologie et la conformité, figurant à l'Annexe II, qui fait partie intégrante de la présente Recommandation;*
- ii) les organisations patronales et associations professionnelles, en tant que de besoin, dans leurs efforts pour encourager et aider les entreprises, en particulier les petites et moyennes entreprises, dans l'élaboration de programmes ou mesures de contrôle interne, de déontologie et de conformité en vue de prévenir et de détecter la corruption transnationale, en tenant compte du Guide de bonnes pratiques pour les contrôles internes, la déontologie et la conformité, figurant à l'Annexe II;*
- iii) les dirigeants d'entreprises à faire des déclarations dans leurs rapports annuels ou à rendre public de toute autre manière leurs programmes ou mesures de contrôle interne, de déontologie et de conformité, y compris ceux contribuant à prévenir et détecter la corruption;*
- iv) la création d'organes de contrôle, indépendants des dirigeants, tels que les comités d'audit des conseils d'administration ou des conseils de surveillance;*
- v) les entreprises à fournir des moyens de communication et de protection pour les personnes qui ne veulent pas commettre une infraction à la déontologie ou aux normes professionnelles sur les instructions ou sous la pression de leurs supérieurs hiérarchiques, ainsi que pour les personnes voulant signaler de bonne foi et sur la base de soupçons raisonnables des manquements à la loi, à la déontologie ou aux normes professionnelles se produisant au sein de l'entreprise, et devraient encourager les entreprises à prendre des mesures appropriées sur la base de tels signalements;*
- vi) leurs agences gouvernementales à examiner, lorsque les transactions commerciales internationales sont concernées et en tant que de besoin, les programmes ou mesures de contrôle interne, de déontologie et de conformité, dans le cadre de leurs décisions d'attribution d'avantages octroyés par les pouvoirs publics, y compris les subventions publiques, les autorisations publiques, les marchés publics, les marchés financés par l'aide publique au développement, et les crédits à l'exportation bénéficiant d'un soutien public. »*

Les 38 pays ont tous entériné l'importance des programmes de conformité comme arme pour lutter contre les activités illicites et appelé les pays signataires à prendre des mesures afin de promouvoir ces programmes. Il est conseillé aux pouvoirs publics d'examiner ces programmes dans le cadre de « leurs décisions d'attribution d'avantages » y compris les autorisations publiques et les marchés publics. En outre, le Groupe de travail a rendu publique une liste de 12 principes baptisés Guide de bonnes pratiques, en vue d'aider les entreprises à concevoir des programmes de lutte contre la corruption efficaces⁵⁰. Les 12 principes du Guide de bonnes pratiques sont pour la plupart connus des professionnels de la conformité et de l'éthique, car ils reflètent des principes de gestion communs. En annexe I, on trouvera une version modifiée du Guide de bonnes pratiques qui pourrait être utilisée pour les programmes de conformité aux règles de concurrence.

⁵⁰ OCDE, Recommandation visant à renforcer la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, annexe II
<http://www.oecd.org/dataoecd/31/53/44229684.pdf>.

Comme nous l'avons déjà indiqué, le manuel des procureurs fédéraux publié par le ministère américain de la Justice opère une distinction entre la lutte contre les pratiques anticoncurrentielles et d'autres branches du droit, mais son analyse s'arrête là. Le modèle de lutte contre la corruption semble accorder une place importante au secteur privé et un rôle aux pouvoirs publics dans le but de promouvoir les programmes de conformité dans les entreprises. L'auteur de ces lignes, qui dispose d'une expérience en droit de la concurrence et dans la lutte contre la corruption ne voit pas de caractéristiques distinctives qui expliqueraient les différences d'approche, s'agissant des programmes de conformité, entre le droit des ententes et le droit relatif aux autres formes d'infractions en réunion et la fraude. S'il existe des différences importantes, il serait fort utile que les autorités de la concurrence fournissent des détails sur ce point afin que les spécialistes puissent comprendre les différences de démarche et les expliquent aux dirigeants d'entreprise.

10. En pratique, comment les pouvoirs publics peuvent-ils mesurer l'efficacité des programmes de conformité ?

Lorsque les services répressifs examinent le rôle et l'importance des programmes de conformité, ils doivent répondre à une question très difficile : comment distinguer les programmes efficaces menés de bonne foi des pseudo-programmes. C'est un point extrêmement important pour toutes les parties prenantes car une erreur d'évaluation permettrait aux contrevenants d'échapper aux poursuites et pourrait jeter le discrédit sur la conformité et l'éthique. Les professionnels de ce secteur, qui veulent que leur entreprise prenne cette fonction au sérieux et mette en place des programmes efficaces, seront perdants à long terme si les pouvoirs publics échouent sur ce point. En outre, une grande partie de leur autorité et de leur réputation repose sur la crédibilité des pouvoirs publics en tant qu'évaluateurs de programmes.

10.1 Charge de la preuve

Pour mener à bien cette tâche, il y a deux éléments essentiels : sans eux, le processus risque fort d'échouer. Le premier est la charge de la preuve et le second, l'expertise. S'agissant de la preuve, il est essentiel qu'elle soit à la charge de l'entreprise. Il serait très difficile et long pour les pouvoirs publics d'établir qu'un programme n'existe pas. C'est donc l'entreprise qui affirme disposer d'un programme qui doit prouver que le programme existe réellement et est crédible. Si ce sont les pouvoirs publics qui déterminent de manière discrétionnaire la façon de traiter une entreprise, il peut y avoir beaucoup de souplesse quant au processus et à la solidité des preuves à apporter.

10.2 Expertise

La question de l'expertise appelle également un examen attentif. Comme nous l'avons déjà indiqué, la conformité et l'éthique sont des domaines multidisciplinaires et se distinguent de la pratique du droit. Même si un juriste a travaillé plusieurs années dans l'instruction d'affaires pénales, cela ne veut pas dire qu'il dispose de l'expertise nécessaire pour évaluer un programme et détecter ses faiblesses. Or, pour un professionnel expérimenté de la conformité et de l'éthique, il y a des questions à poser et des techniques bien précises à appliquer si l'on veut connaître la vérité. Comme dans tout domaine, cela peut paraître obscur au profane, mais pour ceux qui connaissent la question, certaines démarches permettent de faire toute la lumière sur une situation.

Nous avons eu l'occasion de participer à des présentations et à des formations sur l'évaluation des programmes, formations destinées à des responsables de services répressifs, avec un collègue qui avait déjà travaillé pour un procureur fédéral américain dans le même cadre. En l'occurrence, une société qui faisait l'objet de poursuites pénales s'était vu offerte la possibilité de présenter son programme et nous, professionnels extérieurs, avons mené une évaluation et remis nos conclusions aux procureurs. L'entreprise en question a accepté cette démarche et en a assumé le coût.

Lors d'une séance de formation destinée au groupe de travail sur le Foreign Corrupt Practices Act de la Securities and Exchange Commission, nous avons mis au point une série de questions que l'on peut poser à propos d'un programme et avons présenté ce qui permettait de démasquer les faux programmes, ce qui correspondait au minimum nécessaire et les facteurs permettant d'identifier les programmes solides. Nous pourrions facilement fournir des outils similaires à toute autorité de la concurrence intéressée par cette question. Ainsi, en annexe II, on trouvera des exemples de questions qui peuvent être posées à n'importe quel salarié de l'entreprise au cours d'une instruction. Ce sont des questions assez simples qui peuvent conduire très rapidement à une première évaluation du programme d'une société, même si celle-ci n'a pas encore officiellement présenté son programme. Afin que la présente note conserve une taille raisonnable, nous n'y avons pas fait figurer des éléments plus complets relatifs à la conduite des évaluations de programmes, mais nous pourrions les remettre à toute personne qui souhaite approfondir cette question.

Pour tout organisme public qui s'intéresse à ce problème, la méthode la plus efficace consiste sans doute, du moins dans un premier temps, à désigner un expert au sein de l'unité concernée afin qu'il se familiarise avec les programmes de conformité. Cette personne pourrait se tenir informée de l'évolution de ce domaine, aider à concevoir des outils facilitant l'évaluation des programmes, s'occuper de toutes les questions relatives aux programmes de conformité, y compris les évaluations et conseiller l'entreprise sur ces questions.

11. Comment les pouvoirs publics peuvent-ils promouvoir des programmes de conformité efficaces ?

Comme nous l'avons indiqué dans les exemples ci-dessus, les responsables des services répressifs considèrent que les programmes de conformité efficaces constituent un instrument utile dans la lutte contre la criminalité en col blanc et les infractions. Cela nous amène à la question de savoir comment les pouvoirs publics peuvent promouvoir de tels programmes et comment promouvoir des programmes qui fonctionnent réellement.

11.1 Les entreprises agiront-elles seules ?

Si l'on reconnaît que les programmes ont un intérêt, même s'ils doivent parfois aussi être renforcés, la question qui se pose est de savoir si les pouvoirs publics ont un rôle à jouer dans ce domaine. Dans le monde des affaires, il y a sûrement certaines personnes qui pensent que les entreprises peuvent et doivent mettre en place des programmes parce que c'est pertinent sur le plan économique et/ou nécessaire. Pour ces personnes optimistes, l'action des pouvoirs publics n'est pas nécessaire ; il suffit de « vendre » ces programmes et de faire appel à la bonne conscience des dirigeants d'entreprise. L'auteur de ces lignes ne fait pas partie de ces optimistes et a constaté que la réaction à de telles initiatives étant très souvent limitée. Si les programmes ne faisaient que répondre à une nécessité économique, il s'en créerait d'excellents spontanément. Les dirigeants peuvent bien affirmer qu'ils agissent, mais, la plupart du temps, ce n'est pas ce que nous avons constaté cela et l'histoire du développement des programmes de conformité ne confirme pas vraiment la thèse selon laquelle les bonnes intentions des dirigeants suffisent. Celles-ci ne conduisent pas non plus les programmes à avoir recours à des méthodes de prévention et de détection des infractions de plus en plus efficaces. Les dirigeants d'entreprise pensent peut-être sincèrement qu'il faut le faire, mais si cela n'a pas eu lieu spontanément jusqu'à aujourd'hui, on ne voit pas bien pourquoi cela se produirait à l'avenir.

11.2 Les entreprises agiront-elles en réponse à une politique répressive ?

Selon une deuxième théorie, il suffit que les pouvoirs publics utilisent un bâton suffisamment gros : les entreprises prendront peur et mettront en place les méthodes les plus efficaces et les plus innovantes

afin de se surveiller elles-mêmes. Lorsque des sociétés deviennent les cibles directes de mesures judiciaires menaçantes et embarrassantes, la conformité devient temporairement un sujet important. Mais cela fonctionne-t-il réellement et est-ce la solution idéale ? Il semblerait que plusieurs tendances vont à l'encontre de cette idée. Les personnes qui travaillent dans des entreprises ou des organisations ont en général une stupéfiante capacité à distinguer la situation des autres sociétés de celle de leur propre entreprise. Le fait qu'un concurrent ait fait l'objet de poursuites pénales n'amène pas nécessairement un deuxième concurrent à prendre des mesures préventives. La société A peut bien avoir fait l'objet d'une enquête et connu un scandale, pour les dirigeants de la société B, c'est sans doute parce que « l'état-major est particulièrement stupide qu'il a commis ce type d'erreur, nous sommes trop intelligents pour que cela nous arrive ». Jusqu'à ce que la maison brûle, les dirigeants sont souvent dans le déni ou n'écourent même pas le message délivré par les pouvoirs publics. Comme nous l'avons indiqué plus haut, il ne faut pas oublier non plus que la répression, par nature, a toujours lieu après que l'infraction a été commise et que les victimes ont souffert. Elle peut servir à attirer l'attention des dirigeants, mais seulement une fois que le mal est fait.

Enfin, les entreprises ont souvent la mémoire courte. Juste après le choc provoqué par des poursuites pénales, ceux qui étaient auparavant incroyants se convertissent. Tous les dirigeants jurent leurs grands dieux qu'ils ne pécheront plus jamais. Mais quelques cycles économiques plus tard, le responsable de la conformité, auparavant doté de pouvoirs importants, rend compte à un juriste débutant qui travaille au service juridique de l'entreprise et la formation en droit de la concurrence n'est plus dispensée qu'aux pauvres âmes qui ne peuvent y échapper. Sans autre forme active d'encouragement, sans surveillance, sans autres recommandations spécifiques, les succès remportés par les services répressifs peuvent être de courte durée. Encore une fois, il ne s'agit pas de généraliser. Même si ce que nous décrivons ici correspond à la tendance générale, il y a toujours des exceptions. La plus remarquable est sans doute l'impact à long terme qu'a eu sur General Electric (GE) le fait d'être poursuivie dans l'affaire du cartel des équipementiers électriques ; cet impact a duré plusieurs générations. Ironie du sort, les amendes infligées à GE à l'époque paraissent bien dérisoires aujourd'hui. Or, les amendes beaucoup plus lourdes infligées ces dernières années ne semblent pas avoir réussi à prévenir la récidive dans la même entreprise.

11.3 Pourquoi les entreprises adopteraient-elles des programmes solides et durables ?

Qu'est-ce qui pousse les sociétés à mettre en place des programmes efficaces et durables ? Sur ce point, l'expérience que l'on peut tirer des *Organizational Sentencing Guidelines* est très utile. Avant la publication des *Guidelines* en 1991, la conformité et l'éthique n'étaient que très rarement des sujets d'étude, il n'y avait pratiquement aucun professionnel qui se serait considéré comme un spécialiste de la conformité et de l'éthique⁵¹. Dans la plupart des cas, la conformité consistait à envoyer un message aux salariés en espérant qu'il aurait quelque impact. La « conformité » était du domaine exclusif des juristes et l'« éthique », une notion quasi mystique prêchée par quelques idéalistes qui pensaient que les entreprises devaient être guidées par des valeurs. Tout cela ne fonctionnait pas particulièrement bien. La conformité était également presque systématiquement découpée en plusieurs domaines cloisonnés : les personnes qui travaillaient sur la conformité aux règles environnementales n'avaient aucune raison de parler à ceux qui s'occupaient de la conformité au droit de la concurrence. Ceux qui luttaient contre la corruption d'agents publics étrangers n'avaient aucun contact avec ceux qui s'occupaient de la protection des consommateurs.

Or, en 1991, la Commission des peines a édicté des règles pour les peines à appliquer aux organisations dans les procès fédéraux et ces règles ont été à l'origine d'un profond bouleversement. Elles

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L'auteur de ces lignes, en collaboration avec Jay Sigler, professeur à l'université Rutgers, a écrit ce qui est sans doute le premier livre général sur les programmes de conformité en 1988 (*Interactive Corporate Compliance: An Alternative to Regulatory Compulsion*, Greenwood Press, 1988) et traite ce sujet en s'appuyant sur son expérience personnelle.

prévoient que les peines infligées aux entreprises seraient réduites dans certaines circonstances, notamment lorsque les sociétés avaient mis en place des programmes efficaces afin de prévenir les infractions. Pour la première fois ou presque, la conformité était considérée comme un domaine spécifique. Le mécanisme adopté par cette commission a connu un remarquable succès : elle a défini une formule flexible mais très pratique qui permet de déterminer si un programme est efficace (les sept étapes) et elle s'est engagée vis-à-vis des entreprises qui respectaient cette formule. Cette démarche a eu un effet galvanisant. Depuis cette date, les entreprises et les services répressifs du monde entier se sont inspirés de ces règles et de ce type de démarche. Alors qu'auparavant les programmes se limitaient en général à quelques étapes modestes conçues par des juristes, les entreprises doivent aujourd'hui mettre en place de réelles mesures de gestion. Ainsi, un programme qui ne prévoit pas d'audits, n'impose pas de sanctions disciplinaires aux cadres qui n'ont pas pris les mesures nécessaires pour prévenir et détecter les infractions et ne fait pas l'objet d'une surveillance sérieuse par la direction n'est pas du tout pris en considération.

Il est intéressant de souligner que, dans le domaine de la concurrence, c'est la même démarche qui a contribué au succès des programmes de clémence. Alors que le programme de déclaration dont disposait la division antitrust avant 1993 était insuffisant, dès que cette division s'est attelée à définir des règles compréhensibles et pratiques pour la clémence et a garanti un meilleur traitement aux participants, le programme a connu un succès époustouflant.

Compte tenu de ces deux succès spectaculaires et en appliquant les mêmes principes, nous pensons que rien ne fonctionne aussi bien que la formule simple et percutante suivante : définir une règle pratique et prendre un engagement. Les sympathiques appels à la bonne volonté comme les énormes bâtons et la peine capitale pour les entreprises ne donnent pas de tels résultats. L'emploi du bâton peut même avoir des effets indésirables sur les salariés, les fournisseurs, les clients et d'autres structures, voire sur le marché en cas de disparition d'un concurrent. La preuve, c'est que certaines autorités de la concurrence réduisent les amendes pour les contrevenants dont la situation financière est difficile.

Les pouvoirs publics doivent-ils agir afin de promouvoir les programmes de conformité ? D'après notre expérience, c'est la pression exercée par les autorités afin que des programmes efficaces soient mis en place qui oriente le comportement des entreprises. Il sera même nécessaire d'exercer une pression plus forte et plus ciblée pour que les sociétés rendent ces programmes plus efficaces. Nombre d'éléments montrent que les pouvoirs publics se sont engagés avec succès dans cette voie, mais beaucoup reste à faire pour donner à ces programmes tout leur potentiel.

Si les pouvoirs publics jouent un rôle essentiel et si les programmes de conformité peuvent être efficaces pour prévenir et détecter les ententes très tôt, les autorités de la concurrence peuvent-elles supposer que des initiatives provenant d'autres organismes publics obtiendront les résultats souhaités, dès lors qu'elles poursuivent les campagnes actuelles visant au respect de la réglementation ? Ou bien les autorités de la concurrence peuvent-elles bénéficier sans efforts des actions menées par d'autres organismes publics pour lutter contre la corruption, la fraude et d'autres infractions ?

Encore une fois, en s'appuyant sur l'expérience passée, il paraît hautement improbable que des services répressifs qui connaissent mal le droit de la concurrence favorisent les types de programmes les plus efficaces pour lutter contre les ententes. Il est même possible que les ressources, l'innovation et les travaux empiriques sont consacrés à d'autres domaines de conformité, les bénéfiques pour la conformité aux règles de concurrence n'étant qu'accessoires (nous soupçonnons, sans en avoir la preuve, que c'est ce qui se produit effectivement et que s'agissant de la conformité, les ressources sont aujourd'hui davantage consacrées à d'autres domaines comme la lutte contre la corruption, tout du moins dans les pays où les pouvoirs publics ne s'intéressent pas aux programmes de conformité). Si les autorités de la concurrence ne s'intéressent pas à ce domaine et ne prennent pas des mesures significatives pour promouvoir des programmes conçus pour lutter contre les ententes, nous ne sommes pas très optimistes quant aux résultats

à attendre si cette question est laissée à l'initiative d'autres entités qui ne connaissent pas bien les ententes, comme le Groupe de travail de l'OCDE sur la corruption. Si l'objectif est d'empêcher la formation de cartels, qui mieux que ceux dont la mission consiste précisément à éradiquer cette forme de vol peut y parvenir ?

11.4 Comment les services répressifs peuvent-ils promouvoir des programmes de conformité aux règles de concurrence plus efficaces ?

Si les responsables des autorités de la concurrence pensent réellement que les programmes sont un instrument utile dans la lutte contre les ententes ou ont encore besoin d'examiner l'intérêt qu'il y a à prendre des mesures afin de promouvoir ces programmes, une question essentielle se pose : que peuvent faire spécifiquement les services répressifs pour promouvoir ces programmes ? Sur ce point, une liste de solutions possibles figure dans l'annexe III. L'auteur de ces lignes l'avait initialement remise au Groupe de travail de l'OCDE sur la corruption, mais une grande partie de ces solutions peuvent s'appliquer à la plupart des domaines couverts par la conformité, y compris le droit de la concurrence. L'annexe III montre clairement qu'il ne faut pas se contenter de dire aux entreprises qu'elles doivent avoir des programmes et leur donner un blanc-seing lorsqu'elles disposent d'un programme insuffisant.

11.5 Conseiller les entreprises

Parmi les solutions possibles, l'une d'entre elles, assez évidente, consiste à conseiller les entreprises sur le contenu des programmes. Cette solution est-elle efficace et viable ? Il est possible de ne donner aucun conseil, de donner des conseils en prévenant que les pouvoirs publics ne tiennent pas compte des programmes et de donner des conseils pratiques qui s'appuient sur les règles existantes comme les Sentencing Guidelines. Comme il existe d'excellentes règles fondamentales, notamment le Guide de bonnes pratiques du Groupe de travail sur la corruption, il est aujourd'hui beaucoup plus facile de tirer parti de celles-ci, ce qui permet de dégager de nouvelles idées pour lutter contre les ententes.

Comment les entreprises feront-elles usage de ces conseils ? Pour répondre à cette question, il existe une analogie utile et bien connue : la manière dont les services répressifs traitent les programmes de conformité des sociétés. Les vrais programmes qui ont recours à des outils de gestion et reflètent le soutien de la direction sont bien perçus. Les faux programmes, qui ne sont que des bavardages, ne sont pas pris en considération. Il en va de même pour les « programmes » publics qui dispensent des conseils aux entreprises. Si ce ne sont que des discussions, il y a peu de chances que des dirigeants rationnels s'y intéressent. Si la promotion des programmes de conformité par les pouvoirs publics se résume à des discussions, l'État ne dispose d'aucun levier réel pour amener les entreprises à améliorer leurs programmes. En revanche, si les conseils sur les programmes sont étayés par des actions significatives, les sociétés réagiront. Les faux programmes ne comptent pas, que ce soit pour les pouvoirs publics ou les dirigeants d'entreprise. Ce sont les programmes sérieux et pratiques qui permettent d'obtenir des résultats.

Certains membres des services répressifs peuvent s'inquiéter de ce que tout conseil sur les programmes pourrait être utilisé contre les pouvoirs publics. Risque-t-on de voir des chefs d'entreprise affirmer « Vous nous avez dit que c'était ce que nous devions faire ; comment pouvez-vous engager des poursuites contre nous après que nous avons suivi vos conseils ? » Aucun avocat en droit pénal des affaires n'a envie d'entendre cela. Il y a plusieurs manières de répondre à cette objection. La première est d'utiliser le type d'avertissement que les juristes connaissent bien, par exemple en indiquant que tout conseil apporté n'est pas juridiquement contraignant pour le service répressif, et que les faits de chaque espèce déterminent ce qu'il convient de faire. À cette fin, et également pour des raisons pratiques, il est souhaitable que les pouvoirs publics ne donnent pas d'instructions détaillées pour les programmes : il est préférable d'adopter la démarche retenue par les *Sentencing Guidelines* et le Guide de bonnes pratiques : des recommandations et des principes fondamentaux et pratiques et non des schémas et des listes détaillées. Enfin, il faut avertir

l'entreprise que sur toute question relative aux programmes de conformité, c'est à elle qu'incombe la charge de preuve.

Il ne faut pas s'y tromper : l'objectif n'est pas seulement qu'il y ait plus d'entreprises qui se dotent de « programmes », quelle que soit leur qualité. Les mauvais programmes consomment inutilement les ressources des sociétés et font perdre leur temps aux enquêteurs qui les examinent. L'objectif, c'est de développer des programmes sérieux et efficaces. Est-ce à la portée des pouvoirs publics ? Ceux-ci peuvent-ils amener les entreprises à mettre en place des programmes judicieux et parfois même embarrassants, capables de prévenir et de détecter les infractions à un stade précoce ? Cela n'est pas facile, mais la réponse est oui. En fait, les pouvoirs publics sont même peut-être les seuls à pouvoir obtenir ce résultat.

11.6 Justification de l'utilisation de la carotte et du bâton

La méthode est simple et a été évoquée plus haut : elle consiste à prendre un engagement et à édicter une liste de règles. Il faut utiliser à la fois la carotte et le bâton. La répression doit être sévère et constituer une menace crédible. Mais la menace seule ne conduit pas à mener des efforts de prévention efficaces, et n'est certainement pas le moteur des programmes durables. La carotte — le recours à des mécanismes incitatifs — attire l'attention des dirigeants et des conseils d'administration. Pourquoi ? Cette question pourrait faire l'objet de débats et d'analyses très longues, nous proposons ici une explication simple. Dans les affaires, la peur n'est pas la seule source de motivation et n'est sans doute pas la plus importante. Mais même si elle l'est, la peur lointaine de poursuites judiciaires et de sanctions sera toujours moins forte que les menaces immédiates résultant de la situation de l'entreprise. Si le seul facteur qui pousse les sociétés à développer des programmes est la menace lointaine d'une lourde amende, cela n'amène pas la direction des entreprises à consacrer l'énergie nécessaire à la mise en place de programmes solides. Et encore, cette analyse ne tient même pas compte de la réalité des grandes sociétés cotées. Les dirigeants de ces entreprises paient certainement leurs amendes avec l'argent d'autres personnes (les actionnaires) et, lorsque cet argent est versé, la Bourse les récompense immédiatement par un bond du cours de l'action du fait qu'ils ont fait disparaître l'incertitude liée aux poursuites judiciaires. Les événements isolés n'ont généralement pas d'effet sur le cours de Bourse. Par conséquent, à moins que l'amende soit tellement lourde qu'elle conduise à la disparition de l'entreprise et donc sans doute à une moindre concurrence (or les régimes de sanctions sont souvent conçues pour éviter cela), l'effet dissuasif attendu est extrêmement limité.

Si les cadres dirigeants ne risquent pas la prison ou des amendes individuelles qui ne peuvent être remboursées par l'entreprise, le régime de sanctions peut être moins dissuasif, mais, quoi qu'il en soit, les actions des pouvoirs publics paraissent en général plus lointaines que les menaces immédiates résultant de la situation du marché. De plus, même lorsque des dirigeants risquent des peines de prison, ce qui est le cas aux États-Unis et dans certains autres pays, l'impact de cette menace peut être réduit pour des raisons similaires :

- la menace de sanctions est, par nature, lointaine, si on la compare aux événements quotidiens et aux risques liés aux activités de l'entreprise ;
- les menaces extérieures paraissent lointaines en raison du caractère insulaire des grandes organisations ;
- la menace est souvent tempérée par un phénomène apparemment répandu, à savoir que les délinquants en col blanc pensent qu'ils sont trop intelligents pour se faire prendre.

Nous ne prétendons pas que les sanctions sont inadaptées, mais qu'elles connaissent des limites décevantes pour lutter contre les infractions commises par les entreprises⁵².

En revanche, un programme de conformité efficace a, sur tous les membres d'une entreprise, un impact immédiat, contrairement aux pouvoirs publics ou à d'autres intervenants extérieurs. Si le programme, piloté par un responsable éthique et conformité qui fait partie de la direction de l'entreprise, est doté de pouvoirs, connecté au reste de l'entreprise, indépendant et professionnel, il peut accomplir en interne ce que l'État essaie de faire en externe, mais avec beaucoup plus de force et de crédibilité et une meilleure connaissance de l'organisation. Les enquêteurs internes n'ont pas besoin d'un motif sérieux pour ouvrir une enquête, ce n'est pas à eux qu'incombe la charge de la preuve et ils n'ont pas besoin d'une procédure judiciaire pour surveiller les activités du personnel de l'entreprise. En revanche, les personnes qui s'occupent de la conformité manquent souvent de pouvoirs. Sur ce point, les pouvoirs publics peuvent changer la situation.

11.7 Les leviers dont dispose l'État

L'État ne peut se contenter de mots pour donner des pouvoirs aux personnes qui s'occupent de la conformité, mais s'il indique clairement qu'il tient compte des programmes de conformité, les personnes qui s'occupent de ces questions prennent une réelle importance. C'est également de cette manière que les pouvoirs publics peuvent améliorer la qualité des programmes de conformité. Ainsi, s'ils déclarent sans ambiguïté que les sociétés où il n'y a pas de responsable de la conformité doté de réels pouvoirs, où il n'y a pas de vrais audits et où aucun effort n'est mené pour mettre au jour des ententes ne bénéficieront d'aucun traitement de faveur, les dirigeants des entreprises écoutent. La raison de cet intérêt est que les professionnels de la conformité et de l'éthique qui travaillent dans la société leur transmettent ce message et les aident à décider ce qu'il faut faire. Spécialiste de la conformité et de l'éthique depuis des décennies, l'expérience nous a régulièrement montré que ce levier étatique était un outil puissant.

De quels instruments les pouvoirs publics disposent-ils ? En annexe III, nous présentons une liste de techniques possibles. Ces techniques sont assez souples et nécessitent sans aucun doute une phase d'expérimentation. Certaines conviendront davantage à certaines structures qu'à d'autres. Ainsi, si l'existence des programmes de conformité constitue un avantage en cas de risque de poursuites judiciaires et de sanctions, les pouvoirs publics peuvent compter sur les avocats pour qu'ils fassent passer le message à tous leurs clients. Les dirigeants d'entreprise peuvent être davantage sensibles à des incitations positives qui permettent d'élargir les perspectives commerciales. Le potentiel est énorme. Cela étant, tout comme il y avait des personnes très sceptiques lorsque la division antitrust américaine a mis en place un programme de clémence renforcé et testé la solution « engagements/ règles raisonnables », il risque également d'y avoir des sceptiques si l'on applique la même démarche afin de promouvoir une autodiscipline interne au sein des entreprises. Mais, et c'était également vrai pour les programmes de clémence, la lutte contre les ententes mérite que l'on adopte les meilleures méthodes de prévention et de détection possibles.

12. Quelles sont les autres mesures envisageables ?

Ceux qui cherchent à faire participer le secteur privé à la lutte contre les atteintes au droit de la concurrence peuvent s'intéresser à plusieurs types de méthodes. Certaines mesures peuvent être relativement simples et directes et ne nécessitent que peu d'engagements de la part des pouvoirs publics. Certaines ont un caractère préliminaire et permettent d'avoir une meilleure vision d'ensemble de cette question. D'autres visent à trouver des solutions à des problèmes spécifiques. Les solutions suivantes sont suggérées par l'OCDE dans son ensemble et/ou par des États membres de l'UE.

⁵²

Voir Stone, Where the Law Ends: The Social Control of Corporate Behavior (Harper ; 1975).

- Mettre en place un groupe de travail à l'OCDE sur le moyen de faire participer le secteur privé à la lutte contre les ententes grâce aux programmes de conformité.
- Des pays membres individuels peuvent nommer un expert ou un agent de liaison en conformité et éthique au sein de l'organisme national chargé de faire respecter les règles de la concurrence.
- Commander une étude sur le contenu réel des programmes de conformité aux règles de concurrence mis en place par les entreprises, en vérifiant les informations obtenues. De telles études peuvent être commandées à des établissements d'enseignement supérieur ou à des organisations qui regroupent des spécialistes de la conformité et de l'éthique.
- Constituer un groupe de travail pour étudier les méthodes qui permettent d'atteindre les PME. Comme cette question peut concerner plusieurs branches du droit, envisager de mener cette action en coopération avec d'autres organismes chargés de faire respecter la loi. Envisager également de faire participer d'autres types d'organismes publics qui s'adressent aux PME et au secteur privé, voire des organismes qui représentent les PME.
- Publier un document d'orientation sur les programmes de conformité centré sur les questions de concurrence et similaire au Guide de bonnes pratiques du Groupe de travail de l'OCDE sur la corruption.
- Concevoir des modèles d'outils ou des guides types afin d'aider les services répressifs à évaluer les programmes de conformité s'agissant des ententes.
- Commander une étude plus exhaustive sur la manière dont les autorités de la concurrence abordent la question des programmes de conformité.
- Organiser des tables rondes avec des représentants du secteur privé sur les programmes de conformité visant à lutter contre les ententes, afin d'établir un dialogue. Ce sont des personnes qui effectuent les tâches quotidiennes qui devraient y participer, et pas nécessairement des avocats spécialistes du droit pénal des affaires.
- Les pays membres peuvent tenir des auditions publiques ou organiser des journées d'étude sur les programmes de conformité, afin d'en savoir plus sur ce que ces programmes peuvent et doivent contenir pour être plus efficaces.
- Envisager d'essayer la méthode retenue par la Banque Mondiale dans son programme de clémence, à savoir exiger de ceux qui bénéficient du programme qu'ils mettent en place des programmes de conformité et effectuer un suivi de ces programmes.
- Demander aux personnes qui s'intéressent aux programmes de conformité de participer en tant que consultant à des groupes de travail sur les programmes de conformité. C'est la mission que remplit la SCCE dans le cadre des programmes sur le rôle du secteur privé mis en place par le Groupe de travail de l'OCDE sur la corruption.
- Constituer un réseau consacré à la conformité aux règles de concurrence dans l'OCDE dont les membres appartiennent à services répressifs ou sont des responsables nommés dont les intérêts ou les responsabilités concernent les programmes de conformité du secteur privé.

13. Comment en savoir plus sur les programmes de conformité ?

Pour en savoir plus sur la conformité et l'éthique, il est essentiel de commencer par comprendre ce que cette discipline n'est pas. Il ne s'agit pas de pratiquer le droit. Elle ne se limite pas à des avocats qui analysent des affaires puis répondent aux demandes de conseils de leurs clients. Au contraire, il s'agit d'une activité multidisciplinaire qui répond à la question suivante : comment s'assure-t-on que ceux qui agissent au sein des organisations le font de manière éthique et licite ? D'une certaine manière, cette discipline transforme le conseil juridique en action de la direction.

La conformité et l'éthique font appel à plusieurs domaines, notamment la communication, les ressources humaines, l'audit, les théories de la motivation, la dynamique organisationnelle, l'éthique, la formation des adultes, l'analyse statistique, les technologies de l'information, la gestion des risques et le droit. Pour être efficace dans ce domaine, il ne suffit pas de s'intéresser à la loi ou à des textes juridiques. Une compréhension profonde des lois, de la jurisprudence et de l'interprétation du droit de la concurrence peut être tout aussi bien utile qu'inutile pour le responsable d'un programme de conformité.

La SCCE a mis en ligne des informations sur les ressources qui existent dans ce domaine à l'adresse suivante : www.corporatecompliance.org. La SCCE a également créé un réseau social où les personnes intéressées par la conformité et l'éthique peuvent poser des questions et échanger des données. Il peut être consulté par n'importe qui. Les personnes qui souhaitent émettre des commentaires ou échanger des données doivent s'enregistrer, mais cette procédure est également gratuite. La SCCE propose une formation de quatre jours sur les pratiques en matière de conformité et d'éthique, ainsi que des programmes plus courts, des webinaires, des livres et un magazine.

Pour ceux qui s'intéressent aux mesures que peut contenir un programme de conformité, l'auteur de ces lignes a écrit 501 Ideas for Your Compliance and Ethics Program: Lessons from 30 Years of Practice (SCCE ; 2008). Un livre coécrit avec Jeffry Kaplan contient une bibliographie sur la conformité au chapitre 12, annexe 12-B (Kaplan et Murphy, Compliance Programs and the Corporate Sentencing Guidelines) (1993 et suppléments annuels ; Thomson/West). Nous sommes également disposés à fournir des références bibliographiques sur demande.

ANNEXE I

Note : ce qui suit est une adaptation du Guide de bonnes pratiques pour lutter contre la corruption, guide établi par le Groupe de travail de l'OCDE sur la corruption. Ce document a été modifié pour tenir compte de la lutte contre les ententes. Les modifications ont été effectuées par Joseph Murphy et non par le Groupe de travail sur la corruption.

Guide de bonnes pratiques pour les programmes de conformité destinés à lutter contre les ententes

Le présent Guide de bonnes pratiques tient compte des conclusions et recommandations pertinentes formulées par la Division de la concurrence (rattachée à la Direction des affaires financières et des entreprises) dans le cadre de son programme actuel de lutte contre les ententes ; des contributions du secteur privé et de la société civile lors des consultations menées par la Division de la concurrence ; et des travaux sur la prévention et la détection des ententes réalisés antérieurement par l'OCDE, ainsi que par des organismes internationaux du secteur privé et de la société civile. Il tient également compte du travail sans précédent effectué par le Groupe de travail sur la corruption dans le cadre de transactions commerciales internationales pour concevoir un guide similaire destiné à lutter contre la corruption transnationale.

Introduction

Le présent Guide de bonnes pratiques (ci-après « Guide ») s'adresse aux entreprises en vue d'établir et de veiller à l'efficacité des programmes ou mesures de contrôle interne, de déontologie et de conformité pour prévenir et détecter les ententes, et aux organisations patronales et associations professionnelles, qui contribuent de façon déterminante à aider les entreprises dans ces efforts. Il reconnaît que, pour être efficaces, ces programmes ou mesures doivent être liés au cadre général de conformité de l'entreprise. Il a pour objet de servir de guide juridiquement non contraignant aux entreprises dans l'élaboration de leurs programmes ou mesures de contrôle interne, de déontologie et de conformité pour prévenir et détecter les ententes.

Le présent Guide est flexible et peut être adapté par les entreprises, en particulier les petites et moyennes entreprises (ci-après « PME »), en fonction des circonstances propres à chacune d'elles, y compris leur taille, leur forme, leur structure juridique et leur secteur d'exploitation géographique et industriel, ainsi que les principes en matière de compétence et autres principes juridiques fondamentaux dans le cadre desquels elles opèrent.

A) Guide de bonnes pratiques pour les entreprises

Pour être efficaces, les programmes ou les mesures de contrôle interne, de déontologie et de conformité aux fins de prévention et de détection des ententes devraient être mis au point sur la base d'une évaluation des risques tenant compte des circonstances propres à chaque entreprise, notamment les risques de formation d'entente auxquels elle est confrontée (en raison, par exemple, de son secteur géographique et industriel d'exploitation). Ces circonstances et ces risques devraient être régulièrement surveillés, réévalués et adaptés en tant que de besoin pour garantir l'efficacité continue des programmes ou mesures de contrôle interne, de déontologie et de conformité de l'entreprise.

Les entreprises devraient examiner, entre autres, les bonnes pratiques suivantes afin d'assurer l'efficacité des programmes ou des mesures de contrôle interne, de déontologie et de conformité aux fins de prévention et de détection des ententes :

1. un soutien et un engagement solides, explicites et visibles, au plus haut niveau de la direction, concernant les programmes ou mesures de contrôle interne, de déontologie et de conformité aux fins de prévention et de détection des ententes ;
2. une politique interne clairement formulée et visible interdisant la formation d'ententes ;
3. le respect de cette interdiction et des programmes ou mesures correspondants de contrôle interne, de déontologie et de conformité est de la responsabilité de chaque individu à tous les niveaux de l'entreprise ;
4. la surveillance des programmes ou mesures de déontologie et de conformité concernant les ententes, y compris le pouvoir de rendre compte directement à des organes de contrôle indépendants, tels que les comités d'audit internes des conseils d'administration ou des conseils de surveillance, est de la responsabilité d'un ou plusieurs hauts responsables, disposant d'un degré d'autonomie adéquat par rapport aux dirigeants, de ressources et de prérogatives appropriées ;
5. des programmes ou des mesures de déontologie et de conformité élaborés aux fins de prévenir et détecter les ententes, applicables à tous les directeurs, cadres et employés ainsi qu'à toutes les entités sur lesquelles une entreprise exerce un contrôle effectif, notamment les filiales, entre autres dans les domaines suivants :
 - i) entente sur les prix ;
 - ii) répartition des marchés et des clients ;
 - iii) soumissions concertées ;
 - iv) restrictions de production de nature collusive ;
 - v) collusion relative à d'autres aspects de la concurrence.
6. des programmes ou des mesures de déontologie et de conformité élaborés aux fins de prévenir et détecter les ententes applicables, en tant que de besoin et sous réserve de dispositions contractuelles, aux tiers, tels que les agents et autres intermédiaires, les consultants, les représentants, les distributeurs, les contractants et les fournisseurs, les partenaires au sein des consortiums et des co-entreprises, (ci après « les partenaires commerciaux ») incluant, entre autres, les éléments essentiels suivants :
 - i) des vérifications préalables (« due diligence ») fondées sur les risques et documentées de façon adéquate, relatives à l'engagement et l'exercice d'une surveillance appropriée et régulière des partenaires commerciaux ;
 - ii) l'information des partenaires commerciaux sur les engagements pris par l'entreprise de respecter les lois sur l'interdiction des ententes, et sur le programme ou les mesures de l'entreprise en matière de déontologie et de conformité visant à prévenir et détecter les ententes ;
 - iii) la recherche d'un engagement réciproque de la part des partenaires commerciaux.
7. un système de contrôles internes, d'audit de conformité, de surveillance et d'autres mesures conçues de manière raisonnable afin de détecter et de limiter les possibilités de collusion et d'entente ;

8. des mesures élaborées en vue d'assurer une communication périodique et des formations documentées à tous les niveaux de l'entreprise, relatives au programme ou aux mesures de déontologie et de conformité de l'entreprise concernant les ententes, ainsi que, en tant que de besoin, aux filiales ;
9. des mesures appropriées en vue d'encourager et d'offrir un soutien positif au respect des programmes ou mesures de déontologie et de conformité concernant les ententes, à tous les niveaux de l'entreprise ;
10. des procédures disciplinaires appropriées pour répondre, entre autres, aux violations, à tous les niveaux de l'entreprise, des lois contre les ententes, et du programme ou des mesures de déontologie et de conformité de l'entreprise concernant les ententes ;
11. des mesures efficaces en vue de :
 - i) fournir des lignes directrices et des conseils aux directeurs, cadres, employés et, en tant que de besoin, aux partenaires commerciaux, sur le respect du programme ou des mesures de déontologie et de conformité de l'entreprise, notamment lorsque ceux-ci ont besoin d'un avis urgent en cas de situations difficiles ;
 - ii) permettre le signalement interne et si possible confidentiel, ainsi que la protection des directeurs, cadres, employés et, en tant que de besoin, des partenaires commerciaux qui ne veulent pas commettre une infraction à la déontologie et aux normes professionnelles sur les instructions ou sous la pression de leurs supérieurs hiérarchiques, ainsi que des directeurs, cadres, employés et, en tant que de besoin, des partenaires commerciaux voulant signaler de bonne foi et sur la base de soupçons raisonnables des manquements à la loi, à la déontologie ou aux normes professionnelles se produisant au sein de l'entreprise ;
 - iii) prendre les mesures appropriées sur la base de tels signalements ;
12. des examens périodiques des programmes ou des mesures de déontologie et de conformité, afin d'évaluer et d'améliorer leur efficacité dans la prévention et la détection des ententes, en tenant compte des développements pertinents survenus dans ce domaine et de l'évolution des normes internationales et sectorielles.

B) Actions des organisations patronales et des associations professionnelles

Les organisations patronales et les associations professionnelles peuvent contribuer de façon déterminante à aider les entreprises, en particulier les PME, à mettre au point des programmes ou des mesures efficaces de contrôle interne, de déontologie et de conformité aux fins de prévention et de détection des ententes. Ce soutien peut se traduire, entre autres, de la manière suivante :

1. diffusion d'informations sur les questions d'ententes et de collusion, y compris concernant les évolutions intervenues à cet égard dans les forums internationaux et régionaux ;
2. mise à disposition d'outils de formation, de prévention, de vérification préalable et d'autres instruments de conformité ;
3. des conseils d'ordre général concernant les contrôles qui doivent être effectués lorsque l'on met en œuvre un programme de conformité ;
4. des conseils et un soutien d'ordre général sur les moyens de résister à la tentation de mettre en place une collusion.

ANNEXE II

Exemples de questions d'évaluation

On trouvera ci-dessous des exemples de questions qui peuvent être posées aux salariés d'une entreprise dans le cadre d'une enquête afin d'évaluer le programme de conformité de cette entreprise.

1. Que sait la personne du programme de conformité de l'entreprise ? (ne pas oublier que chaque société est susceptible de donner un nom différent à ce programme, par exemple, intégrité, éthique, pratiques commerciales, etc.) ;
2. Qui est le responsable de la conformité ? Si la personne ne le sait pas, surtout si elle est cadre dirigeant, cela montre que le programme a très peu d'effets.
3. L'entreprise dispose-t-elle d'un code de déontologie ? La personne l'a-t-elle jamais lu ? En garde-t-elle un quelconque souvenir ?
4. Existe-t-il un dispositif pour signaler des faits préoccupants ? Peu importe que la personne se souvienne ou non du numéro dès lors qu'elle sait qu'il existe un dispositif permettant de contourner l'encadrement direct si nécessaire.
5. Existe-t-il un mécanisme permettant d'obtenir des conseils sur le type de risque concerné en l'espèce ? Les services juridiques d'entreprise classiques peuvent être un élément essentiel d'un programme de conformité, surtout dans certains domaines complexes. Si un juriste rattaché au centre de profit peut conseiller les salariés sur le droit de la concurrence, c'est un signe important d'engagement en faveur de la conformité, même si cette personne ne fait pas officiellement partie du programme de conformité. Cela dit, il faut opérer une distinction entre disposer d'un juriste d'affaires ou d'un juriste contrat et disposer d'une personne dont la préoccupation principale est de s'assurer que les salariés respectent le droit de la concurrence.
6. La personne a-t-elle suivi une formation sur ce type de risque ? Si elle ne s'en souvient pas, c'est à peu près comme si elle n'en avait pas eu.
7. L'évaluation ou les objectifs annuels de la personne contenaient-ils un élément en relation avec la conformité et l'éthique ? Encore une fois, si la personne ne s'en souvient pas, c'est un signe très net que ces paramètres ne sont pas pris au sérieux.
8. Le responsable de la personne lui a-t-il jamais parlé du code de déontologie ? A-t-elle jamais évoqué la conformité à propos de la question qui fait l'objet d'une enquête ?
9. La personne connaît-elle personnellement un salarié qui participe au programme de conformité ? Les programmes les meilleurs et les plus sérieux désignent un représentant local dans chaque centre de profit. Il ne s'agit pas nécessairement de salariés travaillant sur la question à temps plein, mais la conformité doit représenter une part importante de leur activité ; les personnes qui travaillent dans le centre de profit doivent au moins avoir connaissance de l'existence de ce salarié.

ANNEXE III

Comment les pouvoirs publics peuvent-ils promouvoir les programmes de conformité ?

Par Joseph Murphy, expert habilité dans le domaine de la conformité et de l'éthique

On trouvera ci-dessous une liste de mesures que les pouvoirs publics peuvent adopter afin de promouvoir des programmes de conformité efficaces. C'est indiscutable, si les pouvoirs publics prennent la chose au sérieux, un tel résultat est possible.

1. Prendre en compte les programmes efficaces lorsque l'on décide ou non d'engager des poursuites contre une entreprise ;
2. Offrir une sanction réduite aux entreprises qui disposent de programmes efficaces.
3. Faire de la publicité autour des avantages concrets accordés aux entreprises dotées de programmes solides.
4. Avoir recours à des règles pratiques et souples pour évaluer les programmes.
5. Publier des principes publics fermes soutenant les programmes de conformité efficaces au nom de l'intérêt public.
6. Donner un avantage aux entreprises dotées de programmes efficaces pour les marchés publics.
7. Imposer des programmes de conformité aux entreprises en cas de procédure négociée.
8. Inciter les Bourses à inclure l'obligation de disposer de programmes efficaces dans les règles d'admission à la cote.
9. Faire que les programmes efficaces soient pris en considération dans les programmes de déclaration spontanée.
10. Diminuer les exigences réglementaires pour les entreprises dotées de programmes efficaces.
11. Disposer que les programmes peuvent constituer un argument de défense en cas d'action en responsabilité civile.
12. Disposer que les programmes peuvent aussi être un argument de défense pour un administrateur poursuivi pour négligence.
13. Encourager les grandes entreprises à promouvoir les programmes chez leurs sous-traitants.
14. Proposer des crédits d'impôts pour tenir compte du coût de mise en place des programmes.
15. Faire de l'existence des programmes une condition pour qu'une entreprise puisse bénéficier d'une aide financière de l'État.
16. Faire intervenir activement des responsables publics sur les questions de conformité et d'éthique, y compris sous forme de participation à des conférences et à des séminaires.
17. Former des responsables publics à la conformité et à l'éthique.
18. Faire de l'essor des programmes de conformité un indicateur de la réussite des politiques publiques.
19. Lutter contre les mesures gouvernementales et les décisions de justice qui nuisent au développement des programmes de conformité.

20. Offrir une protection juridique si des efforts ont été menés en matière de programmes de conformité.
21. Fournir un exemple de démarche conformité et éthique solide en s'appuyant sur les programmes de conformité mis en place par des organismes publics.
22. Prendre des engagements très précis afin de récompenser les efforts engagés dans le domaine de la conformité et de l'éthique.
23. Créer pour un responsable public, un poste d'agent de liaison en conformité et éthique.
24. Doter les pouvoirs publics d'un dispositif crédible pour évaluer les programmes.

Nous serons heureux de fournir plus de détails, de citations et d'exemples pour commenter plus avant ces mesures.

Toutefois, pour que celles-ci soient efficaces, plusieurs conditions doivent être réunies. Tout d'abord, la charge de la preuve doit toujours incomber à l'entreprise. Un programme de conformité est un effort interne et seule la société peut prouver ce qu'elle a fait. Deuxièmement, les pouvoirs publics doivent réellement comprendre ce que sont la conformité et l'éthique. De nombreux moyens sont à leur disposition pour y parvenir. Il est essentiel que seules les entreprises qui ont mis en place des programmes sérieux et nommé des responsables conformité et éthique dotés de réels pouvoirs puissent être avantagées et non des sociétés qui se sont contentées d'élaborer des codes et de définir des principes généraux. Toutefois, les avantages ne doivent pas être un objectif que des règles publiques inapplicables rendent inatteignable. Troisièmement, l'engagement des pouvoirs publics de reconnaître les programmes de conformité doit être réel et ne doit pas figurer que sur le papier. Les services répressifs doivent annoncer publiquement qu'ils accordent des avantages aux programmes sérieux, et expliquer quels éléments de programmes ne sont pas jugés efficaces et lesquels le sont.

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ANTITRUST COMPLIANCE PROGRAMMES – CAN COMPANIES AND ANTITRUST AGENCIES DO MORE?

*By Anne Riley and Margaret Bloom**

1. **Antitrust Compliance Programmes: Can Companies and Antitrust Agencies do More? Introduction**

A genuine compliance programme is a substantial, on-going commitment. It requires significant time and resources from individuals at all levels of the business if it is to be successful. The temptation, in the current climate, may be to regard such efforts as an expensive luxury. The reality is that compliance programmes have never been more necessary. Prudent organisations should see them not merely as a cost, but as an investment in risk management. This article suggests some practical steps that companies – and antitrust agencies – could take to promote and improve a genuine antitrust compliance culture.

2. **An antitrust compliance programme as an enforcement tool**

Antitrust agencies have repeatedly emphasised that deterrence is the key function of cartel fines imposed on undertakings. EU Commissioner Almunia repeated this position in a recent speech, and also stated that the ultimate aim of antitrust policy is not to levy fines, but to have no need for fines at all.¹ Thus the ultimate goal of antitrust policy should be to ensure effective compliance. The question is: are the antitrust authorities taking the appropriate steps to achieve this goal, or is there more they can and should be doing?

Many antitrust enforcement regimes focus on punishment without proactively encouraging compliance programmes. While active enforcement is essential for deterrence, the lack of sufficient incentives for serious compliance efforts can also allow unethical behaviour to flourish and ultimately create an unethical culture.

Scholarly evidence and regulatory best practice suggest that agencies should use a combination of regulatory styles or strategies to improve compliance, rather than relying on deterrence through fines alone.² Simple deterrence can fail to produce compliance commitment because it does not directly address

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¹ Joaquin Almunia, Business Europe & US Chamber of Commerce. Competition conference, Brussels, 25 October 2010, Compliance and Competition policy <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/586&type=HTML>.

² CE Parker, 'The compliance trap: the moral message in responsive regulatory enforcement'. University of Melbourne Legal Studies Research Paper No 163. Available at SSRN: <http://ssrn.com/abstract=927559>. Parker argues that 'responsive regulation' (as part of an arsenal of antitrust measures and not as a substitution for punishment), seeks to build moral commitment to compliance with the law. Critics of 'responsive regulation' may say that by advocating co-operative compliance as a preferred enforcement strategy, business

business or societal perceptions of the morality of regulated behaviour – it merely puts a price on non-compliance. Understandably, there are many who argue that administrative fines on companies and compliance programmes by themselves are not enough to cut out cartels.³ They advocate individual criminal liability. Introducing individual sanctions of this nature could help emphasise the moral responsibility for violations of antitrust law. Wouter Wils has pointed out that psychological research suggests that normative commitment is an important factor in explaining compliance with the law.⁴

The tools an antitrust agency uses should include the encouragement (or perhaps even the requirement) to introduce a credible compliance programme.⁵ The agencies should not restrict their actions merely to fines, settlements, leniency and litigation. By positively encouraging compliance programmes, agencies can help companies improve ethical standards and ensure greater compliance in practice.

The debate about whether the existence of an antitrust compliance programme should merit a reduction in the level of a fine has somewhat muddied the waters on what the real objective of a compliance programme should be. While taking credible programmes into account in setting fines is undoubtedly very much welcomed by business, it is understandable that some agencies may find such an approach unpalatable. Some countries (eg the USA, Australia, Canada, the Netherlands and the UK) do give some degree of credit to a company if it has what is seen as an ‘effective’ or ‘credible’ antitrust compliance programme.⁶ Others argue that the threat of heavy fines alone should provide sufficient

offences are not appropriately treated as a ‘real’ crime subject to adversarial, punitive and interventionist forms of regulation. Parker suggests that antitrust enforcement can be suitable for ‘responsive regulation’ if it is combined with restorative justice (where the offender shows remorse and makes a substantive commitment to repair the harm caused). There is a tension here with the approach often taken by antitrust agencies, since restorative justice theory suggests that this is unlikely to be achieved ‘where agency staff lecture and moralize’ (Parker).

³ A Stephan, ‘Hear no evil, see no evil: why antitrust compliance programmes may be ineffective at preventing cartels’. ESRC CCP Working Paper No 09-09 (10 July 2009). Available at SSRN: <http://ssrn.com/abstract=1432340>. This argument has some merit when one considers that fines – and even very high fines – for antitrust violations are often imposed years after the violation ended, when the individual employees involved in the violation have often left the company. Other commentators recommend barring individuals responsible for price-fixing from further employment in a position from which they could again violate or negligently enable their subordinates to violate the antitrust laws. See also DH Ginsburg, JD Wright, ‘Antitrust sanctions’ (2010) 6(2) *Competition Policy International* 3, autumn 2010; George Mason Law & Economics Research Paper No 10-60. Available at SSRN: <http://ssrn.com/abstract=1705701>.

⁴ WPJ Wils, ‘Is criminalization of EU competition law the answer?’ (2005) 28(2) *World Competition: Law and Economics Review* 117; ‘Remedies and sanctions in competing policy: economic and legal implications of the tendency to criminalize antitrust enforcement in the EU Member States’. KJ Cseres, MP Schinkel, FOW Vogelaar, eds (Edward Elgar, 2005). Available at SSRN: <http://ssrn.com/abstract=684921>.

⁵ ICC Policy Paper: ‘The fining policy of the European Commission in competition cases’, Document No 225/659 (2 July 2009): Available at http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/pages/ICC_The%20fining%20policy%20in%20the%20EU%2002-07-09.pdf. See also the European Parliament resolution of 20 January 2011 on the Report on Competition Policy 2009, para 60. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0023+0+DOC+XML+V0//EN&language=EN>.

⁶ See K [Hüschelrath](#), ‘Competition law compliance programmes: motivation, design and implementation’ [2010] *Comp Law* 481. Note that while the US Federal Sentencing Guidelines ostensibly provide some mitigation where a firm has had an ‘effective’ compliance programme in place, this has not been available since November 2004 in cases where ‘high-level personnel’ participated in the infringement. These are defined to include ‘anyone within the undertaking with price-setting authority’ – which is thought to preclude all hardcore cartel cases – see also Stephan, op cit n 4, above.

incentive for firms to take compliance seriously, and that infringing firms should not be rewarded for ‘failed’ compliance.⁷

Of course, credit given by agencies for companies introducing credible antitrust compliance programmes could have a very useful role in incentivising companies to invest the considerable resources required to put in place a credible and effective programme.⁸ Offering mitigation from fines for a compliance programme could encourage a wider range of companies to adopt them – and companies which have such programmes to take credible steps to improve them. But a desire to mitigate fines alone should not be the main aim of such programmes. The proper role of an antitrust compliance programme should be to ensure compliance with the law and to promote ethical behaviour by and between companies.

There are a good number of other actions that an antitrust agency can take in addition to (or perhaps instead of) considering credible antitrust compliance programmes as potential mitigation for a company. These are described later in this article after discussing company motivation and practical guidance on compliance programmes.

3. What motivates companies to invest in compliance – fear of penalties or a desire to comply?

Some commentators assume that a company’s motivation in having an antitrust compliance programme is to introduce some sort of ‘smoke screen’ or ‘cosmetic compliance’ by investing in just enough compliance efforts to avoid legal liability but not enough actually to detect or prevent a violation.⁹ Given the fact that the existence of an antitrust compliance programme does not vitiate liability and is only taken into account as a mitigating factor by some agencies, this view of a company’s motivation in adopting an antitrust compliance programme is perhaps a little simplistic. While the threat of high corporate fines undoubtedly provides an incentive for firms to maintain effective internal compliance efforts, companies have many other reasons for introducing antitrust compliance programmes, including avoiding reputational damage, avoiding costly investigations and follow-on litigation, and ensuring that they are viewed as ethically and socially responsible organisations.

The purpose of an antitrust compliance programme is to help protect companies (and their shareholders) by reducing the scope for future infringements through training and uncovering potential infringements through the periodic auditing of company activities. Ultimately, the point of a compliance programme is to reduce the risk of a violation occurring at all. Although avoidance of the negative consequences of antitrust infringements is the natural starting point of a study of the drivers of compliance programmes, a broader perspective suggests that excellence in compliance can also have positive effects on the efficiency and efficacy of internal processes. For example, managers well trained in competition law are not only more likely to make correct decisions but they can expect to make these decisions more quickly and therefore free up resources for other activities.¹⁰ Another driver for the adoption of compliance

⁷ See Commissioner Almunia, op cit at n 2, above: ‘To those who ask us to lower our fines where companies have a compliance programme, I say this: if we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed?’.

⁸ See the report prepared for the Competition Council of France (Conseil de la concurrence) by Europe Economics in conjunction with Norton Rose: ‘Etat des lieux et perspectives des programmes de conformité’ (in French with Executive Summary in English) (September 2008). Available at http://www.autoritedelaconcurrence.fr/doc/etudecompliance_oct08.pdf.

⁹ See SW Waller, ‘Corporate governance and competition policy’ (23 September 2010). Available at SSRN: <http://ssrn.com/abstract=1681673>.

¹⁰ See [Hüschelrath](#), op cit n 7, above.

programmes (including but not limited to antitrust programmes) is the dramatic spread over recent years in corporate governance requirements and expectations.¹¹

4. Practical compliance for companies

This section provides some practical tips to assist a company in building a credible antitrust compliance programme. These suggestions are not intended to represent a comprehensive list of all possible elements of a compliance programme. They are intended rather to reflect what is commonly regarded as best or good practice for antitrust compliance programmes.

There is a vast amount of literature on what constitutes an effective or credible antitrust compliance programme. Some of the better and more usable publications have been produced by or on behalf of some of the antitrust agencies themselves.¹² These publications all rightly emphasise that there can be no ‘one size fits all’, and that the programme has to be designed bearing in mind the specific antitrust risks faced by the organisation in question.

The various publications on effective compliance programmes use numerous analogies or descriptions, ranging from the ‘Compliance House’¹³ through to the Office of Fair Trading’s (OFT) ‘virtuous circle’ of (1) risk identification, (2) risk assessment, (3) risk mitigation and (4) review – all based on the central tenet of a commitment to comply from the top down.¹⁴

This article advocates ‘5 Cs in Compliance’,¹⁵ which essentially contain the same elements as proposed in these publications. The 5 Cs are considered under the following headings:

- Commitment
- Culture
- Compliance know-how and organisation
- Controls
- Constant monitoring/improvement

¹¹ Section 406 of the Sarbanes-Oxley Act requires an SEC regulated company to disclose whether it has adopted a code of ethics for its principal executive officer and senior financial officers. The UK Corporate Governance Code (2010) also requires the board to conduct an annual review of the effectiveness of the company’s risk management and internal control systems.

¹² See Canadian Competition Bureau Revised Enforcement Bulletin, *Corporate compliance programs* (27 September 2010), at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf); and see OFT report, *Drivers of compliance and non-compliance with competition law*, OFT 1227 (May 2010) at: http://www.of.gov.uk/shared_of/reports/comp_policy/oft1227.pdf, and OFT consultation, *How your business can achieve compliance*, OFT 1278 (October 2010) at http://www.of.gov.uk/shared_of/consultations/OFT1278.pdf. See also the Australian ACCC Guidelines for Corporate Trade Practices Programmes available at www.accc.gov.au/content/index.phtml/itemId/54418.

¹³ Fundamentals of effective compliance management: Economie Suisse ‘dossierpolitik’ (12 April 2010).

¹⁴ See OFT, *Drivers of compliance*, op cit n 13, above.

¹⁵ The authors would like to acknowledge Fiona Carlin from Baker & McKenzie Brussels as the original author of this term.

4.1 *Commitment*

It may seem somewhat perverse to start the list with Commitment when all the publications emphasise that the key to having a credible compliance programme and avoiding window dressing is to ensure that the *culture* of the organisation supports compliance. But it is senior management that sets the culture and tone of an organisation. If a company does not have management commitment as the essential foundation of its compliance structure, the compliance programme simply will not work. The starting point in any good compliance programme is to obtain genuine management commitment and visible management support as this will drive culture. Successful compliance programmes are critically dependent upon the engagement and buy-in of employees and management right up and down the chain. Simply rolling out a training programme will not lead to full or sustainable compliance.

There is no one single answer about how one goes about achieving management commitment to antitrust compliance. It may come about in a number of ways:

- Increased focus on good corporate governance has increased management's awareness of and interest in the need to comply.
- Increasing compliance requirements in other fields, such as in anti-bribery and corruption, have drawn attention to compliance issues generally and the importance of compliance.
- Compliance incidents (either in the antitrust field or in other compliance areas) often focus the minds of management and can be leveraged to obtain support for the programme.¹⁶

4.1.1 *Practical tips*

- Obtain senior management support, accountability and real commitment. Consider asking a director or very senior manager to act as a 'Compliance Champion'.
- Tone at the (very) top of the organisation is essential. This needs *visible* management support. Encourage management to incorporate antitrust compliance messages in their presentations and talks to staff. Encourage management not to give mixed messages to staff.¹⁷
- But the efforts cannot stop there. Visible management support and commitment in the middle and lower levels in the organisation is also essential. The commitment to compliance needs to permeate the organisation and become part of the way the company does business. If this is seen to be 'just a legal initiative' rather than a business driven and management supported initiative it will fail.

One of the big challenges for all companies is keeping compliance on the corporate agenda, particularly in an economic downturn when resources are scarce, management has many other issues to worry about and employees within the organisation may be suffering from compliance fatigue. This is

¹⁶ As an aside, it is ironic that some agencies view compliance incidents as 'failed' compliance, when it is precisely those incidents that can trigger a change (or further improvement) in corporate culture and compliance commitment by focusing the minds of senior management on the need to comply and the serious consequences of compliance violations.

¹⁷ See D Sokol, 'Cartels, corporate compliance and what practitioners really think about enforcement', forthcoming in the *Antitrust Law Journal* symposium on Neo-Chicago Antitrust. Sokol comments that some non-compliance may be caused by mixed messages that employees or executives receive from a company. On the one hand employees may be asked to behave ethically, while on the other hand there might be conflicting employee performance goals. See also Y Mishina et al, 'Why "good" firms do bad things: the effects of high aspirations, high expectations and prominence on the incidence of corporate illegality' (2010) 53 Acad Mg J 701.

perhaps where agencies can help most in undertaking compliance advocacy in society at large to promote an understanding of the need for constant vigilance.

4.2 *Culture*

Corporate culture is a multi-layered concept that includes beliefs, values or corporate ideologies, behavioural norms and expectations, patterns of behaviour and corporate organisational processes. Compliance commentators describe compliance culture mostly in terms of values: a culture that promotes ethics, integrity, respect, trust and accountability. Compliance commitment must be built into the very marrow of the organisation, so that integrity and ethical behaviour become not only a business policy but a way in which business is actually done.

The key to a change in corporate culture is to ensure active and visible support from senior management. Policies, procedures and training are, on their own, insufficient to ensure compliance. To be effective, all policies, procedures and training must be part of a larger culture that instils compliance as a fundamental value. Rules are meaningless if they go against the grain of the organisation as a whole: in other words, if there is a culture of non-compliance. Senior management must articulate a vision of compliance that goes well beyond the compliance function itself and then drive the process on delivering that vision. The responsibility for compliance must be embedded throughout the organisation from the most junior to the most senior person.¹⁸

4.2.1 *Practical tips*

- The company (with the support of the board) should adopt and communicate standards of ethical behaviour and policy at group level (eg through a code of conduct, code of ethics, group business principles). This can and usually does cover more than simply antitrust compliance, and would normally cover such things as anti-bribery and corruption, anti-money laundering, export controls and other compliance topics relevant to the company's business.
- Ensure that very senior people are the 'champions' of compliance – in what they say *and* what they do. Management at all levels needs to be knowledgeable about the risks of non-compliance. Management needs to provide appropriate resources (funding and organisational support) for the compliance programme. These should obviously be suited to the specific needs, size and geographic spread of the organisation.

4.3 *Compliance know-how and organisation*

This topic is vast, encompassing how companies organise their programmes, and how they identify and address compliance risks through training.¹⁹ The first step in assessing what sort of compliance organisation (if any) the company needs and what sort of training needs to be done is to assess what risks the business is facing.

¹⁸ Price Waterhouse Coopers/Economist Intelligence Unit joint report (Financial Services briefings) Compliance: a gap at the heart of risk management 2003: http://www.pwc.com/en_GX/gx/financial-services/pdf/compliancegapheart.

¹⁹ See, eg, the US Federal Sentencing Guidelines, Chapter 8, Part B, 'Remedying harm from criminal conduct and effective compliance and ethics program', available http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP8.pdf.

4.3.1 *Risk assessments*

Since businesses have limited resources they need to focus those resources where the antitrust risk is greatest. Companies need to determine which risks are most likely to occur and which ones have the greatest impact (eg cartel risk, unilateral conduct issues, vertical issues). This will also assist in determining what sort of training might be required for the company and who in the company needs to be trained (about what, and to what level of sophistication). It will also be necessary to consider whether the company has a history of non-compliance. The measures required for a recidivist to prevent a future occurrence (or, at least, to reduce its likelihood) are likely to be greater than for companies with a clean antitrust record.

4.3.2 *Compliance organisation*

While senior management should be accountable for ensuring compliance, the implementation of an effective and credible programme may be delegated to a designated person (compliance officer or other appropriate officer). Implementation includes training, monitoring and overseeing a complaints and misconduct reporting system. Whether a dedicated compliance organisation is required will depend on the size, scale and the nature of the business concerned. Clearly, a small company dealing in a single country and facing limited compliance risks would not need to go to the expense of establishing a dedicated compliance office, whereas a multinational company with significant potential compliance exposures in many disciplines may feel that this is a prudent thing to do.

There is no set model for what a compliance office might look like. For example, some companies deal with compliance risk in their legal team – where there is an in-house legal function – and some companies prefer to have a dedicated compliance function with dedicated business compliance officers. Some multinationals now also have an in-house business integrity function which is staffed by individuals having forensic investigations experience, who can undertake internal compliance investigations. However the company decides to organise itself, it is most efficient to ensure that its antitrust compliance efforts are harmonised with its compliance efforts generally in other areas, for example, with anti-bribery and corruption efforts, and in all cases the compliance organisation should be designed to address the specific needs and compliance risks of the company concerned.

4.3.3 *Compliance training and know-how*

Having identified the antitrust risks facing the organisation and the geographic spread of those issues, the next step is to determine what antitrust training should be given, and what supporting documentation is required.²⁰ The purpose of training staff and providing antitrust compliance guidance notes is to keep the awareness of staff at a high level. Raising awareness helps minimise the risk of violations occurring. However, no matter how good the programme, it can never completely eliminate the possibility that some individuals may simply ignore company policy.

- Practical tips

Having assessed the specific antitrust risks in the business, design the materials and training to be as relevant as possible to the company's specific risk profile:

²⁰

See RM Abrantes-Metz, P Bajari, J Murphy, 'Antitrust screening: making compliance programs robust' (26 July 2010). Available at SSRN: <http://ssrn.com/abstract=1648948>. Abrantes-Metz et al comment: 'In the past much of antitrust compliance work has focused on training, perhaps accompanied by an antitrust compliance manual. But regardless of the amount of employee training they conduct and the existence of written materials, it is likely that most practitioners feel they do not have a handle on this area of risk ... Given the lengths participants go to hide their conduct, and the longevity of such cartels, it is evident that the participants were not acting in innocent ignorance. But although this is true, it does not necessarily follow, even in such cases, that training plays no role'.

4.3.4 *Training*

- Identify staff to be trained according to their risk profile. For example, higher risk staff may be people in a sales function or who attend trade or industry meetings and networks.²¹ Ensure that induction of new employees (or movement of employees from a lower risk job into a higher risk job) includes antitrust training as required by their risk profile.
- Ensure the content of the training is specific to the company's antitrust needs and risk profiles. Consider whether the company needs on-line training, face-to-face (FTF) training, or both. While on-line training is good for global reach and can be sourced in multiple languages, it is probably not adequate on its own for higher risk staff who will need to be able to ask questions and get on the spot answers. There are many on-line training products available off-the-shelf; however, some are too high level and generic. Others are too legalistic and tend to cover all antitrust issues (some of which may not be relevant to the business). Hence, some multinational companies have developed their own specific on-line training despite the cost involved in doing so.
- The next step is to identify appropriate trainers for FTF antitrust training. Ideally the trainers will be knowledgeable in antitrust law. But (depending on the resources available) this may not always be the case; so the company may need to consider developing a 'train the trainer' course. Many external counsel commentators on this subject recommend that external counsel deliver FTF training. This is certainly possible if there is no other alternative. But it is costly and external counsel may not fully understand the company's business model. Consider training trainers from within the company's legal, compliance or other functions.
- The size of the group to be trained in FTF training is of critical importance. There may be a (short-term) cost saving in 'training' a large group of people in a lecture-style format. But this sort of training is not effective in the long run, since the audience is unlikely to learn (or retain) much if the session is not interactive and lively. It is only possible to ensure a lively interaction with a small group of people. The optimal number for FTF training is around 20 people in one session. This makes training extremely time consuming for the trainer (and possibly more costly for the organisation, even if in-house resources are used for training), but it is more effective in the long run.
- The format and content of the training (whether FTF or on-line) should be best suited and adapted to the compliance needs of the business. Various forms of training have been tried and tested, including teaching by examples (scenarios) and case studies, using quizzes, Q&A sessions and other interactive modes of training involving role playing such as mock trials. The purpose of these different training methods is not to trivialise the topic but to ensure that the training fully engages the trainees. Using different methods of training also helps overcome or minimise compliance fatigue or resistance to training. If the resource is available in-house, it is useful to have colleagues in the company's HR or training functions help with the design of the courses to ensure maximum impact.
- Where possible, senior management or team leaders should play an active role in the training to reinforce the messages given on the expected corporate culture of ethics and compliance.
- Ensure suitable records are made of attendance at all training.²²
- In summary, make it relevant; make it memorable; and above all, maintain the effort.

²¹ Some useful guidance on risk profiling for training is contained in the OFT documents referred to at op cit n 13, above.

²² Training attendance can be recorded, eg, by asking attendees to sign an attendance sheet or by electronic tracking of on-line training. The purpose of tracking who attends training is to ensure that those who were scheduled to attend but have not can be identified and required to take necessary training. Obviously all records kept of training should be in compliance with other legal requirements such as data privacy laws.

4.3.5 *Guidelines and notes to staff*

- Develop clear and simple rules – these can be ‘Do’s and Don’ts’ or any other form that is suitable for the company. The key rule however is to use plain business language – not legalistic jargon.
- The notes should not be too lengthy. Make it easy for people to understand and follow the rules.
- Tailor guidelines to the specific needs of different business units and in different situations.
- Consider preparing short (1–2 pages maximum) notes on specific topics of particular relevance to the business (eg benchmarking, attending trade associations).
- Think about what languages materials should be translated into²³ and the method of delivery to get maximum reach (eg having all materials easily accessible on a company intranet site).

4.4 *Controls*

Training needs to be supported by other control mechanisms. Some of the more common ones are discussed below.

4.4.1 *Individual compliance assurances*

Ensuring executives and senior managers continue to focus on antitrust issues can prove a continuing challenge. Some have suggested²⁴ that companies should require at risk staff to sign an annual statement of compliance with the company’s antitrust policy. These could take the form of:

- a statement that the individual has read and understood the company’s programme, including its policies and procedures;
- a statement that the individual has complied with antitrust laws and with the company’s business principles or code of conduct;²⁵
- a statement that an employee has understood the compliance programme and *will* comply with the law.

The latter approach may do more to embed a compliance culture in the organisation and to ensure personal individual responsibility among the employees for compliance behaviour; consequently, it is the approach which is often taken. Given the administrative difficulties of obtaining and monitoring such statements on an annual basis, some companies now incorporate this statement in their on-line training to capture the certification electronically.

4.4.2 *Reporting concerns (helpline)*

It is considered to be good practice²⁶ to establish a confidential system which individual employees can use anonymously to report compliance concerns. Generally, this is a helpline operated by a third party:

²³ In some countries, works council rules can require company training materials to be translated into local languages.

²⁴ This is suggested in the Canadian Competition Bureau 2010 Enforcement Bulletin, see op cit n 13, above.

²⁵ But there is a risk that a backward looking statement of past compliance by individuals may be counter-productive within the organisation. It made be viewed by employees as a cynical and self serving attempt by the company to ‘cover’ itself in the event of a violation and to provide the grounds for disciplinary action. There may also be works council/employment law issues with this approach in some countries.

usually a compliance services organisation or external counsel. It is common for the helpline to be available for reporting all forms of code of conduct and compliance concerns, not just antitrust concerns. It is also important for the organisation to have in place some clearly understood principles for investigating all concerns raised through the helpline and for the company to provide appropriate assurances that internal whistle-blowers will not be retaliated against.

4.4.3 *Keeping a record of disassociation*

Given the importance of being able to ‘prove the negative’ and show that the individual and the company had disassociated themselves from potentially unlawful activity involving others, many companies now have a system of requiring employees to report competition concerns and the actions taken to disassociate the company.²⁷

4.4.4 *Consequence management and incentives*

- Disciplinary measures

It is essential that the antitrust compliance programme is supported by clear rules, policies and procedures on what will happen to individuals in the event of non-compliance. It is important that a deliberate violation of company policy and of antitrust law is appropriately sanctioned by the company, with disciplinary measures up to and including dismissal. As a practical matter, the disciplinary policy needs to be flexible enough to deal with situations where the company may need to apply for leniency and therefore may not want to dismiss the individual immediately, but to keep him/her on the pay-roll (possibly on suspension or ‘gardening leave’) until the antitrust investigation has finally concluded. However, it is also important that disciplinary measures for minor or genuinely accidental violations are carefully judged. It is better to ensure that any accidental errors are disclosed voluntarily by employees, allowing in-house counsel to assess whether or not the matter needs to be dealt with further, than to risk employees deliberately covering up their unwitting errors and creating evidentiary gaps which can prove more problematic later.

- Positive incentives

It is worth considering whether the company could assist in fostering a culture of compliance by providing appropriate incentives for performing in accordance with the compliance programme. For instance, compliance could be considered for the purposes of employee evaluations, promotion and bonuses. While attending required training could and arguably should be linked to the employee performance appraisal process, there may be some reluctance to reward employees merely for complying with the company’s code of conduct, since this would be a minimum expectation in any event.²⁸

- No compliance disincentives

While some companies may express some slight discomfort in granting bonuses for (mere) compliance with their code of conduct, most would agree that a company should not undermine the code of conduct by rewarding commercial success when antitrust (or other compliance) risks

²⁶ Only where permitted as a matter of national law, of course.

²⁷ See the OFT report and consultation, op cit n 13, above.

²⁸ This view may be the corporate equivalent of an antitrust agency’s reluctance to grant a reduction in fine.

are being ignored. In other words, the company should not provide incentives that directly undermine compliance objectives. Unrealistic commercial objectives, combined with group pressure, may cause individual employees to violate the law and company policies. Senior management must make it clear that business performance is only good when it is in compliance with the law.

4.4.5 *Controls relating to trade association attendance and industry events*

Trade associations can provide a useful and perfectly lawful forum for companies to meet and discuss matters of common concern to the industry, such as the introduction of new legislation. However, such events involve competitors meeting together so there is a risk that discussions may stray into inappropriate topics. For that reason, a number of multinationals are now introducing systems to track who attends such events.²⁹ Tracking enables the company to ensure the proper internal authorities have been obtained for attendance, to ensure that the individuals are appropriately trained and to ensure that the activities of the trade association or business network (including formal and informal meetings) are conducted in compliance with antitrust law.

4.5 *Constant monitoring and improvement of the programme*

It is important that businesses regularly review all aspects of their compliance programme to ensure that there is unambiguous commitment to compliance from the top down, that the risks identified or the assessment of them have not changed and that the risk mitigation activities remain appropriate and effective.

4.5.1 *Practical tips*

- Ensure the programme expressly provides for regular reviews. Review antitrust risks within each business unit or area on a regular basis. An annual review is recommended.
- Have the programme controls audited periodically to ensure that the governance structure for antitrust compliance is robust.
- Undertake a root and branch review of the entire programme periodically (every 3–5 years). Part of that should involve, at a minimum, benchmarking best practice programmes with other compliance professionals and may include an external assessment of the robustness of the programme.
- Update and renew training materials from time to time to minimise compliance fatigue.
- Amend the programme as required to address new risks or perceived defects or gaps in the programme.

4.5.2 *Reports to senior management*

Senior management must continue to be engaged in and supportive of the programme. The board should understand the operation of the programme and the compliance risks facing the organisation. Hence, the compliance programme should involve regular reports to senior management and to board committees such as the audit committee or corporate social responsibility committee (if relevant to the company). These reports could either be made as antitrust compliance reports or as part of an overall compliance and ethics report, depending on the particular risks faced by the company.

²⁹ See the OFT report and consultation, op cit n 13, above.

4.5.3 *Audits of the programme*

It is important to distinguish between audits of processes and controls, and audits of substantive compliance. Audits of processes and controls are essential to ensure that there is a robust and effective governance structure. There are pros and cons of undertaking audits of substantive antitrust compliance which ought to be fully understood before they are embarked upon.

- Pros
 - An audit of substantive compliance allows potential violations to be uncovered and, if it uncovers instances of non-compliance, puts the company in a better position in the race for immunity.
 - Identified areas of potential non-compliance can, and should, be used to focus on risk and improve the quality of the compliance programme (including training). They can be used to leverage further management support for the compliance effort.
 - Undertaking periodic audits of substantive compliance underlines management's commitment to the programme.

- Cons
 - In order to ensure and preserve legal privilege, it may be essential to have audits of substantive compliance undertaken by external counsel, which could be extremely costly.
 - However, the cost is not the only drawback. Since by their nature cartels are covert and individuals involved go to great lengths to hide their participation, there is a considerable risk (without the benefit of a 'smoking gun') that the audit will not uncover any violations. There is a risk of producing false negatives and drawing false assurance from the results.
 - In the absence of a 'smoking gun', substantive compliance audits may be resisted by the business as being unnecessarily disruptive. They risk engendering a feeling of resentment and suspicion towards genuine compliance efforts.

Because of the downsides of undertaking an audit of substantive compliance without evidence of a potential violation, some commentators have suggested that it may be worthwhile running an audit of substantive compliance in tandem with an internal amnesty programme (where the company offers to take no action against employees if they come forward voluntarily with evidence of antitrust violations).³⁰ While that is certainly an interesting idea, there are a number of complex legal and practical issues that would need to be fully addressed before such an approach could be put into action.³¹

³⁰ See the Jasper De Gou (Akzo in-house Antitrust Counsel) presentation with Gibson Dunn webinar. Slides from the presentation are available at <http://www.gibsondunn.com/publications/Documents/WebcastSlides-LegalProfessionalPrivilege.pdf>.

³¹ The issues that would need to be addressed would include employment law issues, staff/works council issues, legal privilege, corporate disclosure requirements, potential conflicts of interest between the company and the employee if the activity disclosed is criminal, and the validity of any 'amnesty' offers under public interest and other relevant laws.

4.5.4 Other suggestions for compliance action

Other commentators have made other suggestions for inclusion in a compliance programme. Although these have some negative aspects or practical difficulties, they are mentioned here for the sake of completeness.

- *Mock dawn raids.* Consideration might also be given to whether the antitrust compliance programme should include dawn raid training. While it is obviously important for the company to understand what happens in an investigation (and in particular to understand the duty of co-operation), dawn raid ‘training’ through mock raids should not be part of the antitrust compliance programme since it dilutes the main message of the importance of compliance.³²
- *Contract review.* It has been suggested that companies should regularly review individual business contracts (including diarising review dates) and even that the marketing department should communicate with the legal department when market share thresholds are met.³³ While this concept is not entirely without merit, it is important for companies to focus their resources on the areas of greatest risk. If a company’s risk area is more likely to be horizontal arrangements than vertical arrangements, this contract review would likely go beyond what is essential to mitigate the main risks to the business. If a company did decide to undertake such a rolling contract review, the marketing department may not be best placed to assess market share (unless a comprehensive economic analysis of relevant markets had first been conducted).

5. What (more) can agencies do to promote compliance?

Compliance programmes should be welcomed and actively promoted by antitrust agencies as part of their enforcement toolbox.³⁴ Credible and genuine programmes reduce the likelihood of wrongdoing and expand the government’s overall enforcement resources, thereby increasing the likelihood that a given corporate employee will be apprehended either before or after the employee commits the violation.³⁵ Compliance programmes also deter wrongdoing by generating social norms that champion law-abiding behaviour.

Followers of Harvard Business School’s Michael Porter will be aware of his call³⁶ for government agencies and companies to work together to ‘create shared values’. In line with this thinking, perhaps it is now time for the business community and the antitrust agencies to work together to produce a shared understanding of what a credible compliance programme might look like, and to work together jointly to promote compliance expectations and acceptance within the community at large and the business community in particular.

³² In addition, conducting mock raids gives rise to employment law, human rights and other legal issues.

³³ KS Desai, ‘Antitrust compliance: the effects of perceived regulatory failure’. *The European Antitrust Review* (Global Competition Review, 2010).

³⁴ The antitrust agencies should also bear in mind that regulatory authorities and a growing number of governments around the world have welcomed company compliance efforts; recently, eg, the member countries of the OECD and the signatories to the anti-bribery convention have endorsed the role of compliance programs in preventing corruption – cited in Abrantes-Metz et al (op cit n 21, above).

³⁵ MH Baer, ‘Governing corporate compliance’ (2009) 50(1) *Boston College Law Review*; Brooklyn Law School, Legal Studies Paper No 166. Available at SSRN: <http://ssrn.com/abstract=1474291>.

³⁶ ME Porter, MR Kramer, ‘The big idea: creating shared value’ (Jan–Feb 2011) *Harvard Business Review*, forthcoming.

This is not a request for reduced antitrust enforcement, but for more engagement from the agencies. This is desirable because the public needs a better understanding of the benefits of antitrust enforcement,³⁷ and companies need a better understanding of the value of compliance programmes as a useful cultural tool to improve compliance.³⁸

Possible measures antitrust agencies could take to promote further investment in credible compliance programmes include:

- Consideration of credible antitrust compliance programmes as a mitigating factor when assessing the level of any penalty.
- Consideration of the absence of genuine antitrust compliance efforts as an aggravating factor in assessing the level of any penalty.
- Imposing a requirement on companies to adopt a credible antitrust compliance programme as part of an infringement decision, settlement or commitment decision.³⁹
- Providing clear guidance on the necessary elements of a credible compliance programme.⁴⁰
- Expressing views on the adequacy (or otherwise) of compliance programmes in infringement decisions to provide guidance on the required elements of a credible antitrust compliance programme.
- Discussing antitrust compliance programmes in the European Competition Network and the International Competition Network to reach a consensus on the requisite elements of a credible compliance programme. Particularly valuable would be any experience of agencies from their investigations as to which aspects of programmes work well in practice and which need strengthening.

³⁷ Sokol, op cit n 18, above, suggests that successful enforcement has not created sufficient awareness of cartel behaviour among the public. Relative to other types of financial crimes, such as accounting fraud, the public seems unaware or uninterested in cartel activity. Sokol comments that the lack of public awareness of cartels and lack of corresponding moral outrage to cartel crimes reduces the (societal) cost of participation in a cartel. The conclusion therefore is that more needs to be done to raise normative expectations: in society at large as well as within the business community.

³⁸ I Ayers, J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992). See also the European Parliament Resolution of 20 January 2011, at n 6 above: the Resolution calls for ‘mechanisms to ensure the effective operation of ...corporate compliance programmes’ (para 60).

³⁹ The Australian ACCC has used its enforcement activity to make businesses implement compliance systems. The ACCC’s strategy is aimed at deeper business commitment to and achievement of competition goals. In combination with this strategy, the ACCC has ‘very self-consciously’ nurtured trade practices compliance skills and standards in order to promote high quality compliance management within Australian business more widely than would have been possible through enforcement action alone. See CE Parker, VL Nielsen, ‘Do businesses take compliance seriously?’ (2006). University of Melbourne Legal Studies Research Paper No 197. Available at SSRN: <http://ssrn.com/abstract=946850>, and the ACCC’s Corporate Trade Practices Compliance document, op cit n 13, above.

⁴⁰ Antitrust authorities have an important role to play in providing guidance, advice and support on how companies can introduce a credible antitrust compliance programme. The report produced for the French Conseil de la Concurrence recommended that the French agency provide clear guidelines on an optimal framework for a compliance programme (see n 9, above). This approach has also been recommended more generally in Europe (see the ICC Policy Paper, op cit n 6, above.) A number of agencies do provide helpful guidelines, see in particular the guidelines issued by the Canadian Competition Bureau, the ACC and the OFT (op cit n 13, above).

- Expressing views in press releases and other publications on the requisite elements of a credible antitrust compliance programme.
- Greatly improving and increasing antitrust advocacy, in particular within the business community. Some agencies assume that if guidance or compliance statements are made on the agency website that business people will read the statements and amend their behaviour accordingly. Sadly, this is most unlikely to be the case. Agency websites are not part of the day-to-day reading matter for most business people. Agencies therefore need to be far more active in reaching out to the business community. Advocacy action could include:
 - Increasing, and vastly improving the quality of, dialogue with business and in the general media to raise awareness about the importance of antitrust compliance, including targeted information campaigns. One example was a campaign in Brazil to alert younger people to the societal dangers of price-fixing and other cartels, to improve normative standards.⁴¹
 - Holding national ‘antitrust days’ or national ‘anti-cartel enforcement days’ involving not only agencies, academics and practitioners but members of the business and wider community.⁴²
 - Targeting specific organisations or associations (e.g. trade associations) as part of an active educational campaign.⁴³

6. Conclusion

The purpose of a good compliance programme is to ensure that a company operates according to ethical standards. This article offers some practical guidance on how companies can strengthen their investment in antitrust compliance. In addition, the antitrust agencies should do more to encourage companies to invest the considerable resources needed to have a credible compliance programme. The incentives of agencies and companies need to be aligned to deliver compliance with the law.

⁴¹ In 2009 Brazil’s CADE and SDE commissioned a comic booklet for children, featuring the characters from the country’s most popular comic book series, telling the story of a cartel among lemonade stands. The idea was to introduce concepts of business ethics by exploring the example of a ‘lemonade cartel’ and target those who are the future of the country, the children, who would then go home and discuss the issues with their parents and guardians.

⁴² To be of any real value it would be essential that the event should be designed in a way which reaches the widest possible public audience. Similar ‘antitrust days’ in Brazil involved advocacy actions in eight Brazilian airports, in which brochures and materials were distributed to raise awareness of competition culture and the importance of fighting cartels. It was accompanied by a nationwide campaign via advertisements in the four major weekly magazines in Brazil, and postcards were sent to key executives of 1,000 companies. The main objective of this initiative was ‘to prevent companies from engaging into cartel activity as well as to raise awareness of the evilness of cartel behaviour and the ways it affects the lives of consumers’. See OECD Document: DAF/COMP(2010)14 *Annual report on competition policy developments in Brazil 2009*.

⁴³ The ACCC targeted a range of individuals and organisations (such as industry associations, compliance professionals and potential whistle-blowers) with the capacity to understand the possible reputational damage caused by publicity and encouraged the business compliance community to put in place compliance controls – See Parker and Nielsen, op cit n 40, above.

SUMMARY OF DISCUSSION

By the Secretariat

The Chairman opened the roundtable by introducing the speakers; Dr. Philip Marsden, from the British Institute of International and Comparative Law, Mr. Mark Pieth, the Chair of OECD Working Group on Bribery, Mr. Mats Isaksson, Head of the OECD Corporate Affairs Division, Ms. Anne Riley from Shell, Mr. Guido DeClercq from GDF/Suez and Mr. Joseph Murphy from the Society for Corporate Compliance and Ethics. The Chairman proposed to organise the roundtable around five themes: (1) General Drivers of Compliance, (2) Different Types of Sanctions, (3) Innovative Approaches to Compliance, (4) Corporate Compliance Programmes and (5) Guidelines for Competition Compliance. The Chair then handed the floor to the UK for an initial presentation on the drivers of compliance.

1. Drivers of compliance

A delegate from the UK explained that the OFT recognises most businesses do wish to comply with competition law. The OFT has therefore taken steps to assist businesses in this compliance by conducting a programme of qualitative research for a report entitled “*Drivers of compliance and non-compliance with competition law*”. The aims of this report were to gain a better understanding of the practical challenges faced by businesses seeking to achieve a compliance culture, including factors motivating businesses to comply, what has worked well in practice to achieve this and how and why compliance challenges can arise in spite of best compliance efforts within businesses. Understanding these factors allow the OFT to better manage its limited resources in order to help business comply with competition law.

The research identified a number of drivers of compliance and non compliance. Drivers of compliance include: financial penalties, director disqualification orders, criminal sanctions, the reputational impact of being involved in a competition law infringement (both for the business and individually), corporate benchmarking and desire to be perceived as an ethical business, and a strong culture of compliance. Drivers of non compliance include: ambiguity or lack of management commitment, uncertainty about legal requirements or overly cautious legal advice, employee naiveté, rogue employees, a restricted ‘tick box’ approach, and competing interests from other areas of compliance.

Following its research programme the OFT has published a suite of guidance documents aimed at businesses and a film (“Understanding Competition Law”) which can be used by companies during internal training or presentations. The documents and film all follow a four step compliance methodology, with the core of the virtuous circle being commitment to compliance from the top down in the organisation. Step one is risk identification, step two is risk assessment, step three is risk mitigation and step four is review. This follows established risk management methodology, and has much in common with many of the compliance documents produced by other competition agencies. However, it is important to recognise that one size does not fit all and there is an emphasis on practicality in the documents. If, despite their best efforts, and having followed the methodology set out in the guidance materials, companies do infringe competition law a neutral approach is taken. Therefore, while no automatic discount on the financial penalty is given, the OFT will consider the facts of the case and a 10% reduction in the fine may be awarded. For example in the recent construction cases, the Competition Appeal Tribunal acknowledged compliance programmes were in place and gave discounts accordingly.

The Chairman then gave the floor to the invited panellists for their observations.

Mr. Marsden highlighted the importance of considering drivers of non-compliance, and provided three reasons that companies may have for not complying with competition law. First, companies may not be aware of the competition law issue, which could be solved through increasing awareness through training and advocacy. Second, companies may decide the benefits of violating the law are worth the risk, in which case the benefit/risk ratio needs to be changed, with higher fines and more targeted punishment. Third, companies may believe they are simply above the law and will not be caught, which means drivers for detection should be increased, and fines should be high enough to attract the Board of Directors attention, motivating them to take action within the company. The solutions for overcoming drivers of non-compliance are therefore related to transparency, punishment and detection. The academic literature suggests that companies rationally compare the fine they may receive against the chance of detection. However, this assumes that corporate officials behave like an economically rational unit, with perfect information. In reality this is not the case, as corporate officials are human beings, vulnerable to a variety of different reactions. Tinkering with the market benefit ratio is not, therefore, the solution.

Mr. DeClerq commented that competition law is one aspect of the numerous legal areas on the compliance agenda. It is therefore competing with other enforcement areas (e.g. bribery and corruption, data privacy, security and financial fraud, health security and safety etc) for a company's limited resources.

Mr. Murphy stated that in his experience arrogance and laziness were both key drivers of non-compliance. Arrogance in the sense of companies believing their behaviour will not be detected, and laziness as being part of a cartel means the company does not have to work as hard. It is critical for enforcers to provide incentives for companies to detect cartel violations themselves, as corporate executives are involved in the day to day running of the business, whereas government bodies must assess from a distance. The lack of company resources issue can be partly solved by adopting a compliance programme with an integrated approach that benefits from economies of scale; for example looking for both collusion and corruption simultaneously. The OECD Working Group on Bribery emphasises in its good practice guidelines the importance of an integrated approach.

Mr. Pieth commented that criminology of individual crime indicates it is more the likelihood of getting caught and being brought to justice which has a deterrence effect, rather than an abstract fine. The environment of competing incentives also plays a role, as companies are faced with a substantial list of legal requirements that they must comply with.

1.1 Effectiveness of fines

The Chairman commented that two issues arose that should be discussed further. First, the importance given in the contributions to the deterrence model which works on the premise that higher fines means a higher probability of being caught. Second, how does this theoretical model translate into reality, given the frequency of cartels does not appear to diminish despite the increased fines? The Chairman called upon the EU to comment.

A delegate from the EU emphasised the difficulty of determining the actual level of cartel activity and the extent of compliance. Although both the number of cartel cases and the amount of fines levied in the EU has increased, this does not indicate clearly if there are more or less cartels in action. A distinction should be drawn between cartel activity on the one hand, and cartel detection on the other. The increased number of decisions and amount of fines, combined with the leniency programme, may be a result of better detection activity. The interaction between the incentives to start a cartel, the possibility for detection, leniency programmes, sanctions (both company and individual) and private damages should all be considered. As regards the question of whether fines are too high, the principle of proportionality is a

general principle of EU law and will therefore be considered before any fines are administered. The EU has also received more than fifty requests for ‘inability to pay’ in cartel cases, of which around ten were granted. In some of these cases the fines were reduced by 70% to avoid bankruptcy. On the issue of the ownership structure of companies, incentives are needed for management at the top level to work on compliance programmes for activities which take place at a lower level. Reputational damage is an issue which companies are concerned with, and the EU’s new settlement programme is an attractive way for companies to deal quickly with an investigation before too much damage is done. Due diligence examinations in merger cases can also assist in the detection of cartels. Commissioner Almunia has publicly commented that he does not believe that the existence of compliance programmes should lead to either lower or higher fines. However this does not prevent the encouragement of compliance programmes, and the EU is currently considering ways in which this encouragement can best be carried out.

Mr. Marsden agreed with the EU that tracking the level of fines and the number of cartels uncovered does not provide an accurate comparison of the situation. It does not lead to a clear conclusion about whether fines are accurate or not. A more important question is do these fines deter? It is also interesting to question why there is a reticence to use multiple drivers of compliance, i.e. fines in conjunction with director disqualification, debarment, harmful publicity etc.

The Chairman next asked Chile to comment on a statement in their contribution that pecuniary sanctions do not seem to be an effective deterrent.

A delegate from Chile responded that cartels are problematic because they are lucrative for those involved, but at the same time detection is very difficult. The more power the competition authority (the FNE) has, the more sophisticated the companies become in hiding the cartel. In addition there is a cap on fines in Chile, but this is not related to the turnover of the company. In 2009 the fines increased to 30 million USD for cartels and 20 million USD for other infringements. Compared with fines imposed for infringements of other regulations these figures are very high. Fines can be levied on both individuals and companies. The FNE intends to issue guidance on how fines are calculated to improve transparency for the business community. It is also very important that the principle of proportionality be respected. The Supreme Court has the power to review fining decisions of the TDLC and tends to adopt a more conservative approach reducing the amount of fines, but exceptionally it has increased them. The FNE is the prosecutor which has the duty of competition law enforcement and the TDLC is the judicial body in charge of adjudication. The FNE has limited resources and as a result must prioritise the key cases to follow up. In some cases imparting the message of what a company can and cannot do, as well as imposing by a judicial order the modifications of contracts or the termination of a company, is more important than the amount of the fine.

The Chairman next handed the floor to Ms. Anne Riley to comment.

Ms. Riley emphasised that while enforcement is essential for deterrence, the lack of sufficient incentives for serious compliance efforts can allow unethical behaviour to flourish. Simple deterrence alone can fail to produce compliance commitments because it does not directly address the societal perception of the morality of the behaviour that is being regulated. It merely puts a price on non-compliance. The focus should therefore be on how to engender a culture of compliance and not merely a fear of non compliance. As Commissioner Almunia stated, the goal of antitrust policy is not to levy fines, but to have no need for those fines at all. The active encouragement of compliance programmes and real compliance activities by companies will do more to achieve no violations at all than merely imposing fines in the first place. Antitrust agencies should think creatively about compliance programmes and how they can be used as an additional enforcement tool.

A delegate from Bulgaria commented on the amendments made to their competition law which increase the financial sanctions which can be levied upon companies. Previously it had been financially advantageous for infringing companies to pay the fines, rather than comply with competition law. As yet the new sanctioning system has not been in place long enough to evaluate its effectiveness. While financial sanctions can be very powerful instruments, allowing companies to offer commitments instead of paying a fine can also be an effective tool to encourage compliance. Since the adoption of more detailed rules on accepting commitments, the Bulgarian Commission has approved commitments in a number of decisions. All instruments which may encourage compliance should therefore be used in order to achieve the final goal of effective competition.

The Chairman commented that some of the additional tools may be more costly for competition authorities as they require monitoring. The Chairman next asked BIAC to comment on whether current fines are excessive compared to what is required for optimal deterrence.

A delegate from BIAC emphasised that fines are not excessive per se, but once fines are high enough then making them even higher will not increase deterrence. In a number of jurisdictions fines are already sufficiently high for management to take compliance seriously and increasing them further would not increase deterrence. There is no magic number, but there is a level beyond which higher sanctions are not going to be more effective. The reason is that these high corporate fines are not actually borne by those who are responsible for the infringement. Instead they are paid by the group structure, meaning it is a company's shareholders and pensioners and ultimately in some cases even the consumers who pay. It should also be emphasised that the attention of the Board of Directors should not be focused only on the amount of the fine, but also demonstrate that the action is morally wrong.

A delegate from Romania provided details on the recent amendments to the competition law there which provide the Romanian Competition Council (the "Council") with additional tools for encouraging compliance, notably commitments and settlements. There has also been an increase in the level of fines, and in 2010 the Council doubled the volume of fines applied. Companies are using more sophisticated means to hide their cartels, and it is increasingly difficult for the Council to uncover them. However, the fines have achieved a certain level of deterrence and as a result companies have started to use the leniency programmes. Since the introduction of the guidelines on commitments a number of companies have approached the Council, requesting advice on how to comply with competition law so as to avoid reputational damage. The introduction of the Certificate of Independent Bid Rigging ("CIBD") has also encouraged companies approaching the Council for advice before participating in tenders. These additional tools are as important as fines for ensuring increased compliance with competition law.

The Chairman commented on the statistical problems in trying to measure the level of sanctions and the number of violations. Even if there was a decline in the number of cartel cases, this could be explained by the fact firms are becoming more adept at hiding their cartels. A clear statistical relationship between levels of fines and actual deterrence is therefore unlikely. Instead theoretical notions that firms try to maximise profits are relied upon.

2. Different types of sanctions

2.1 *Effectiveness of criminal sanctions*

The Chairman then turned to the US for a discussion on private antitrust litigation and data related to criminal sanctions.

A delegate from the US began by talking about private antitrust litigation as a driver of compliance. A number of variables drive compliance, including (i) the likelihood that violations will be detected, (ii) the

likelihood they will be prosecuted and (iii) the severity of the sanctions. These three variables are all raised by private antitrust actions. In a private litigation system the likelihood of violations being detected increases, as those people involved in the industry are much closer to the facts than those working in competition authorities. Private parties also have an incentive to bring a case forward for prosecution as they will be compensated. Allowing private parties to act as prosecutors also greatly assists the competition authorities who do not have sufficient resources to prosecute every case themselves. In terms of sanctions, under the Clayton Act private claimants are awarded treble damages for an antitrust violation, and the court has very little discretion to award less. There is also the option to bring a class action in an antitrust case. While there are some accepted shortcomings of class actions (for example the promotion of meritless litigation) they nonetheless change the balance of power between the plaintiff and the defendant, and facilitate the plaintiff bringing an action.

The delegate next provided the US perspective on deterrence based on the country's long history of criminal enforcement of antitrust laws. The issues paper casts doubt on the effectiveness of criminal penalties by pointing to a high rate of recidivism among cartel offenders and a high rate of cartel detection. A distinction should be drawn between general deterrence, which is aimed at convincing executives that they should not commit the offence, and specific deterrence which is aimed at convincing a particular company and its executives not to commit the same offence again. It is commonly recognised that for cartel offences the level of sanctions necessary to achieve specific deterrence is below what is required to achieve general deterrence. There has been much data published on recidivism in cartel cases, with the conclusion drawn by some academics that a confirmed high rate of recidivism by a company would be clear proof of failure of specific deterrence. However, the delegate argued that much of this data exaggerates recidivism and masks the success of specific deterrence in the US. The limitations of this data should be highlighted, in particular the double counting; for example if a company was involved in five different cartels simultaneously, the academic literature has treated the company as having reoffended four times. However this is not meaningful recidivism. Much of the data also dates back to 1990 which does not indicate the effectiveness of sanctions today. The delegate reported that when US data was examined going back to 1999, there were no instances of a company having joined a cartel, for which at a later date it was convicted, after the conviction of a prior cartel offence.

The true instance of cartels past or present cannot be known, but it is clear that the arsenal of weapons used by competition enforcers to detect cartels has been considerably strengthened over the years. When these improved tools are applied simultaneously by enforcement officials in multiple jurisdictions targeting the same international cartels, the impact has to be exponentially greater. In the US the corporate leniency programme has become the single most powerful investigative tool. It has led to the production of evidence, in many cases from outside the US, which may not have been obtained by US enforcers in the absence of the leniency programme, and resulted in convictions that would not have been secured without the leniency programme. In addition, firsthand accounts from cartel members have shown that cartels chose not operate in the US, despite its profitability as a market, in order to avoid the risks of detection and severe sanctions they risk incurring.

The Chairman asked Germany to provide details on its approach to criminalisation, in particular with reference to bid rigging.

A delegate from Germany explained that the German approach tends to be less supportive of the use of criminalisation in antitrust enforcement. Whether a country should introduce criminalisation will be dependent on the existing judicial system, and the process for administering fines which is currently in place. It can be challenging for a system with individual criminal fines on the one hand and administrative fines for companies on the other to work smoothly. The German approach is rather idiosyncratic as cartel offences are generally subject to administrative fines, whereas bid rigging offences are subject to criminal fines. However, there are very few criminal fines levied in bid rigging cases and one of the reasons for this

is the lack of a strong cultural consensus that these types of infringements should be classified as criminal. This is particularly the case for cartels. Another reason why criminal enforcement is less useful in Germany is because jail sentences below two years are hardly ever executed, as instead they are suspended. Naturally, the tools at the disposal of competition authorities should be sufficient for deterring anticompetitive behaviour. However, financial penalties and the risk of personal liability and reputational damage are a sufficient deterrent, without the need for additional criminal sanctions.

The Chairman next turned to Australia and asked the delegation to comment on the newly adopted criminal sanctions there, and why they were introduced given the effective compliance activities already in place.

A delegate from Australia responded that the ACCC have only had the power to impose criminal sanctions since the middle of 2009. Prior to that there was, and remains, an extensive programme of compliance involving education and compliance programmes. The media was also used to increase awareness, and this had a reputational effect on those prosecuted. However, despite this strong programme of enforcement, penalties were low, and disproportionate to the benefits that could be gained from being in a cartel. As a result, civil penalties were increased in 2007 and in 2009 criminal sanctions were introduced. It is too early to comment on whether these criminal sanctions will have a significant deterrence effect, but feedback from the business community indicates that boardroom discussions often focus on these criminal sanctions. Directors at the 200 major corporate firms in Australia are therefore all likely to be aware they risk imprisonment if they are involved in cartel conduct.

A delegate from New Zealand explained that, following Australia's lead, they were also considering the introduction of criminal sanctions for competition infringements. One of the reasons is the special relationship that New Zealand has with Australia, and the medium term commitment made between the governments that companies operating in both markets should face the same sanctions in both countries. The concern in New Zealand is that criminalisation could result in the chilling of pro-competitive collaborative behaviour, which is generally to be encouraged given the small size of the economy. In response to government concerns, the Ministry of Economic Development ("the Ministry") recently published a draft exposure bill. This bill provides an opportunity for comments on the Ministry's work and aims to clarify what is prohibited and what is exempted. Although only limited feedback has been received so far, business appears to be satisfied with the Ministry's work. Once it has been clearly established which arrangements are exempt from competition law, this will allow the Commerce Commission to follow international trends and take a more active role in sanctioning hard core cartel behaviour. It is likely that in New Zealand, as for many countries, there is a significant amount of cartel behaviour which goes undetected.

The Chairman next asked Denmark to comment on a recent economic study commissioned by the competition authority which showed that the level of sanctions was not sufficient.

A delegate from Denmark responded that the study compared the Danish regime with other regimes around the world, and demonstrated that the Danish regime falls short with respect to both financial and non-financial sanctions. The main deterrent used is reputational damage. Under the Danish regime it is the court that imposes criminal fines, and the fines levied for competition infringements tend to be very low. One of the reasons is that most other economic crimes are punishable by imprisonment. The lack of custodial sentences for cartel infringements sends a clear signal to the court that this is not a serious crime. It is therefore unlikely the court will levy higher fines in cartel cases unless prison sentences can also be given as a sanction. There have been discussions as to how the introduction of imprisonment will affect the leniency programme, but this is just a matter of adjusting the legal framework. If individuals risk imprisonment this will increase their incentives to come forward and collaborate with the competition authority. The introduction of prison sentences will also increase the investigative tools available to the

competition authority, as, in conjunction with the police, phone tapping and surveillance will be permitted. These are tools which are indispensable in the investigation of economic crimes. The introduction of criminal sanctions will therefore greatly strengthen the current enforcement framework in Denmark.

The Chairman then asked Mr. Pieth to provide his view on the debate to use criminal sanctions for cartels.

Mr. Pieth drew a comparison with corruption, and how this appears to be the inverse situation. In corruption cases, there is no question of the individual being criminally liable, but the challenge is the finding of corporate wrongdoing, and administering corporate fines. The OECD Working Group on Bribery has a measurement called 'functional equivalence' which means there is an element of flexibility in the approach to sanctioning, but similar crimes should be treated equally. It is not clear that individual criminal sanctions are needed in competition law, as it may be sufficient that the individual loses his/her job. Focus should therefore be on ensuring corporations pass down the message that if individuals become involved in cartel activity that will be the end of their career.

A delegate from Ireland commented that criminal sanctions have been in place there since 1996, but there have only been thirty three convictions for hardcore cartel activity. There are two key points to bear in mind when considering whether to adopt a criminal sanctions regime. First, the necessity to persuade politicians and public opinion that these really are crimes. This tends to be easier in relation to the consumers market, and the convictions so far have concerned car dealers and central heating oil as these are products consumers can relate to. Second, while the threat of imprisonment is the single biggest deterrent to an individual, the introduction of criminal sanctions into legislation does not mean judges will necessarily impose them. Judges tend to be independent and reluctant to sentence someone for crimes related to cartels. In addition, trying to prove a cartel conspiracy reaches a criminal standard of proof (i.e. beyond reasonable doubt) is a very challenging task. It is also important to recognise that criminal sanctions do not work for every type of competition breach. Therefore, while engaging in an abuse of dominance is a criminal offence in Ireland, there is no practical possibility of mounting a criminal case. The case would become an argument between the economists on both sides, which would never persuade a jury.

A delegate from Israel commented that while Israel has criminal liability, few substantial prison sentences have been awarded. Executives of corporations and firms not personally involved in an antitrust violation, but unable to prove they were not aware of the violation, are also liable to be sanctioned. Compliance programmes can be of benefit here as when a company has a compliance programme in place, executives are more easily able to prove that they did everything in their power to prevent the violation. A company's management can encourage its employees to maximise profits and increase market share, but subject to the compliance programme. Further sanctions include disqualification of executives from serving on a board, tort liability and new legislation is being drafted concerning administrative fines.

A delegate from Turkey raised the issue of what would happen in a situation involving both criminal sanctions and administrative antitrust fines, and which would take priority.

The Chairman responded that cases can often involve both corruption and a cartel, with the cartel being used as a tool to cover up the corruption. This is particularly common in cases involving public procurement, for example, buildings, roads or hospitals. How a case such as this is treated depends on the legal system of different countries. In France, for example, two individual investigations would be carried out – one focused on the corruption and the other on the cartel. The investigating teams may liaise with each other, but otherwise they would run as separate inquiries.

A delegate from Mexico commented that these cases happen most commonly in relation to bid rigging. In particular there have been cases in Mexico relating to medicines, as it is common for companies

to have contact with the relevant person in the government organising the bid. These cases have demonstrated a close relationship between corruption and cartels.

The Chairman next turned to Mr. DeClerq to provide his thoughts from a company perspective.

Mr. DeClerq opened his presentation by setting out two basic assumptions related to compliance programmes. The first assumption relates to the need for a combination of values and compliance. The law is there to make sure that the underlying value of free and fair competition is preserved, and this should not be taken for granted. In advancing the compliance agenda, both companies and competition agencies need to accept and commit to this basic tenet of competition law. If the values exist but there is no compliance agenda, these values will not be sustainable. Both companies and agencies need to clearly articulate around the combination of the two. Steps should be taken to ensure that business people do not feel they have just another constraint imposed upon them. Instead of viewing compliance as a monolithic agenda, the governance of an organisation needs to be understood. The second assumption is that compliance is focused on changing behaviour, and preventing behavioural offences (cartels, abuse of dominance). Employees behave as they do because they are looking for solutions in the context in which they are operating. The common mission of companies and agencies is to ensure the compliance programme has sufficient tools available and adequate incentives to drive the necessary changes in behaviour.

The compliance agenda is growing in terms of both the number of legal fields that must be complied with, and the extent of the compliance. Compliance programmes are becoming more objective oriented, and the stated objectives are very wide. They include; risk prevention and minimisation, detection of inadvertent and unauthorised actions at an early stage, providing awareness of ethical conduct standards, educating business of the formal power available to competition authorities, facilitating co-operation between the company and the competition agency, and identifying contraventions committed by other companies that are affecting the business. These objectives converge with those set out in the bribery environment, in particular, for example, under the UK Bribery Act. The key for successful compliance programmes in both areas is efficiency, leadership, training, education and information and due diligence.

Compliance needs to be embedded in a legally conforming environment. This is crucial for the compliance programme to be credible. Legal departments should therefore be given privileged and confidential status, to enable them to drive the compliance programme forward with the requisite recognition. Governance is also paramount, and simple direct actions need to be taken to ensure governance is improved. Directors should be made liable for the compliance programme, as imposing a fiduciary duty will increase their sense of responsibility for the programme. Awareness is another important driver, meaning awareness about the legal, financial and reputational consequences of a breach. Incentives are also important, both internal (for example bonuses to employees being contingent on adhering to the compliance programme) and external (for example a company wishing to be perceived as ethical and corruption free). Imposing a mandatory competition compliance programme with clear agendas, under the responsibility of a senior director will have a much larger impact over compliance than either fines or criminalisation.

2.2 *Effectiveness of debarment/disqualification*

The Chairman next asked Poland to comment on its view regarding the limitation of using fines and disqualification orders to target individuals.

A delegate from Poland responded that while fines and disqualification orders can ensure deterrence, at the same time the efficiency of these sanctions have their limits. Imprisonment may therefore be more effective. Disqualification orders are not allowed for under Polish law, but as outside observers it would seem possible that a company could simply indemnify a former director for any financial loss caused by

the disqualification order. Therefore the consequences of the infringement which the individual would normally have to bear could be partially transferred to the company, which would not be the case of imprisonment. Of course the company would not be able to compensate for the negative impact of the disqualification order on the career or personal reputation of the sanctioned director.

A delegate from the UK explained that the notion of director disqualification is not exclusive to competition law, and it is a sanction designed to protect businesses from individuals who are not fit to be directors of companies. In the case of publicly owned companies there would be severe ramifications if companies sought to financially indemnify an individual who had broken the law. The possibility cannot be ruled out in private corporations, but in the case of PLCs (public limited companies) this would be very unlikely.

2.3 *Recidivism: promoting compliance*

The Chairman then turned to Japan and asked the delegation to provide details on steps taken to improve compliance there.

A delegate from Japan emphasised that vigorous enforcement of competition law is the most fundamental base to promote compliance with the law. The Japan Fair Trade Commission (JFTC) has taken a number of measures to strengthen enforcement, including raising fines and introducing a leniency programme. A number of surveys have been conducted, targeting companies, with several reports and recommendations published every year. One of the most effective ways to encourage Japanese companies to comply with competition law is to demonstrate that their competitors are also complying. In 2006 a report was carried out analysing the industries which are particularly prone to competition law infringements. The construction industries have shown a particularly high reoccurrence of bid rigging in public procurement, and they consider industry wide effort to be the most effective measure for full compliance with competition law. However, different approaches are required depending on the size of the company. Larger scale construction companies will generally have a department in charge of compliance, and in this case the focus is on promoting compliance substantially around the company. Smaller companies may not have a compliance system in place at all and will need to focus on establishing a division and allocating staff to it. The construction industry report also surveyed the causes of recidivism. Long term business practices were cited by the majority of respondents as the main cause of bid rigging. The second highest answer was the structure of the construction industry itself, which suffers from excessive supply and declining demand. The third was the procurement system which is prone to bid rigging.

Following the surveys, the JFTC published a report with a number of recommendations for companies to enhance the effectiveness of compliance. These include; (i) ensuring the involvement of top management, (ii) establishing a strong legal and/or compliance team, (iii) issuing a compliance manual, (iv) training courses for both management executives and employees, (v) active involvement of the parent company, (vi) establishing in-house rules regarding competitor contacts, (vii) conducting in house investigations in response to alleged violations. The JFTC has also been involved in advocacy efforts with the business community, academics, schools, the media and has broadcast films for PR activities via the JFTC website. These efforts have resulted in an improving trend of compliance, indicated by the increased number of leniency applications which have been received.

The Chairman commented that Japan's presentation contrasted nicely with that of Mr. DeClerq in showing there is no one size fits all approach for compliance programmes, and using techniques such as surveys can be very useful in trying to understand how business perceive the compliance issue. The Chairman then invited Mr. Pieth to comment.

Mr. Pieth drew a distinction between corporate compliance programmes and compliance in more general terms. Companies may not have separate compliance systems for each area. Instead there tends to be one compliance programme which concerns a multitude of areas (bribery, tax, corruption, health and safety etc) and not just competition. A similar approach will be adopted but there are also slightly different sets of risks to bear in mind. It is interesting to consider the way in which regulation and compliance are interlinked. For example, if considering criminal law then corruption is a *mens rea* crime and consequently there is no automatic strict liability. Mitigation may be given for having a good compliance system in place, although this should not be given automatically. This ensures a fair approach, as companies know the standard they should adhere to. If companies do everything in their power to adhere to this standard and there is a failure to comply, they should nonetheless be given credit for their efforts. A comparison was drawn with the OECD Working Group on Bribery, and the relatively stringent monitoring system which is also applied to company compliance. Countries are then assessed on how they implement those standards, which can be challenging for those countries that do not quite meet them.

The Chairman reflected that the call appears to be for competition authorities to think about what a good compliance programme would entail and setting standards that firms can follow.

3. Innovative approaches to compliance

The Chairman then asked Norway to comment on the interesting proposition of convincing ethical funds not to invest in firms that are not compliant with competition laws.

A delegate from Norway said that the competition authority has been trying to convince the ethical committees of the Norwegian government pension fund that the ethical criteria for inclusion and exclusion must include competition crime. This is for three reasons; first, ethical investment has grown substantially over the past decade, second the criteria for exclusion has shown a demonstrable effect on company behaviour and third, exclusion from a fund encourages companies to implement a working compliance programme. An example of where this has worked very well can be taken from a Swedish pension fund that excluded Scandinavian Airlines after a cartel co-operation with Maesk Air in 2001. The fund blacklisting usually lasts for five years, unless the company can prove a significant improvement related to the practices causing the exclusion. Scandinavian Airlines was reincluded in the portfolio in 2006 after having introduced a detailed compliance programme, with comprehensive training. Including competition crimes in the criteria for ethical funds therefore has a real impact in promoting compliance with competition law. First there is the divestment effect, meaning hardcore cartel activities are divested from the ethical investment fund, second the shareholders activism effect, which implies shareholders become more active and take steps to ensure the company has a compliance programme in place and third the screening effect, which means ethical funds will look for the existence of a compliance programme before investing. However, there has so far been a lack of enthusiasm from committee members to include competition on the list. One reason for this is the conflicting demands placed on the committee to include a variety of different issues on the blacklist, for example tobacco companies, or companies using child labour. In comparison competition may not rate as highly. However the criteria are under constant development, and the competition authority will continue to work towards bringing competition crime to the forefront of the committee's attention.

Mr. Murphy agreed that the immoral aspect of competition crime does need to be communicated more strongly. However, trying to battle a large group of competing interests may not be the most productive way of going about this. Instead the funds should be urged to invest only in companies with very strong compliance programmes, which cover not just competition, but all of the key compliance areas.

The Chairman next asked France to comment on the adoption of an instrument focused on encouraging compliance within SMEs.

A delegate from France explained that the instrument was introduced into French law in 2008, and is administered by the DGCCRF¹ as opposed to the competition authority (the “Authority”). It has a dual objective: (i) facilitation of an accelerated settlement process for less serious anticompetitive infringements involving local markets, thus avoiding a long and costly court process; and (ii) allowing the Authority to concentrate on more complex cases concerning companies operating in larger markets. The injunction requires three conditions to be fulfilled: (i) the practices must affect only local as opposed to national markets – the latter remain the responsibility of the Authority; (ii) there must be no European dimension triggering Articles 101 and 102 TFEU; and (iii) the company’s individual turnover must not exceed €50 million, and the group turnover must not exceed €100 million. The injunction is therefore clearly targeted at SMEs with local impact. If these criteria are satisfied, the SME is required to cease the anticompetitive practice and in the case of serious infringements financial penalties can be imposed. However, these penalties are capped at €75,000 or 5% of the SME’s turnover. If the SME chooses to accept the injunction, the Authority cannot take any further action. If the SME refuses to accept the injunction, the DGCCRF will hand the case to the Authority, who will follow the usual channels for an infringement of competition law. However, the latter situation has yet to occur. The Authority is kept informed of all action taken by the DGCCRF and since 2009 around ten cases have been concluded.

Although the injunction process is focused on SMEs this does not mean it concerns only insignificant cases. One of the first cases to be dealt with was a classic information exchange case between eight companies in the construction sector. The injunction is therefore a valuable tool for encouraging SMEs to respect competition rules and for generally promoting compliance, with three principal characteristics. First, it has an educational value, as following an injunction, the DGCCRF has a responsibility to educate the SMEs on how to put in place the necessary rules and regulations to ensure competition law is adhered to in the future. Second, it acts as an instrument to promote a competition culture, both in companies where anticompetitive behaviour is the ‘norm’, and where it results from lack of knowledge about the law. Third, it acts as a tool to disseminate good practice, and in some cases SMEs have even gone as far as to impose obligations over and above those required under the injunction. An example was given of the French Architecture Academy which accepted the injunction imposed for exchanging price information and the President of the Academy took the initiative to go beyond this by publishing the competition laws on the Academy’s website, and publishing an article on the subject to raise awareness. The DGCCRF has also been invited to the next Annual General Meeting to speak to the members about the importance of competition law. The injunction has therefore proved to be a very useful tool for promoting a culture of compliance.

The Chairman next asked Canada to comment on its policy of providing transitional advisory opinions at no cost to determine whether an existing agreement is compliant with competition law.

A delegate from Canada responded that the free advisory opinions are given by the Competition Bureau (the “Bureau”) in the context of the amendments which were made to the competition law in March 2009. The amendments were designed to create a more effective criminal enforcement regime for the most egregious forms of cartel agreements and also include a new civil provision allowing for the review of potentially anticompetitive agreements. In order to help businesses adjust to the changes in the law a transition period of one year was put into place to ensure compliance with the new provisions. During this one year period businesses could apply to the Bureau free of charge for a written opinion on the applicability of the new conspiracy provision to an existing agreement, to ensure it did not violate the new law. This allowed companies to revise their agreements before the law actually came into effect in March 2010. The decision to waive the usual fee was in order to facilitate a smooth transition to the new law. Companies can still request an opinion on a business arrangement from the Bureau now, but they will be charged \$15,000. The opinion given is binding and strictly on the applicability of the provision, i.e.

¹ Direction générale de la concurrence, de la consommation et de la répression des fraudes

whether the agreement would be reviewed under the civil or criminal conspiracy provision. The Bureau does not engage in a thorough competitive analysis or make a formal statement as to whether there is likely to be a substantial lessening in competition.

The Chairman next asked Sweden to comment on its use of a web based interactive tool for trade associations.

A delegate from Sweden explained that in 2006 the competition authority carried out a survey of trade associations and found that one third of those asked engaged in anticompetitive behaviour. The web based tool was developed in response to the need to raise awareness, and provide clear and practical advice to trade associations. The tool is available on the Swedish competition authority's website and is based on a traffic light system which categorises practices as either green meaning compliant (e.g. education, training, general lobbying, legal advice), amber meaning it may not be compliant (e.g. information sharing, costing and pricing support) and red meaning it is not compliant (e.g. price co-ordination, price recommendation and market sharing). Each practice links to a further page where the anticompetitive nature of the practice is explained further, with reference to relevant case law. The introductory page emphasises that the guidance is simply aimed at raising awareness of competition law, and is not a substitute for legal advice. The tool is also an imperfect proxy of the level of compliance or the number of detected infringements. However, the competition authority did carry out a survey among trade associations in 2010 showing an increased awareness of competition law, with 90% of respondents saying they were aware that competition law infringements could result in fines, compared to 72% in 2009.

4. Corporate compliance programmes

The Chairman invited Mr. Mats Isaksson to take the floor, and draw some comparisons between competition theory and corporate governance.

Mr. Isaksson opened his presentation by explaining that the enforcement of widely used national corporate governance codes relied on a concept known as 'comply or explain'. This means a company either declares that it complies with a default requirement of the code, or they explain why they do not comply. This approach allows for a variety of corporate governance arrangements, enabling companies to take into account company specific circumstances, and accepting that one size may not fit all. Therefore in the world of corporate governance, deviation from default requirements are not only accepted, they are also expected. The importance is that practices are disclosed so that investors can make an informed decision. Given the ways in which companies differ, it was expected that quite a variety of corporate governance arrangements would be disclosed. In fact, empirical studies have shown an unexpectedly high degree of compliance with default requirements. In Italy, for example, compliance in 2008 was reported at 95% . However, upon closer inspection a study found significant differences between formal and actual compliance, with actual compliance much lower. Companies therefore preferred to claim default compliance with the code rather than explain the actual arrangements in place. Thus the system of 'comply and explain' does not automatically deliver on its promise to provide the market with correct information about corporate governance practices. There is no sanction for deviating from the default requirements, and a company is simply required to explain the superiority of its alternative arrangements.

There are two main consequences of this market imperfection; first, the market information about actual corporate governance practices in a jurisdiction will remain incorrect and unchallenged, and second in order to avoid punishment some companies will adopt corporate governance practices which comply with the formal requirements of the code, even if this is not optimal for the company's performance or investors best interests. These kinds of market imperfections provide business opportunities for intermediate corporate governance consultants, advisors and rating agencies. In theory these intermediaries are part of the solution, but they may also be part of the problem. The dominant company in the market is

Institutional Shareholders Services (ISS), and around 1700 of the largest institutional investors depend on their advice. The ISS approach to evaluating good corporate governance and compliance has therefore become somewhat a benchmark. However this drive towards conformity discourages companies from departing from the default code, even if there are no sanctions for revealing a more efficient system. There is also a drive towards conformity through the rating agencies. This could be defended if it led to better corporate governance, but this is not the case. On the contrary, the ISS corporate governance index shows no predictability in relation to corporate governance performances.

There are some potential solutions to these issues. One is replacing market scrutiny with public scrutiny, via a supervisor that can verify the information provided by companies. Another avenue is to put pressure on investors to perform their role, and carry out the scrutiny and monitoring themselves. However, this would be very difficult in practice as would require a fundamental change to investor incentives. Perhaps the most feasible solution is to be more explicit and open up the codes to alternative arrangements and more explicitly to signal appreciation of diversity. The key message is that before relying on market driven self regulation, it is important to know how the market actually functions rather than how it is supposed to function.

A delegate from Korea commented that in 2001 the KFTC launched a project to introduce and support a compliance programme across the corporate community. During the initial stage of the operation the KFTC provided relatively generous incentives to promote the operation of the compliance programme, by granting benefits of up to 10 – 30% reduction in fines for having adopted the programme. However, the KFTC came under criticism as some companies were adopting the compliance programme in order to benefit from the fine reduction, but with no real intention of actually implementing it. In response the KFTC stopped providing reductions based on the mere fact of having adopted the compliance programme and in 2006 introduced a compliance programme evaluation system to prevent scam programmes. A government established agency called the Korea Fair Trade Mediation Agency (“KOFAIR”) is responsible for both conducting and financing the compliance programme evaluation. Companies submit their programme to KOFAIR and based on an assessment of seven criteria a grade is given. The seven criteria include: a) affirmation by a CEO on his/her willingness for voluntary compliance with competition law; b) appointment of a staff in charge of the compliance programme; c) production of a compliance manual; d) compliance education; e) establishment of internal monitoring system; f) introduction of sanctions on law violations; and g) systematic management of relevant documents. Both on-site and document inspections are carried out to ensure the accuracy of the evaluation and reductions of 10 -20 % are given to companies with a grade A or higher.

The KFTC does, however, have some reservations about the reliability of KOFAIR’s evaluations, and whether the adoption of a compliance programme should merit a mitigation or exemption from a sanction. As a result the KFTC has rarely provided reductions to companies based on the compliance programme evaluation results. There are also some questions concerning how companies who have implemented a sham programme should be treated. There have been some arguments that these companies should face increased penalties. However the KFTC does not believe imposing aggravated penalties of this sort is in line with the purpose of the compliance programme.

5. Guidelines for competition compliance

The Chairman commented that the risk of compliance being more formal than real and the fact that not all companies are the same are important issues that competition authorities have to bear in mind when considering compliance programmes. It is clear the involvement of competition authorities in the design and monitoring of compliance programmes is necessary, there is no ‘one size fits all’ approach and the objectives must be clear. The Chairman then invited Mr. Joseph Murphy to take the floor.

Mr. Murphy thanked the Committee for addressing such an important topic, and emphasised his role as a compliance and ethics professional as opposed to a lawyer. He urged all the members to refer to the white paper he submitted on behalf of the Competition Committee. The first key issue is to define what a compliance and ethics programme is. The simple definition is that a compliance programme is management commitment to do the right thing and management steps to make it happen. The key issue here is management, not the practice of law. The second key issue concerns policy questions. Should companies be given credit for having a compliance programme, or should the presence of a compliance programme be irrelevant at all stages of the legal assessment? Is there a middle ground? A distinction should be drawn here between economically complex matters, such as monopolisation, distribution issues and price discrimination, which require legal and economic analysis and cartels, which are secret and the subject of leniency programmes. Mr. Murphy emphasised that he would focus on cartels. Around thirty years ago competition law compliance programmes were state of the art and the leading type of compliance programme. However this success appears to have atrophied, particularly compared to the broader field of compliance and ethics in other areas such as corruption. Audits under competition programmes are not really audits, they are more like risk assessment and there are a lack of sufficient incentives included in competition programmes. Given the secrecy surrounding cartels, and the participant's knowledge that what they are doing is illegal, some academics have questioned the utility of compliance programmes which effectively train participants about something they already know. However, training should not just be about overloading employees with information, it should be focused on motivating people to change their behaviour and do the right thing. Training in itself is not a compliance programme but is just one of the management tools that make up an effective program, such as those listed in the OECD Working Group on Bribery's Good Practice Guidance.

Another frequently cited problem with compliance programmes is the cost, in particular for smaller companies. However, while large companies with subsidiaries and many unknown employees will require more costly programmes, in smaller companies the management will know everyone in the firm and can profit from their size to target employees personally and encourage a compliance culture. What small companies cannot afford is unnecessary bureaucracy.

Different competition authorities adopt different approaches to compliance programmes. Some have made clear that compliance programmes will be taken into account, others have even provided guidance on what compliance programmes should contain. However, it is important not to be too narrowly focused on competition law, and accept that many other areas of the law face the same issues. For example many parallels can be drawn with the work carried out by the OECD Working Group on Bribery. An important question raised in the context of this group was how to determine if the programme is a sham, although this should usually be clear and the burden of proof rests upon the company. It is key that governments credibly commit and recognise compliance programmes. One solution would be to establish an OECD compliance and ethics network among enforcement authorities, or a Working Group to address how best to recruit the private sector into the fight against cartels. Surveys of companies on the subject are of limited use as they only provide information on what people want to report, rather than what they actually do, but roundtable discussions with private sector compliance and ethics representatives are of use.

The Chairman invited Ms Riley to take the floor.

Ms. Riley explained that she had spent over 20 years working as an antitrust lawyer in businesses and therefore had a solid understanding of how companies work and what motivates businesses to act in certain ways. She opened her presentation by focusing on the importance and value of credible compliance programmes. A genuine and credible antitrust compliance programme is a substantial and ongoing commitment. It requires a substantial amount of time, and resources and the commitment of senior management. SMEs can implement programmes for much less provided they have this commitment from senior management. The ultimate goal of an antitrust compliance programme, and antitrust policy at

government level, should be to ensure effective compliance in practice. This is a shared goal, and in-house counsel and compliance officers are very open to working with competition authorities to achieve it. Most competition authorities focus on punishment, without proactively encouraging compliance programmes. However, it is vital that competition authorities understand that compliance programmes can be a useful tool for them. It should also be emphasised that corporate executives are human beings and it is a fallacy to expect them to rationally calculate the risk of being caught against the size of the gain. So what can competition authorities do? They can positively encourage companies to invest resources that are appropriate for the size of the organisation and the risks faced by it (accepting that there is no ‘one size fits all’), help companies improve their ethical standards, and ensure greater compliance in practice. The ultimate policy goal is to reduce and hopefully eliminate illegal cartel behaviour. The debate on the level of antitrust fines has to a certain extent rendered unclear the true purpose of compliance programmes. Offering incentives to invest in a credible programme will encourage a wider range of companies to adopt programmes and if larger companies are incentivised to do so then SMEs are likely to follow. However, the proper role of a compliance programme is not to reduce the level of the fine, it is to achieve compliance. Corporate governance is also a key issue, and a momentum needs to be created where companies are encouraged to invest in an appropriate and credible programme.

The primary benefit of a compliance programme is to avoid the violation in the first place, and to instil ethical standards and cultural values within the organisation. There is currently a lack of public awareness and moral condemnation of anti-competitive practices, which reduces the likelihood of compliance efforts. Greater engagement with the media about the benefit of compliance programmes is needed, and the importance of companies investing in them. Competition agencies could also impose requirements on companies to adopt compliance programmes in infringement decisions, or when negotiating settlements or commitments. The work of international organisations such as the OECD, ICN and ECN is also key. However, it is insufficient to simply post information on websites as companies do not check these frequently. Advocacy efforts therefore need to be wider, and dialogue with the business community should be increased, including targeting management, institutes of directors and business trade associations. Companies have to deal with the challenges of compliance on a daily basis, and they know best what works and what does not work within the company. At the same time companies need to be willing to dialogue with antitrust agencies, and be open to hearing the concerns that agencies have. Other approaches such as targeting trade associations (Sweden) and National Antitrust days (Brazil) and providing cartoons to children on the subject (Japan) are also very welcome.

There is no ‘one size fits all’ approach for compliance programmes, but there are certain general principles which have been suggested, and which can be summarised as the ‘5 Cs in Compliance’²: (i) Commitment, (ii) Culture, (iii) Compliance Know-How and Organisation, (iv) Controls and (v) Constant Monitoring and Improvement. It is management commitment which sets the culture of an organisation, so management commitment is fundamental. Culture is not created in a day and must develop over time, and the culture of a firm is what ultimately motivates behaviour. A genuine commitment to compliance must therefore be at the very marrow of the business, and should not be viewed as a legal initiative. It should not be just a matter of business “policy”, but real compliance should be how business is done in practice. Know how through codes of conduct and training allow the messages to be repeated frequently, and require business leaders to take ownership of the messages. Interactivity is also important, as a passive message does not pass as effectively. Controls such as help lines for whistle blowing are also important to allow employees to report concerns anonymously. Some firms now track which employees attend trade association meetings to ensure they have the requisite training before they attend. Finally constant monitoring is fundamental as compliance is a lifetime commitment. The programme should be regularly reviewed and kept fresh and up to date. The business community and antitrust agencies need to work

² Fiona Carlin from Baker & McKenzie is the original author of this term.

together to produce a shared understanding of what a credible programme might look like, and to promote expectations about compliance and acceptance in the community of a need to comply.

The Chairman opened the floor for comments and questions.

A delegate from South Africa emphasised the importance of corporate governance and how compliance programmes should be used as tools to encourage good management and good governance. Compliance programmes allow management to identify risk, monitor it and do something about it. However, they do not make a firm more competitive, and therefore a compliance programme should be complemented by pro competitive strategies. Both are needed, as otherwise firms only know what they should not do, not what they should do.

Mr. Murphy responded that this might be the case for simple compliance programmes, but compliance and ethics programmes are different and are focused on reaching people in the company. No system can monitor the behaviour of over one hundred thousand employees based around the world. If one employee breaks the law this does not mean the governance or morality of the company is bad.

Ms. Riley commented that good compliance and ethics programmes are about behaviour. Corporate governance is an element, but the programmes should not be about telling people what they cannot do, they are about telling people how to compete fairly and ethically in the market.

The Chairman summarised four key messages that could be taken from the roundtable. First, it is important to clarify the objectives that should be assigned to compliance programmes as tools for competition authorities as there are many different interpretations of what compliance programmes should achieve. Second, it should be recognised that there is competition for compliance within firms, and firms cannot be expected to devote all their resources for compliance on competition law. Third, competition authorities need to better understand business decisions and engage in a dialogue with the business community. Fourth, there are some clear bright lines on what compliance programmes should contain, and, for example, a compliance programme that does not have incentive components is unlikely to be as effective. The question is how far should competition authorities go? One approach is to leave the responsibility for compliance programmes with the business community, given they are for the benefit of the firm. However, if competition authorities want to promote compliance with competition law, it is arguably the responsibility of competition authorities to engage in a discussion with the business community and work together towards some common standards. The Chairman then thanked all the speakers and closed the roundtable.

COMPTE RENDU DE LA DISCUSSION

Par le Secrétariat

Le Président ouvre la table-ronde par une présentation des intervenants : le Dr. Philip Marsden, du *British Institute of International and Comparative Law*, M. Mark Pieth, Président du Groupe de travail de l'OCDE sur la corruption, M. Mats Isaksson, Directeur de la division des affaires d'entreprise de l'OCDE, Mme Anne Riley de Shell, M. Guido DeClercq de GDF/Suez et M. Joseph Murphy de la *Society for Corporate Compliance and Ethics*. Le Président propose d'organiser la table-ronde autour de cinq thèmes : (1) les facteurs de conformité, (2) les différentes catégories de sanctions, (3) les approches innovantes de la conformité, (4) les programmes de conformité d'entreprise et (5) les directives de conformité au droit de la concurrence. Le Président passe la parole au Royaume-Uni pour une présentation introductive sur les facteurs de conformité.

1. Facteurs de conformité

La délégation du Royaume-Uni explique que l'OFT considère que la plupart des entreprises aspirent à la conformité au droit de la concurrence. L'OFT a par conséquent pris des mesures pour aider les entreprises dans leur quête de conformité en réalisant un programme de recherche qualitative sur les facteurs de conformité ou d'infraction au droit de la concurrence, intitulé « *Drivers of compliance and non-compliance with competition law* ». Ce rapport vise une meilleure compréhension des défis pratiques auxquels sont confrontées les entreprises soucieuses de se doter d'une culture de conformité, et notamment des facteurs qui incitent les entreprises à rechercher la conformité, des moyens qu'elles déploient utilement pour y parvenir et des raisons pour lesquelles des défis peuvent se poser malgré leurs meilleurs efforts. La compréhension de ces facteurs permet à l'OFT de mieux gérer les ressources limitées qui lui sont allouées pour aider les entreprises à se conformer au droit de la concurrence.

La recherche a permis d'identifier plusieurs facteurs de conformité ou d'infraction. Les facteurs de conformité comprennent notamment : les sanctions pécuniaires, les ordonnances de déchéance de mandat social, l'atteinte à la réputation (des entreprises et des personnes) attachée à une infraction au droit de la concurrence, l'évaluation comparative, l'aspiration à être perçue comme une entreprise éthique et une forte culture de la conformité. Les facteurs d'infraction comprennent notamment : l'ambiguïté ou l'absence d'engagement des dirigeants, les incertitudes concernant les obligations légales ou les conseils juridiques excessivement prudents, la naïveté ou la malhonnêteté des collaborateurs, un « scrupulisme » réducteur et la concurrence d'autres domaines de conformité.

A l'issue de ce programme de recherche, l'OFT a publié un ensemble de documents d'orientation à l'intention des entreprises et produit un documentaire (« comprendre le droit de la concurrence ») destiné à être diffusé dans le cadre de formations ou de présentations internes aux entreprises. Ces documents et le documentaire s'inspirent tous d'une méthodologie de conformité en quatre étapes, prônant en essence un cercle vertueux dont le point de départ serait une impulsion des dirigeants de l'organisation. La première consiste à identifier les risques, la deuxième à les évaluer et la troisième à les atténuer, tandis que la quatrième est dévolue à un audit. Ces supports suivent les méthodologies établies de gestion des risques et présentent de nombreux points communs avec les documents d'autres agences de la concurrence qui traitent de la conformité. Cela ne veut cependant pas dire qu'il existerait une quelconque solution standard qui serait applicable à tous les cas de figure. Ces documents mettent d'ailleurs au contraire l'accent sur les

aspects pratiques. Si en dépit de tous les efforts qu'elles déploient et bien qu'ayant suivi la méthodologie explicitée dans les supports d'orientation, les entreprises enfreignent le droit de la concurrence, l'agence adopte un positionnement neutre. Par conséquent, sans octroyer automatiquement une réduction des sanctions financières, l'OFT prend en compte les circonstances particulières à la situation et peut décider de réduire de 10 % le montant de l'amende. Par exemple, dans des affaires récentes émanant du secteur du bâtiment, le tribunal chargé de se prononcer en appel sur les questions de concurrence a reconnu que des programmes de conformité avaient été mis en place et a accordé en conséquence des réductions.

Le Président donne la parole aux orateurs invités afin qu'ils fassent part de leurs observations.

M. Marsden souligne l'importance d'étudier les facteurs d'infraction et énonce trois raisons pour lesquelles les entreprises peuvent ne pas être en conformité avec le droit de la concurrence. D'abord, elles peuvent ne pas être informées d'une question de droit de la concurrence, ce à quoi l'on peut remédier en les sensibilisant davantage, par des actions de formation et de communication. Ensuite, les entreprises peuvent considérer que les avantages d'enfreindre le droit valent de courir le risque, auquel cas il convient de modifier le rapport risques-avantages, par des amendes plus élevées et des sanctions mieux ciblées. Enfin, les entreprises peuvent imaginer être au-dessus des lois et hors d'atteinte, ce qui signifie qu'il est nécessaire d'intensifier les moyens de détection et d'ordonner des sanctions financières d'un montant suffisant pour attirer l'attention des conseils d'administration et motiver l'adoption de mesures au sein des entreprises. Les solutions pour vaincre les facteurs d'infraction sont par conséquent liées à la transparence, aux sanctions et à la détection. Les publications académiques suggèrent que les entreprises comparent rationnellement les amendes qu'elles reçoivent et la probabilité de détection. Cela suppose toutefois que les mandataires sociaux se comportent comme une unité économiquement rationnelle et parfaitement informée. Il en va autrement dans les faits, les mandataires sociaux étant des êtres humains, vulnérables à un éventail de réactions diverses. Ajuster le rapport risques-avantages ne constitue donc pas une solution.

M. DeClerq fait remarquer que le droit de la concurrence n'est que l'un des nombreux domaines juridiques dans lesquels les entreprises se voient imposer des obligations de conformité. Il est par conséquent placé en concurrence avec d'autres aspects de l'application du droit (comme les pots-de-vin et la corruption, la confidentialité des données, l'hygiène et la sécurité) pour mobiliser les ressources limitées de l'entreprise.

M. Murphy observe que l'expérience lui a enseigné que l'arrogance et la paresse sont des facteurs clés d'infraction. L'arrogance au sens où les entreprises pensent que leur comportement ne sera pas détecté et la paresse parce qu'une entreprise qui fait partie d'une entente n'est pas obligée de travailler autant. Il est crucial que les pouvoirs publics incitent les entreprises à détecter elles-mêmes les infractions, car les dirigeants des entreprises sont impliqués dans leur gestion courante alors que les autorités doivent procéder à des évaluations à distance. Le manque de ressources des entreprises peut être en partie comblé en adoptant une approche intégrée des programmes de conformité afin de bénéficier d'économies d'échelle, en examinant par exemple l'entente et la corruption simultanément. Le Groupe de travail de l'OCDE sur la corruption souligne dans son guide de bonnes pratiques l'importance d'une approche intégrée.

M. Pieth rapporte que la criminologie des délits individuels montre que c'est davantage la probabilité d'être pris et traduit en justice qui a un effet dissuasif qu'une sanction pécuniaire abstraite. Un contexte d'incitations contradictoires joue également un rôle, les entreprises étant confrontées à une liste considérable d'obligations juridiques à respecter.

1.1 Efficacité des sanctions pécuniaires

Le Président recense deux questions qui ont été évoquées et appellent une plus ample discussion. D'abord, l'importance donnée dans les contributions au modèle de dissuasion qui se fonde sur le

présupposé qu'une amende plus élevée augmente la probabilité de détection. Ensuite, ce modèle théorique résiste-t-il à l'épreuve des faits, dans la mesure où la fréquence des ententes ne semble pas diminuer bien que le montant des amendes ait été augmenté. Le Président donne la parole à l'UE.

La délégation de l'UE souligne la difficulté de déterminer le niveau réel d'activité collusoire et le degré de conformité. L'augmentation du nombre de cas d'entente et le relèvement du montant des sanctions pécuniaires ordonnées dans l'UE n'indique pas clairement une hausse ou une diminution de l'activité collusoire. Il convient d'opérer une distinction entre l'activité collusoire et la détection des ententes. L'augmentation du nombre de jugements et du montant des amendes, associée au programme de clémence, peut résulter d'une meilleure détection. L'interaction entre les incitations à créer une entente, la possibilité de détection, les programmes de clémence, les sanctions (contre les entreprises et contre les personnes) et les demandes d'indemnisation introduites par des particuliers doivent également être prises en considération. S'agissant de savoir si les amendes sont trop lourdes, le principe de proportionnalité est un principe général du droit de l'UE et doit par conséquent être pris en compte avant d'ordonner toute sanction pécuniaire. L'UE a en outre reçu plus de cinquante requêtes pour « incapacité de paiement » dans des affaires d'ententes, dont une dizaine ont été accordées. Dans certains cas, les amendes ont été diminuées de 70 % pour éviter la faillite. A propos de la question de l'organigramme des entreprises, des incitations sont nécessaires pour que la direction œuvre à des programmes de conformité pour les activités qui se déroulent aux échelons inférieurs. L'atteinte à la réputation est une question qui interpelle les entreprises et le nouveau mécanisme transactionnel de l'UE constitue un moyen attrayant pour les entreprises d'accélérer la conclusion d'une enquête avant d'avoir subi un préjudice trop important. Les vérifications préalables aux opérations de fusions peuvent également faciliter la détection des ententes. Le commissaire européen Almunia a déclaré publiquement qu'il ne croyait pas que l'existence de programmes de conformité justifiait de moduler le montant des sanctions pécuniaires, que ce soit à la baisse ou à la hausse. Cela n'empêche toutefois pas d'encourager les programmes de conformité et l'UE réfléchit actuellement aux meilleures façons de le faire.

M. Marsden abonde dans le sens de l'UE, estimant que l'évolution du montant des sanctions pécuniaires et du nombre d'ententes détectées ne fournit pas une comparaison exacte de la situation. Cela ne permet pas de tirer une conclusion claire sur l'exactitude des sanctions pécuniaires. La question de l'impact dissuasif de ces amendes est plus cruciale. Il est également intéressant de se demander pourquoi l'on hésite à utiliser conjointement plusieurs facteurs de conformité, par exemple des sanctions pécuniaires associées à une déchéance ou interdiction de mandat social, la mauvaise publicité, etc.

Le Président invite ensuite le Chili à commenter sa prise de position, dans sa contribution, sur l'inefficacité des sanctions pécuniaires en tant qu'outil de dissuasion.

La délégation du Chili répond que les ententes créent des problèmes parce qu'elles sont lucratives pour leurs auteurs, mais qu'elles sont aussi difficiles à détecter. Plus l'autorité de la concurrence (la FNE) a de pouvoirs et plus les entreprises déploient de moyens sophistiqués pour dissimuler les ententes. Le Chili impose en outre un plafonnement des amendes, dont le montant n'est pas fonction du chiffre d'affaires des entreprises. En 2009, le montant des amendes prononcées a augmenté pour atteindre 30 millions USD pour des ententes et 20 millions USD pour d'autres infractions. Par rapport aux amendes ordonnées pour des infractions à d'autres réglementations, ces montants sont très élevés. Les sanctions pécuniaires peuvent être imposées à la fois aux personnes et aux entreprises. La FNE projette d'émettre des directives sur le calcul des amendes afin d'améliorer la transparence pour les entreprises. Il est également très important de respecter le principe de proportionnalité. La cour suprême a le pouvoir de réviser les sanctions pécuniaires décidées par la TDLC et tend à adopter une approche plus conservatrice, réduisant le montant des amendes, mais le relevant aussi exceptionnellement. Chargée de l'application du droit de la concurrence, la FNE instruit les affaires, qui sont jugées par le TDLC, organe judiciaire. La FNE dispose de ressources limitées et doit par conséquent cibler le suivi des affaires les plus importantes. Dans certains cas,

communiquer aux entreprises ce qu'elles peuvent ou ne peuvent pas faire et ordonner une injonction de modifier un contrat ou dissoudre une entreprise importent davantage que le montant de l'amende.

Le Président donne la parole à Mme Anne Riley.

Mme Riley souligne que si l'application est essentielle au regard de la dissuasion, l'absence d'incitations suffisantes à de sérieux efforts de conformité pourrait favoriser les comportements contraires à l'éthique. La simple dissuasion peut ne pas suffire à susciter des engagements de conformité parce qu'elle n'influe pas directement sur la perception qu'ont les entreprises de la moralité du comportement réglementé. Elle se borne à chiffrer le coût de l'infraction. Il faudra par conséquent mettre davantage l'accent sur la création d'une culture de la conformité que sur la peur de l'infraction. Pour reprendre les déclarations du commissaire européen Almunia, l'objectif de la politique de la concurrence n'est pas d'imposer des sanctions pécuniaires, mais de ne pas avoir à en imposer du tout. Pour qu'il n'y ait plus d'infractions, il est plus efficace d'encourager activement les programmes de conformité et les activités de conformité réelle des entreprises que de se contenter d'imposer des sanctions financières. Les autorités de la concurrence devraient faire preuve de davantage de créativité dans leur façon de considérer les programmes de conformité et réfléchir à la façon de les utiliser comme outils supplémentaires d'application de la réglementation.

La délégation de la Bulgarie commente certains amendements du droit de la concurrence de son pays alourdissant les sanctions financières susceptibles de frapper les entreprises. Auparavant, les entreprises avaient davantage intérêt à enfreindre le droit de la concurrence et à acquitter le montant des amendes que de s'y conformer. Le nouveau système d'imposition des sanctions est encore trop récent pour qu'on puisse en évaluer l'efficacité. Si les sanctions financières peuvent être des instruments très puissants, autoriser les entreprises à prendre des engagements plutôt que de payer une amende peut également être un outil efficace pour encourager la conformité. Depuis l'adoption de règles plus détaillées pour l'acceptation des engagements, la commission bulgare a approuvé des engagements dans plusieurs affaires. Tous les instruments susceptibles d'encourager la conformité devraient donc être employés pour parvenir à l'objectif final d'une concurrence effective.

Le Président fait observer que certains outils supplémentaires peuvent être plus onéreux pour les autorités de la concurrence car ils exigent un suivi. Le Président demande au BIAC s'il considère que le montant actuel des sanctions pécuniaires est excessif par rapport à ce qui serait requis pour une dissuasion optimale.

La délégation du BIAC souligne que le montant des amendes n'est pas excessif en soi, mais qu'une fois qu'il est suffisamment élevé, continuer à l'augmenter ne les rendra pas plus dissuasives. Dans plusieurs juridictions, les amendes sont déjà suffisamment lourdes pour que les dirigeants d'entreprises prennent la conformité au sérieux et les alourdir ne renforcera pas leur effet dissuasif. Il n'existe pas de chiffre magique, mais il y a un niveau au delà duquel des sanctions plus lourdes ne sont pas plus efficaces. Cela tient à ce que ces amendes élevées imposées aux entreprises ne sont pas réellement payées par les personnes responsables de l'infraction. Elles sont acquittées par le groupe, c'est-à-dire que ce sont les actionnaires, les bénéficiaires des régimes de retraite et parfois même les consommateurs qui paient. Il importe en outre de ne pas focaliser l'attention des administrateurs uniquement sur le montant des amendes, mais aussi de leur démontrer que leurs agissements sont moralement injustes.

La délégation de la Roumanie apporte des précisions concernant de récents amendements au droit de la concurrence qui confèrent à l'autorité de la concurrence (au « Conseil ») des outils supplémentaires pour encourager la conformité, tels que les engagements et les règlements transactionnels. On a également alourdi les sanctions pécuniaires et, en 2010, le volume des amendes décidées par le Conseil a doublé. Les entreprises utilisent des moyens plus sophistiqués pour dissimuler leurs ententes et le Conseil éprouve de

plus en plus de difficultés à les détecter. Le montant des sanctions pécuniaires est toutefois devenu relativement dissuasif, poussant les entreprises à commencer à faire usage des programmes de clémence. Depuis l'introduction de directives sur les engagements, plusieurs entreprises ont pris contact avec le Conseil pour demander des conseils sur la façon de se conformer au droit de la concurrence dans le souci d'éviter des atteintes à leur réputation. La création d'une attestation d'absence de collusion a aussi incité certaines entreprises à solliciter des conseils auprès du Conseil avant de procéder à des appels d'offres. Ces outils supplémentaires sont aussi importants que les amendes pour promouvoir le développement de la conformité au droit de la concurrence.

Le Président commente les problèmes de statistique que pose le calcul du niveau des sanctions et du nombre des infractions. Même si le nombre des affaires d'entente diminue, cela peut signifier que les entreprises sont plus adroites pour dissimuler leur collusion. Une relation statistique claire entre le niveau des sanctions pécuniaires et la dissuasion réelle est par conséquent improbable. On s'appuie à la place sur des notions théoriques selon lesquelles les entreprises s'efforcent d'optimiser leurs bénéfices.

2. Différentes catégories de sanctions

2.1 *Efficacité des sanctions pénales*

Le Président invite les États-Unis à parler des actions privées de droit de la concurrence et des données collectées sur les sanctions pénales.

La délégation des États-Unis aborde le sujet des actions privées de droit de la concurrence en tant que facteur de conformité. Différents facteurs incitent à la conformité, parmi lesquels (i) la probabilité de détection des infractions, (ii) la probabilité de poursuites judiciaires et (iii) la sévérité des sanctions. Ces trois facteurs sont présents dans les actions privées de droit de la concurrence. Dans le cadre d'actions privées, la probabilité de détection des infractions augmente, les personnes intervenant dans le secteur concerné étant beaucoup plus proches des faits que les autorités de la concurrence. Les parties privées ont en outre une incitation pour engager des poursuites, car elles en retireront un avantage financier. Autoriser les parties privées à jouer le rôle du procureur aide en outre énormément les autorités de la concurrence qui ne disposent pas des ressources suffisantes pour présenter chaque affaire devant la justice. S'agissant des sanctions, la loi Clayton triple les indemnités ordonnées au profit de demandeurs privés au titre d'infractions au droit de la concurrence et le tribunal a peu de marge de manœuvre pour se montrer moins généreux. Les affaires de droit de la concurrence peuvent également donner lieu à des recours collectifs. Si les recours collectifs présentent quelques inconvénients reconnus (ils favorisent par exemple les recours sans fondement), ils modifient néanmoins l'équilibre des pouvoirs entre l'accusation et la défense et facilitent le déclenchement d'une action par le demandeur.

La délégation présente le point de vue des États-Unis sur la dissuasion en se fondant sur un long historique d'application pénale du droit de la concurrence. Le document de référence émet des doutes quant à l'efficacité des sanctions pénales en s'appuyant sur les taux élevés de récidive et de détection des délits d'entente. Il convient de distinguer la dissuasion à caractère général, qui vise à convaincre les dirigeants de ne pas commettre de délit, de la dissuasion spécifique, qui consiste à inciter une entreprise particulière et ses dirigeants à ne pas récidiver. On s'accorde généralement à penser que dans le cas de délits d'entente, la dissuasion spécifique nécessite un niveau de sanction moindre que la dissuasion générale. De nombreuses données ont été publiées au sujet des récidives, certains analystes concluant que la confirmation d'un taux élevé de récidive au sein d'une entreprise serait une preuve évidente d'échec de la dissuasion spécifique. La délégation estime toutefois que ces données tendent souvent à exagérer la récidive et masquent la réussite de la dissuasion spécifique aux États-Unis. Il convient de souligner les limites des données, en particulier la double comptabilisation : les études traitent par exemple une entreprise qui a participé simultanément à cinq ententes différentes comme ayant récidivé quatre fois. Il ne

s'agit pourtant pas de récurrence significative. Une grande partie des données remonte en outre à 1990 et n'est donc pas révélatrice de l'efficacité des sanctions actuelles. La délégation observe que lorsque l'on considère les données collectées depuis 1999, on ne recense aucune entreprise qui, ayant déjà été reconnue coupable d'un délit d'entente, ait ensuite participé à une entente et été à nouveau reconnue coupable.

Il est impossible de savoir exactement combien il y a eu d'ententes par le passé et combien il y en a aujourd'hui, mais il est clair que l'arsenal utilisé par les instances chargées de faire appliquer le droit de la concurrence pour détecter les ententes a été considérablement étoffé au fil des ans. Lorsque ces outils améliorés sont employés simultanément par les instances de plusieurs juridictions contre les mêmes ententes internationales, l'impact augmente de façon exponentielle. Aux États-Unis, le programme de clémence à l'intention des entreprises est devenu le premier outil d'investigation. Il a permis l'obtention de preuves, qui se trouvaient souvent hors des États-Unis, et de condamnations qui n'auraient pas pu autrement être obtenues par les autorités américaines. En outre, les témoignages directs révèlent que les ententes se tenaient à l'écart du marché américain, bien qu'il soit rentable, par souci d'éviter les risques de détection et les sanctions sévères auxquelles leurs auteurs auraient été exposés.

Le Président invite l'Allemagne à préciser son approche de la pénalisation, en particulier, en ce qui concerne la manipulation des appels d'offres.

La délégation allemande explique que l'approche de l'Allemagne tend à s'écarter de la pénalisation dans l'application du droit de la concurrence. Pour chaque pays, le bien-fondé de la pénalisation dépend du système judiciaire existant et du mécanisme de sanctions pécuniaires déjà en place. Il peut être délicat de faire cohabiter au sein d'un même système l'imposition d'amendes pénales contre les personnes et d'amendes administratives contre les entreprises. L'approche de l'Allemagne est assez idiosyncrasique puisque les délits d'entente sont généralement sanctionnés par des amendes administratives, alors que les délits de manipulation d'appels d'offres exposent leurs auteurs à des amendes pénales. Il est toutefois très rare que des amendes pénales soient prononcées dans des affaires de manipulation d'appels d'offres, notamment parce que la pénalisation de ces délits ne bénéficie pas d'un consensus culturel fort. Cela est particulièrement vrai s'agissant des pratiques collusoires. Une autre raison pour laquelle l'application pénale est moins utile en Allemagne est que les peines de prison de moins de deux ans ne sont presque jamais exécutées, car elles sont assorties de sursis. Naturellement, les outils à la disposition des autorités de la concurrence devraient être suffisants pour dissuader les velléités de comportements anticoncurrentiels. Les sanctions financières et le risque de responsabilité personnelle et d'atteinte à la réputation sont suffisamment dissuasifs pour rendre superflue l'adjonction de sanctions pénales.

Le Président invite l'Australie à commenter l'adoption récente de sanctions pénales dans ce pays et d'en expliquer les raisons compte tenu de l'efficacité des mécanismes existants de contrôle de la conformité.

La délégation de l'Australie répond que l'ACCC dispose du pouvoir d'imposer des sanctions pénales seulement depuis le milieu de l'année 2009. Auparavant, le pays faisait appel (et fait toujours appel) à un mécanisme étendu alliant actions de formation et programmes de conformité. Les médias étaient utilisés à des fins de sensibilisation, exposant les individus poursuivis à un risque d'atteinte à leur réputation. Toutefois, malgré la solidité de ce cadre applicatif, les sanctions étaient légères et hors de proportion avec les avantages que pouvait procurer une entente. Les sanctions civiles ont par conséquent été alourdies en 2007 et, en 2009, des sanctions pénales ont été créées. Il est encore trop tôt pour savoir si ces sanctions pénales auront un effet dissuasif considérable, mais les remontées d'information émanant des entreprises indiquent que les discussions des conseils d'administration tournent souvent autour de ces sanctions pénales. Il est donc probable que les administrateurs des 200 premières entreprises australiennes savent tous que des pratiques collusoires les exposeront à des peines d'emprisonnement.

La délégation de la Nouvelle-Zélande explique que son pays est tenté d'emboîter le pas à l'Australie et de punir par des sanctions pénales les infractions au droit de la concurrence. Cette décision serait notamment motivée par les liens particuliers qui unissent la Nouvelle-Zélande et l'Australie et l'engagement pris par les autorités des deux pays d'uniformiser à moyen terme les sanctions encourues par les entreprises actives sur leurs deux marchés. On s'inquiète en Nouvelle-Zélande de ce que la pénalisation pourrait dissuader les entreprises de coopérer à la promotion de la concurrence, un comportement généralement encouragé compte tenu de la taille réduite de l'économie. En réponse aux préoccupations des pouvoirs publics, le Ministère du développement économique (le « Ministère ») a récemment publié un projet de loi de sensibilisation. Ce texte permettra de recueillir les commentaires sur les travaux du Ministère et de clarifier ce qui est interdit et ce qui est autorisé. Malgré des remontées d'information limitées jusqu'ici, il semble que les entreprises soient satisfaites du travail réalisé par le Ministère. Une fois qu'il sera clairement établi quels arrangements sont autorisés par le droit de la concurrence, la Commission du commerce pourra suivre les tendances internationales et sanctionner plus activement les comportements collusoires patents. Il est probable qu'en Nouvelle-Zélande comme dans de nombreux pays, bon nombre de comportements collusoires ne sont pas détectés.

Le Président invite le Danemark à commenter une étude économique récente commanditée par l'autorité de la concurrence révélant l'insuffisance des sanctions.

La délégation du Danemark précise que l'étude comparait le régime danois avec les autres régimes à travers le monde et mettait en évidence les insuffisances du régime danois tant du point de vue des sanctions financières que non financières. Le principal outil de dissuasion employé est l'atteinte à la réputation. Dans le cadre du régime danois, le tribunal ordonne des amendes pénales dont le montant tend à être très bas dans le cas d'infractions au droit de la concurrence. L'une des raisons en est que la plupart des autres délits économiques sont punissables d'emprisonnement. L'absence de mesures privatives de liberté pour des délits d'entente signale clairement aux tribunaux qu'il ne s'agit pas d'un délit grave. Il est par conséquent improbable que les tribunaux ordonnent des amendes plus lourdes dans des affaires d'entente à moins que des peines d'emprisonnement puissent également être prononcées. L'impact de l'introduction de peines d'emprisonnement sur les programmes de clémence a fait l'objet de débats, mais cela nécessiterait simplement un ajustement du cadre juridique. Le risque de se voir infliger une peine d'emprisonnement renforcerait l'incitation des personnes physiques à se rapprocher de l'autorité de la concurrence et à coopérer avec elle. L'introduction de peines d'emprisonnement conférerait également à l'autorité de la concurrence de nouveaux outils d'investigation puisque la surveillance et les écoutes téléphoniques seraient dès lors autorisées, en conjonction avec la police. Ces outils sont indispensables lorsque l'on enquête sur des délits économiques. L'introduction de sanctions pénales renforcerait donc considérablement le cadre applicatif existant au Danemark.

Le Président invite M. Pieth à partager son point de vue sur l'application de sanctions pénales en cas d'ententes.

M. Pieth établit un parallèle avec les affaires de corruption qui semblent représenter un cas de figure inverse. Dans les affaires de corruption, la responsabilité pénale des individus ne fait aucun doute, mais le défi consiste à prouver l'implication de l'entreprise et à prononcer des sanctions pécuniaires contre l'entreprise. Le Groupe de travail de l'OCDE sur la corruption adhère à un principe d'« équivalence fonctionnelle » qui admet une certaine souplesse dans l'ordonnance des sanctions, mais prône une égalité de traitement pour des délits similaires. Il n'est pas évident que des sanctions pénales personnelles soient nécessaires en droit de la concurrence, la perte d'emploi pouvant suffire. Il conviendrait par conséquent de s'assurer que les entreprises fassent passer le message que les personnes impliquées dans des activités d'entente verront leur carrière se terminer.

La délégation de l'Irlande fait observer que malgré l'instauration de sanctions pénales en 1996, on ne recense que trente-trois condamnations pour délit patent d'entente. Il faut prendre en compte deux éléments clés pour savoir s'il convient d'adopter un régime de sanctions pénales. D'abord, la nécessité de convaincre les politiques et l'opinion publique qu'il s'agit réellement de délits. Cela tend à être plus facile lorsque les affaires ont trait à des marchés de masse et jusqu'ici les condamnations ont frappé des concessionnaires automobiles et des fournisseurs de fioul domestique, soit des distributeurs de produits dont les consommateurs se sentent proches. Ensuite, si la menace de peines d'emprisonnement est le principal élément de dissuasion pour les personnes physiques, l'introduction de sanctions pénales dans la législation ne veut pas dire que les juges les prononceront nécessairement. Les juges tendent à être indépendants et réticents à ordonner des peines à des personnes physiques pour des délits liés aux ententes. En outre, il n'est pas aisé de démontrer le caractère délictueux d'une collusion (au-delà de tout doute raisonnable). Il est par ailleurs important de reconnaître que les sanctions pénales ne fonctionnent pas pour chaque type de manquement au droit de la concurrence. Par conséquent, même si l'abus de position dominante est un délit en Irlande, il est impossible dans les faits d'obtenir un procès en droit pénal. Le débat tournerait à la querelle de clochers entre économistes des deux bords sans aucune chance de convaincre un jury.

La délégation d'Israël fait observer que même en disposant de la responsabilité pénale, des peines d'emprisonnement ont été rarement prononcées. Les dirigeants d'entreprises et d'établissements n'ayant pas participé personnellement à l'infraction au droit de la concurrence, mais incapables de démontrer qu'ils n'en avaient pas connaissance, peuvent également faire l'objet de sanctions. Les programmes de conformité peuvent être utiles à cet égard, car lorsqu'un programme de conformité a été mis en place, les dirigeants peuvent plus facilement prouver qu'ils ont fait tout ce qui était en leur pouvoir pour éviter l'infraction. La direction peut encourager les collaborateurs de l'entreprise à maximiser la rentabilité et à gagner des parts de marchés, mais dans le cadre du programme de conformité. D'autres sanctions peuvent être appliquées comme l'interdiction de mandat d'administrateur ou l'engagement de leur responsabilité civile, et un projet de loi prévoit l'imposition d'amendes administratives.

La délégation de la Turquie soulève la question de savoir ce qu'il adviendrait en cas d'infraction au droit de la concurrence passible à la fois de sanctions pénales et d'amendes administratives. Lesquelles l'emporteraient ?

Le Président répond que les affaires peuvent souvent allier corruption et ententes, ces dernières servant de couverture à la corruption. C'est particulièrement courant dans les affaires liées à la passation de marchés publics, pour la construction de bâtiments, de routes ou d'hôpitaux, par exemple. La façon de traiter une affaire de ce type dépend du système juridique de chaque pays. En France, par exemple, deux enquêtes distinctes peuvent être menées, l'une ciblant la corruption et l'autre l'entente. Les équipes qui enquêtent peuvent se rapprocher, mais elles mènent séparément leur enquête à tous autres égards.

La délégation du Mexique fait observer que le cas se produit souvent dans le cadre d'affaires de manipulation des appels d'offres. Il y a eu notamment au Mexique des affaires de ce genre dans le domaine de la fourniture de médicaments, car il est courant que les entreprises soient en contact avec l'agent administratif chargé d'organiser l'appel d'offres. Ces affaires ont démontré le lien étroit entre la corruption et les ententes.

Le Président invite M. DeClerq à exprimer son point de vue depuis la perspective d'une entreprise.

M. DeClerq énonce en guise d'introduction deux hypothèses fondamentales en liaison avec les programmes de conformité. La première concerne la nécessité d'associer valeurs et conformité. La loi est là pour garantir la préservation de la valeur sous-jacente d'une concurrence libre et loyale, ce qui ne va pas de soi. En oeuvrant à la conformité, les entreprises et les autorités de la concurrence doivent accepter et

s'engager à respecter ce principe élémentaire du droit de la concurrence. Si les valeurs existent, mais que l'on n'œuvre pas à la conformité, leur pérennité est compromise. Les entreprises comme les autorités de la concurrence doivent clarifier l'articulation entre ces deux éléments. Il convient de prendre des mesures pour s'assurer que les entreprises n'ont pas l'impression de se voir seulement imposer une nouvelle contrainte. Plutôt que de considérer la conformité comme un objectif monolithique, il importe de comprendre le gouvernement d'entreprise des sociétés. La seconde hypothèse est que la conformité vise la modification d'un comportement et la prévention de délits comportementaux (ententes, abus de position dominante). Les collaborateurs de l'entreprise agissent comme ils le font parce qu'ils recherchent des solutions dans le contexte dans lequel ils fonctionnent. La mission commune des entreprises et des autorités est de s'assurer que les programmes de conformité disposent de suffisamment d'outils et d'incitations adéquates pour imprimer les modifications comportementales nécessaires.

La conformité se développe, investissant un nombre croissant de domaines juridiques et poussant ses exigences toujours plus loin. Les programmes de conformité tendent à se spécialiser par objectifs, ceux-ci pouvant varier de façon importante. Il peut s'agir notamment de prévenir et minimiser les risques, de détecter à un stade précoce les actions qui n'auront pas été souhaitées ni autorisées, de sensibiliser les collaborateurs aux normes de comportement éthique, d'informer les entreprises des pouvoirs officiels dévolus aux autorités de la concurrence, de faciliter la coopération entre l'entreprise et l'autorité de la concurrence ou d'identifier les infractions commises par d'autres entreprises et qui affectent l'activité. Ces objectifs convergent avec ceux poursuivis dans le contexte de la lutte contre la corruption, tels que ceux visés en particulier par la loi du Royaume-Uni sur la corruption. La clé de la réussite des programmes de conformité dans ces deux domaines est à rechercher dans l'efficacité, l'impulsion de la hiérarchie, la formation, l'éducation et l'information et les vérifications préalables.

La conformité doit s'inscrire dans un cadre de respect du droit. C'est crucial pour la crédibilité du programme de conformité. Les services juridiques des entreprises doivent par conséquent bénéficier d'un statut privilégié et confidentiel pour leur permettre de déployer le programme de conformité avec la reconnaissance requise. Le gouvernement d'entreprise revêt également une importance déterminante et peut être directement amélioré par de simples mesures qu'il convient de prendre. Il faut que les administrateurs engagent leur responsabilité dans le programme de conformité, l'imposition d'un devoir fiduciaire tendant à les responsabiliser davantage. La sensibilisation est un autre facteur déterminant, dans le sens où il faut faire prendre conscience des conséquences qu'aurait un manquement, tant du point de vue juridique et financier qu'au niveau de l'atteinte à la réputation. Les incitations ne sont pas non plus à négliger, en interne (les primes des collaborateurs pourraient par exemple être conditionnées par l'adhésion au programme de conformité) comme à l'extérieur (l'entreprise pouvant par exemple souhaiter être reconnue pour son sens éthique et son absence de corruption). Obliger les entreprises à se doter d'un programme de conformité au droit de la concurrence avec des objectifs clairs, sous la responsabilité d'un administrateur haut placé, servira bien mieux la cause de la conformité que les sanctions pécuniaires ou la pénalisation.

2.2 Efficacité de la déchéance ou de l'interdiction de mandat social

Le Président invite la Pologne à commenter son point de vue sur les limites de l'utilisation des sanctions pécuniaires et des ordonnances de déchéance de mandat social visant les personnes physiques.

La délégation de la Pologne explique que les sanctions pécuniaires et les ordonnances de déchéance de mandat social peuvent être dissuasives, mais qu'en même temps, leur efficacité a ses limites. L'emprisonnement peut par conséquent être plus efficace. Les ordonnances de déchéance de mandat social ne sont pas autorisées en droit polonais, mais en tant qu'observateurs extérieurs, il semblerait possible qu'une entreprise puisse simplement indemniser un ancien administrateur au titre de toute perte financière causée par l'ordonnance de déchéance de mandat social. Par conséquent, les conséquences que la personne

physique devrait normalement supporter pour l'infraction seraient partiellement transférées à l'entreprise, ce que ne permettrait pas l'emprisonnement. L'entreprise ne serait bien-sûr pas en mesure de compenser l'impact négatif de l'ordonnance de déchéance de mandat social sur la carrière ou la réputation personnelle de l'administrateur sanctionné.

La délégation du Royaume-Uni fait observer que le concept de déchéance du mandat social ne relève pas exclusivement du droit de la concurrence et qu'il s'agit d'une sanction qui vise à protéger l'entreprise contre les personnes physiques qui ne devraient pas occuper de fonctions d'administrateurs au sein des entreprises. Dans le cas d'entreprises publiques, toute tentative d'indemnisation financière d'individus ayant enfreint le droit aurait de sévères ramifications. Cette éventualité ne peut être écartée dans le cas d'entreprises privées, mais s'il s'agissait de sociétés cotées en bourse, une telle pratique serait très improbable.

2.3 *Récidive : promouvoir la conformité*

Le Président invite la délégation du Japon à préciser les mesures adoptées pour améliorer la conformité dans ce pays.

La délégation du Japon souligne qu'une application volontariste du droit de la concurrence n'est pas fondamentalement le meilleur ferment pour promouvoir la conformité au droit. La Commission japonaise de libre-échange (Japan Fair Trade Commission - JFTC) a pris plusieurs mesures pour renforcer l'application, alourdissant notamment les sanctions pécuniaires et introduisant un programme de clémence. Plusieurs enquêtes ont été réalisées, ciblant les entreprises, et des rapports et recommandations ont été publiés chaque année. L'une des façons les plus efficaces d'encourager les entreprises japonaises à se conformer au droit de la concurrence est de leur prouver que leurs concurrents s'y conforment également. En 2006, une étude a été réalisée qui analysait les secteurs les plus touchés par les infractions au droit de la concurrence. Dans le bâtiment, où la récurrence des manipulations d'appels d'offres pour des marchés publics est particulièrement élevée, on considère que le moyen le plus efficace d'assurer une conformité complète au droit de la concurrence serait un effort de l'ensemble du secteur. Il conviendrait toutefois de varier les approches en fonction de la taille des entreprises. Les grandes entreprises de bâtiment sont généralement dotées d'un service chargé de la conformité et dans ce cas il s'agit surtout de promouvoir la conformité au sein de l'entreprise. Les entreprises plus petites peuvent ne pas avoir instauré de système de conformité du tout et doivent s'appliquer à créer un service et à le doter en personnel. Le rapport sur le secteur du bâtiment s'est également penché sur les causes de la récidive. La majorité des entreprises interrogées citent les pratiques historiques des entreprises comme principale cause de la manipulation des appels d'offres. La deuxième raison la plus citée est la structure du secteur du bâtiment, qui est affecté par une offre surabondante et une diminution de la demande. La troisième est le système de passation des marchés, qui facilite la manipulation des appels d'offres.

Dans le sillage des enquêtes, la JFTC a publié un rapport contenant un certain nombre de recommandations à l'intention des entreprises en vue de renforcer l'efficacité de la conformité. Parmi celles-ci : (i) s'assurer de la participation de la haute direction, (ii) mettre en place une équipe forte en charge des affaires juridiques et/ou de la conformité, (iii) élaborer un manuel de conformité, (iv) assurer des formations pour les cadres et les employés, (v) faire activement participer la maison mère, (vi) se doter de règles internes régissant les contacts avec les concurrents, (vii) mener des enquêtes en interne en réponse aux accusations d'infractions. La JFTC a également participé à des actions de sensibilisation des entreprises, des universités, des écoles et des médias et a diffusé des films de sensibilisation, accessibles sur le site Internet de la JFTC. Ces efforts ont permis d'améliorer la tendance, comme le montre le nombre croissant de requêtes de clémence qui ont été reçues.

Le Président remarque que la présentation du Japon fournit un contrepoint intéressant à celle de M. DeClerq, car elle montre qu'il n'existe pas d'approche standard des programmes de conformité et que les outils comme les enquêtes peuvent se révéler très utiles pour comprendre la façon dont les entreprises perçoivent la question de la conformité. Le Président invite M. Pieth à faire part de ses commentaires.

M. Pieth établit une distinction entre les programmes de conformité d'entreprise et la conformité dans une acception plus générale. Les entreprises n'ont pas nécessairement de système distinct pour chaque domaine de conformité. Elles ont généralement un programme de conformité pour une multitude de domaines (pots-de-vin, fiscalité, corruption, santé et sécurité, etc.) plutôt qu'un programme dédié à la concurrence. L'approche est similaire, mais les risques diffèrent quelque peu. Considérons les interactions entre réglementation et conformité. Du point de vue du droit pénal, par exemple, la corruption est un délit qui implique une intention délictueuse et la responsabilité objective n'est donc pas automatique. La sanction pourra être atténuée si un système de conformité satisfaisant existe, sans que cette atténuation soit toutefois automatique. On garantit ainsi une approche équitable, les entreprises sachant à quelles normes elles doivent adhérer. Si elles font tout ce qui est en leur pouvoir pour adhérer à cette norme sans parvenir à la conformité, leurs efforts doivent néanmoins être récompensés. On établit un parallèle avec le Groupe de travail de l'OCDE sur la corruption et le système de surveillance relativement rigoureux qui est également appliqué pour la conformité des entreprises. On évalue ensuite la façon dont les pays mettent en œuvre les normes, ce qui peut représenter un défi lorsqu'ils n'y parviennent pas totalement.

Le Président conclut qu'il semble qu'il appartient aux autorités de la concurrence de réfléchir à ce qui rend un programme de conformité satisfaisant et de définir des normes que les entreprises peuvent suivre.

3. Approches innovantes de la conformité

Le Président invite la Norvège à commenter la proposition intéressante consistant à convaincre les fonds éthiques de ne pas investir dans des entreprises qui ne se conforment pas au droit de la concurrence.

La délégation de la Norvège explique que l'autorité de la concurrence s'efforce de convaincre les commissions d'éthique du fonds de pension public norvégien de faire figurer l'infraction au droit de la concurrence parmi les critères d'inclusion et d'exclusion. Trois raisons militent pour cela : d'abord, l'investissement éthique s'est considérablement développé depuis 10 ans ; ensuite, les critères d'exclusion ont un impact démontrable sur le comportement des entreprises et enfin, l'exclusion d'un fonds encourage les entreprises à se doter d'un programme de conformité efficace. On peut citer à titre d'exemple l'exclusion par le fonds de pension suédois de la compagnie aérienne Scandinavian Airlines après une entente collusoire avec Maesk Air en 2001. L'interdiction décrétée par le fonds dure généralement cinq ans, à moins que l'entreprise n'apporte la preuve qu'elle a considérablement amélioré les pratiques à l'origine de son exclusion. Scandinavian Airlines a été réintégrée dans le portefeuille du fonds en 2006 après avoir mis en place un programme de conformité détaillé associé à des efforts de formation exhaustifs. Incorporer les délits de concurrence parmi les critères des fonds éthiques a par conséquent un impact réel de promotion de la conformité au droit de la concurrence. L'impact s'exerce en premier lieu au niveau du désinvestissement, les pratiques collusoires injustifiables conduisant le fonds éthique à céder ses investissements ; l'activisme actionnarial prend ensuite le relais, ce qui implique que les actionnaires deviennent plus actifs et prennent des mesures pour s'assurer que l'entreprise est dotée d'un programme de conformité ; en troisième lieu, l'impact joue sur la sélection, les fonds éthiques vérifiant l'existence d'un programme de conformité avant d'investir dans une entreprise. A ce stade, la proposition d'inclusion de la concurrence dans la liste des critères ne soulève pas l'enthousiasme des membres des commissions. Cela tient notamment au fait que les commissions sont soumises à des sollicitations contradictoires pour la prise en compte de divers enjeux comme le tabac ou le travail des enfants. Par comparaison, la concurrence peut paraître moins prioritaire. La liste de critères est cependant en évolution constante et l'autorité de la

concurrence poursuivra ses efforts pour que les délits de concurrence figurent en bonne place parmi les questions soumises à l'attention de la commission.

M. Murphy convient de la nécessité de sensibiliser davantage l'opinion à l'aspect immoral des délits de concurrence. Toutefois, le meilleur moyen d'y parvenir n'est peut-être pas d'affronter une diversité d'intérêts contradictoires. Il pourrait être plus utile de convaincre les fonds de n'investir que dans les entreprises dotées de programmes de conformité très élaborés, couvrant non seulement la concurrence, mais tous les domaines importants de la conformité.

Le Président invite la France à commenter l'adoption d'un mécanisme d'encouragement des PME à la conformité.

La délégation de la France explique qu'un mécanisme a été introduit en droit français en 2008, qui est géré par la DGCCRF¹ plutôt que par l'autorité de la concurrence (l'« Autorité ») et poursuit un double objectif : (i) faciliter un règlement accéléré des infractions au droit de la concurrence les moins graves affectant des marchés locaux, afin d'éviter des procédures judiciaires longues et coûteuses et (ii) permettre à l'Autorité de se concentrer sur les affaires plus complexes impliquant des entreprises actives sur des marchés plus étendus. Trois conditions sont nécessaires : (i) les pratiques ne doivent affecter que des marchés locaux et non nationaux, ceux-ci relevant toujours de la responsabilité de l'Autorité, (ii) elles ne doivent pas revêtir de dimension européenne déclenchant l'application des Articles 101 et 102 du traité sur le fonctionnement de l'UE et (iii) le chiffre d'affaires de l'entreprise concernée ne doit pas dépasser 50 millions d'EUR, ni celui du groupe 100 millions d'EUR. Ce mécanisme s'adresse donc clairement aux PME à l'empreinte locale. Si les critères sont réunis, la PME se voit contrainte de cesser toute pratique anticoncurrentielle et, en cas d'infraction grave, se voit imposer des sanctions financières. Celles-ci sont toutefois plafonnées à 75 000 EUR ou 5 % du chiffre d'affaires de la PME. Si la SME accepte cette injonction, l'Autorité ne peut prendre d'autres mesures. Si elle refuse, la DGCCRF transmet l'affaire à l'Autorité qui suit les canaux habituels en cas d'infraction au droit de la concurrence. Ce cas de figure ne s'est toutefois pas encore produit. L'Autorité est tenue informée de toutes les mesures prises par la DGCCRF et, depuis 2009, une dizaine d'affaires se sont conclues ainsi.

Même si le mécanisme d'injonction cible les PME, il ne s'agit pas nécessairement d'affaires insignifiantes. L'une des premières affaires concernait un cas classique d'échange d'informations entre huit entreprises du secteur du bâtiment. L'injonction est par conséquent un outil précieux pour encourager les PME à respecter les règles de concurrence et pour promouvoir la conformité de façon générale, et qui se distingue par trois principales caractéristiques. D'abord, elle a une valeur éducative, puisqu'à la suite d'une injonction, la DGCCRF a la responsabilité d'éduquer les PME sur la façon de mettre en place les règles et réglementations nécessaires pour garantir le respect du droit de la concurrence à l'avenir. Ensuite, elle fonctionne comme un instrument pour promouvoir une culture de la concurrence à la fois au sein des entreprises où les comportements anticoncurrentiels sont la norme et là où ils résultent d'une mauvaise connaissance du droit. Troisièmement, c'est un outil de diffusion des bonnes pratiques et certaines PME sont même allées jusqu'à imposer des obligations au-delà de celles requises par l'injonction. On cite l'exemple de l'Académie d'architecture de France qui a accepté l'injonction pour échange d'informations tarifaires et le Président de l'Académie a pris l'initiative d'aller au-delà en publiant les dispositions du droit de la concurrence sur le site Internet de l'Académie, ainsi qu'un article sur le sujet, dans un but de sensibilisation. La DGCCRF a également été invitée à la prochaine Assemblée Générale Annuelle afin de parler de l'importance du droit de la concurrence. L'injonction s'est par conséquent révélée un instrument très utile pour promouvoir une culture de conformité.

¹ Direction générale de la concurrence, de la consommation et de la répression des fraudes.

Le Président invite le Canada à commenter sa politique d'avis consultatifs de transition gratuits pour établir si les conventions existantes sont conformes au droit de la concurrence.

La délégation du Canada répond que le Bureau de la concurrence (le « Bureau ») fournit des consultations gratuites dans le contexte d'amendements au droit de la concurrence datant de mars 2009. Ces modifications visaient la création d'un régime d'application pénale plus efficace pour les cas les plus graves d'accords de cartels et comportaient également de nouvelles dispositions de droit civil pour l'examen des accords potentiellement anticoncurrentiels. Afin d'aider les entreprises à s'adapter aux modifications du droit, une période transitoire d'un an a été instaurée pour assurer la conformité aux nouvelles dispositions. Pendant cette période transitoire, les entreprises pouvaient solliciter gratuitement du Bureau un avis consultatif écrit sur l'applicabilité de la nouvelle disposition sur les pratiques collusoires à un accord existant, afin de s'assurer qu'il ne violait pas la nouvelle loi. Cela a permis aux entreprises de réviser leurs accords avant que la loi n'entre en vigueur en mars 2010. La décision de ne pas facturer les frais habituels visait à faciliter la transition vers la nouvelle loi. Les entreprises peuvent encore solliciter du Bureau des avis consultatifs sur des arrangements d'affaires, mais elles devront acquitter la somme de 15 000 CAD. L'avis fourni est opposable et concerne strictement l'applicabilité de la nouvelle disposition, à savoir si la convention serait examinée en vertu de la disposition civile ou pénale en matière de pratiques collusoires. Le Bureau ne procède pas à une analyse concurrentielle exhaustive et ne fait aucune déclaration officielle quant à la probabilité de réduction substantielle de la concurrence.

Le Président invite la Suède à parler de son utilisation d'un outil interactif par Internet pour les associations professionnelles.

La délégation de la Suède explique qu'en 2006, l'autorité de la concurrence a réalisé une enquête sur les associations professionnelles et a conclu qu'un tiers des associations interrogées avaient des comportements anticoncurrentiels. L'outil interactif a été élaboré en réponse au besoin de sensibilisation. Il fournit des conseils clairs et pratiques aux associations professionnelles. Disponible sur le site Internet de l'autorité suédoise de la concurrence, il utilise un système de sémaphore pour classer les pratiques en vert lorsqu'elles sont conformes (par exemple, enseignement, formation, défense des intérêts, avis juridiques), en orange si elles peuvent ne pas être conformes (par exemple, partage d'informations, aide en vue de l'établissement de devis ou de tarifs) et en rouge si elles sont non conformes (par exemple, coordination tarifaire, recommandations de prix et partage de marchés). Pour chaque pratique, un lien renvoie à une autre page où le caractère anticoncurrentiel de la pratique est expliqué de façon plus détaillée, avec des références à la jurisprudence. La page d'introduction souligne que les directives ne visent qu'une sensibilisation au droit de la concurrence et ne remplacent pas un avis juridique. Cet outil ne fournit qu'une approximation du niveau de conformité ou du nombre d'infractions détectées. L'autorité de la concurrence a toutefois réalisé une enquête auprès des associations professionnelles en 2010 qui a montré qu'elles étaient davantage sensibilisées au droit de la concurrence, 90 % des personnes interrogées déclarant être informées que les infractions au droit de la concurrence étaient passibles d'amendes, contre 72 % en 2009.

4. Programmes de conformité d'entreprise

Le Président invite M. Mats Isaksson à prendre la parole afin d'établir certains rapprochements entre la théorie de la concurrence et le gouvernement d'entreprise.

M. Isaksson explique en guise d'introduction que l'application des codes de gouvernement d'entreprise couramment employés dans son pays repose sur le concept « appliquer ou expliquer ». Cela signifie qu'une entreprise a le choix entre déclarer qu'elle se conforme à une exigence du code et expliquer pourquoi elle ne s'y conforme pas. Cette approche autorise une diversité d'arrangements de gouvernement d'entreprise, permettant de prendre en compte la situation spécifique des entreprises et reconnaissant qu'il n'existe pas de solution standard applicable à tous. Ainsi, dans l'univers du gouvernement d'entreprise, la

déviations des exigences par défaut est non seulement acceptée, mais également anticipée. Ce qui compte, c'est que les pratiques sont divulguées et que les investisseurs peuvent en conséquence prendre des décisions en connaissance de cause. Compte tenu des différents modes de fonctionnement des entreprises, on aurait pu s'attendre à une grande diversité d'arrangements de gouvernement d'entreprise. Les études révèlent en fait un degré étonnamment élevé de conformité aux exigences par défaut. En Italie, par exemple, la conformité atteignait 95 % en 2008. Toutefois une étude plus approfondie fait apparaître des écarts significatifs entre la conformité officielle et réelle, qui est nettement inférieure. Les entreprises préféreraient donc déclarer leur conformité au code par défaut plutôt que d'expliquer les arrangements réellement en place. Ainsi le système « appliquer ou expliquer » ne tient pas forcément sa promesse de fournir au marché des informations exactes sur les pratiques de gouvernement d'entreprise des sociétés. Il n'y a pas de sanction pour qui dévie des exigences par défaut et une entreprise est simplement tenue d'expliquer en quoi ses arrangements alternatifs sont préférables.

Cette imperfection du marché a deux grandes conséquences : d'abord les informations dont disposent les marchés sur les pratiques de gouvernement d'entreprise des sociétés de la juridiction demeurent inexacts et indiscutés, et ensuite, pour ne pas être pénalisées, certaines entreprises adoptent des pratiques de gouvernement d'entreprise qui sont conformes aux exigences officielles du code, même si elles ne sont pas optimales du point de vue de la performance de la société ou de l'intérêt des investisseurs. Ce type d'imperfections de marché crée des opportunités pour les consultants et conseillers en gouvernement d'entreprise et les agences de notation. En théorie, ces intermédiaires font partie de la solution, mais ils peuvent aussi faire partie du problème. La société dominante sur ce marché est Institutional Shareholders Services (ISS), dont les conseils sont suivis par environ 1700 grands investisseurs institutionnels. L'approche retenue par ISS pour évaluer le gouvernement d'entreprise et la conformité est par conséquent devenue une sorte de référence. Toutefois, la pression en faveur de la conformité décourage les entreprises de s'écarter du code par défaut, même s'il n'y a pas de sanction pour révéler un système plus efficace. Les agences de notation exercent également des pressions de conformité. Cette situation serait défendable si elle conduisait à un meilleur gouvernement d'entreprise, mais non. Au contraire, l'indice ISS de gouvernement d'entreprise montre qu'il n'y a pas de lien de cause à effet avec les performances de gouvernement d'entreprise.

On peut apporter certaines solutions à ces questions. L'une consiste à substituer à l'observatoire de marché un observatoire public, en chargeant une autorité de surveillance de vérifier les informations fournies par les sociétés. Une autre approche serait de faire pression sur les investisseurs pour qu'ils remplissent leur rôle et se chargent eux-mêmes de l'observation et de la surveillance. Ce serait toutefois très difficile dans la pratique car cela exigerait de modifier fondamentalement les incitations des investisseurs. La solution la plus pratique serait peut-être d'être plus explicite et d'ouvrir les codes à des arrangements alternatifs et de signaler plus explicitement l'appréciation de la diversité. Le message clé est qu'avant de s'en remettre à une autorégulation impulsée par les marchés, il est important de savoir comment le marché fonctionne réellement plutôt que la façon dont il est supposé fonctionner.

La délégation de la Corée rapporte qu'en 2001 la KFTC a lancé un projet pour introduire et soutenir un programme de conformité parmi les entreprises. Pendant la phase initiale de l'opération, la KFTC a offert des incitations plutôt généreuses pour promouvoir l'adoption du programme de conformité en accordant en contrepartie des allègements pouvant aller de 10 % à 30 % du montant des sanctions pécuniaires. La KFTC a toutefois essuyé des critiques, certaines entreprises adoptant le programme de conformité afin de bénéficier de l'allègement des sanctions pécuniaires, mais sans réelle intention de le mettre en œuvre. En réaction, la KFTC a arrêté d'offrir des allègements pour le simple fait d'adopter le programme de conformité et, en 2006, elle a introduit un système d'évaluation des programmes de conformité afin de prévenir les abus. L'agence gouvernementale de médiation du libre-échange (Korea Fair Trade Mediation Agency- KOFAIR) est chargée de réaliser et de financer l'évaluation du programme de conformité. Les entreprises soumettent leur programme à la KOFAIR qui confère une notation fondée

sur l'appréciation de sept critères. Ces critères incluent : a) l'affirmation par le directeur-général de l'entreprise de son intention volontaire de se conformer au droit de la concurrence ; b) l'affectation de collaborateurs au programme de conformité ; c) l'élaboration d'un manuel de conformité ; d) la formation à la conformité ; e) la mise en place d'un système interne de surveillance ; f) l'introduction de sanctions en cas d'infractions et g) la gestion systématique des documents pertinents. Des inspections sur site et des audits sur dossier permettent de garantir l'exactitude des évaluations et des allègements de 10 % à 20 % sont accordés aux entreprises à partir de la notation A.

La KFTC reste toutefois réservée quant à la fiabilité des évaluations de la KOFAIR et sur le fait de savoir si l'adoption d'un programme de conformité justifie l'atténuation ou l'exemption d'une sanction. C'est pourquoi la KFTC a rarement accordé des allègements aux entreprises sur la base des résultats d'évaluation du programme de conformité. On s'interroge sur le traitement à réserver aux entreprises qui se sont dotées de simulacres de programmes. Certains prônent un alourdissement des sanctions pour ces entreprises. La KFTC ne considère toutefois pas qu'un tel alourdissement servirait l'objectif du programme de conformité.

5. Directives de conformité au droit de la concurrence

Le Président fait observer que, dans leur évaluation des programmes de conformité, les autorités de la concurrence doivent tenir compte du caractère plus théorique que pratique du risque de conformité et du fait que les entreprises ne sont pas toutes identiques. Il ne fait pas de doute qu'il est nécessaire d'associer les autorités de la concurrence à la conception et à la surveillance des programmes de conformité, qu'il n'existe pas de solution unique applicable à tous les cas de figure et que les objectifs doivent être clairement définis. Le Président donne la parole à M. Joseph Murphy.

M. Murphy remercie le Comité de traiter d'un sujet aussi important et souligne qu'il intervient en qualité de professionnel de la conformité et de l'éthique et non en tant que juriste. Il invite instamment l'ensemble des participants à se référer au livre blanc qu'il a présenté au nom du Comité de la concurrence. Il importe d'abord de définir ce qu'est un programme de conformité et d'éthique. Une définition simple est qu'il s'agit d'un engagement de la direction de faire les choses comme elles doivent l'être et des mesures de cette même direction pour qu'il en soit ainsi. C'est essentiellement une question de direction d'entreprise, non de pratique du droit. Le second aspect important concerne l'action des pouvoirs publics. Doit-on récompenser les entreprises qui se dotent de programmes de conformité ou la présence d'un programme de conformité ne doit-elle avoir d'incidence à aucune étape de l'évaluation juridique ? Existe-t-il une voie intermédiaire ? Il convient d'établir une distinction entre des questions économiques complexes, comme les monopoles, la distribution et les prix discriminatoires, qui appellent une analyse juridique et économique, et les ententes, qui sont secrètes et couvertes par des programmes de clémence. M. Murphy souligne qu'il parlera essentiellement des ententes. Il y a une trentaine d'années, les programmes de conformité au droit de la concurrence étaient à la pointe et les plus élaborés des programmes de conformité. Cette réussite semble toutefois s'être atrophiée, surtout par comparaison à la question plus large de la conformité et de l'éthique touchant d'autres domaines, comme la corruption. Les audits réalisés dans le cadre des programmes de conformité au droit de la concurrence n'en sont pas vraiment ; ils s'apparentent davantage à des exercices d'évaluation des risques et les incitations sont trop faibles. Compte tenu du secret qui entoure les ententes et du fait que les parties n'ignorent pas qu'elles enfreignent la loi, certains analystes se sont interrogés sur l'utilité des programmes de conformité qui ne font que former les participants à quelque chose qu'ils connaissent déjà. La formation ne devrait cependant pas consister uniquement à submerger les collaborateurs d'informations ; elle devrait viser essentiellement à les motiver à changer de comportement et à agir correctement. La formation ne constitue pas en soi un programme de conformité, mais n'est que l'un des outils de gestion qui composent un programme efficace, comme sont énumérés dans le Guide de bonnes pratiques du Groupe de travail de l'OCDE sur la corruption.

Un autre inconvénient des programmes de conformité que l'on entend fréquemment dénoncé est leur coût, en particulier pour les entreprises de taille réduite. Toutefois, si les grandes entreprises avec des filiales et de nombreux collaborateurs inconnus exigent des programmes plus onéreux, dans les petites entreprises, la direction connaît chacun dans l'entreprise et ces petites structures peuvent tirer avantage de leur taille pour cibler personnellement les salariés et promouvoir une culture de conformité. Ce que les petites entreprises ne peuvent pas se permettre, c'est de la bureaucratie inutile.

Toutes les autorités de la concurrence n'ont pas la même approche des programmes de conformité. Certaines ont fait clairement savoir qu'elles en tiendraient compte, d'autres ont même élaboré des directives sur leur contenu. Il importe cependant de ne pas cibler excessivement le droit de la concurrence et de reconnaître que d'autres domaines du droit sont confrontés à une problématique similaire. On peut par exemple établir de nombreux parallèles avec les travaux réalisés par le Groupe de travail de l'OCDE sur la corruption. Une question importante soulevée dans le contexte de ce groupe est la façon de déceler les simulacres, même si cela devrait habituellement être évident et s'il appartient à l'entreprise de démontrer la validité de son programme. Il est crucial que les pouvoirs publics s'engagent de façon crédible et reconnaissent les programmes de conformité. Une solution pourrait consister à établir dans l'enceinte de l'OCDE un réseau de conformité et d'éthique réunissant les différentes autorités chargées de l'application du droit de la concurrence ou bien un Groupe de travail afin d'élucider le meilleur moyen de mobiliser le secteur privé dans la lutte contre les ententes. Dans ce domaine, les enquêtes auprès des entreprises sont d'une utilité limitée dans la mesure où elles n'informent que sur ce que l'on veut y voir figurer plutôt que sur les pratiques réelles, mais les tables rondes sur la conformité et l'éthique avec des représentants du secteur privé sont utiles.

Le Président donne la parole à Mme Riley.

Mme Riley explique qu'elle a travaillé pendant plus de 20 ans au sein d'entreprises privées en tant que juriste spécialisée dans le droit de la concurrence et qu'elle a par conséquent acquis une solide compréhension de la façon dont les entreprises fonctionnent et de ce qui les motive à agir de certaines façons. Elle commence par souligner l'importance et la valeur de programmes de conformité crédibles. Un programme de conformité au droit de la concurrence authentique et crédible est un engagement considérable et permanent. Il exige du temps, des ressources et l'engagement de la haute direction. Les PME peuvent mettre en œuvre des programmes en mobilisant beaucoup moins de ressources, à condition d'avoir l'engagement de la haute direction. L'objectif ultime d'un programme de conformité au droit de la concurrence et de la politique de la concurrence au niveau des pouvoirs publics doit être d'assurer une conformité effective dans la pratique. C'est un objectif partagé. Les juristes d'entreprises et les responsables de la conformité sont très ouverts à l'idée d'œuvrer à sa réalisation avec les autorités de la concurrence. La plupart des autorités de la concurrence se concentrent sur les sanctions, sans encourager de façon proactive les programmes de conformité. Or il est crucial que les autorités de la concurrence comprennent que les programmes de conformité peuvent être pour elles un instrument utile. Il faut aussi souligner que les cadres des entreprises sont des êtres humains et c'est cultiver une idée fausse que de s'attendre à les voir calculer rationnellement le risque d'être pris par rapport à l'ampleur du gain. Alors que peuvent donc faire les autorités de la concurrence ? Elles peuvent encourager positivement les entreprises à investir les ressources appropriées en fonction de leur taille et des risques auxquelles elles sont exposées (en reconnaissant qu'il n'existe pas de solution standard applicable à toutes), les aider à améliorer leurs normes d'éthique et assurer une meilleure conformité dans la pratique. L'objectif de politique ultime est de réduire et, espérons-le, d'éliminer les comportements d'entente illégaux. Le débat sur le montant des amendes pour infraction au droit de la concurrence a en quelque sorte obscurci l'objectif réel des programmes de conformité. Proposer des incitations pour investir dans un programme crédible encouragera un éventail plus large d'entreprises à se doter de programmes et si les grandes entreprises bénéficient d'avantages incitatifs, il est probable que les PME leur emboîteront le pas. Toutefois le rôle des programmes de conformité n'est pas de réduire le montant des sanctions pécuniaires, mais d'obtenir la

conformité. Le gouvernement d'entreprise est également une question cruciale et un élan doit être impulsé pour encourager les entreprises à investir dans un programme approprié et crédible.

Le principal bienfait d'un programme de conformité est d'abord d'éviter l'infraction et d'instiller des normes d'éthique et des valeurs culturelles au sein de l'entreprise. La faible sensibilisation du public aux pratiques anticoncurrentielles et une condamnation morale insuffisante rendent les efforts de conformité plus improbables aujourd'hui. Il faut convaincre davantage les médias des avantages des programmes de conformité et de l'importance pour les entreprises d'investir dans de tels programmes. Les agences de la concurrence pourraient imposer aux entreprises l'obligation de se doter de programmes de conformité lorsqu'elles rendent leurs décisions à la suite d'infractions ou lorsqu'elles négocient des règlements transactionnels ou des engagements. Les travaux des organisations internationales comme l'OCDE, le RIC et le REC sont cruciaux également. Il ne suffit pas cependant de publier des informations sur des sites Internet que les entreprises ne consultent pas fréquemment. Il faut intensifier les efforts de sensibilisation et renforcer le dialogue avec les entreprises, en ciblant notamment les directions, les instituts d'administration et les associations professionnelles. Les entreprises sont confrontées quotidiennement aux défis de la conformité et elles sont les mieux placées pour savoir ce qui fonctionne et ce qui ne fonctionne pas au sein de l'entreprise. En même temps, elles doivent souhaiter le dialogue avec les agences de la concurrence et s'ouvrir à leurs préoccupations. D'autres approches utilisant par exemple les associations professionnelles (Suède), les journées nationales de promotion de la concurrence (Brésil), l'éducation des enfants par les dessins animés (Japon) sont également bienvenues.

Il n'y a pas pour les programmes de conformité de norme standard appropriée à tous les cas de figure ; toutefois, certains principes généraux ont été avancés, que l'on peut résumer par « les 5 mots d'ordre de la conformité »² : (i) Engagement, (ii) Culture, (iii) Compétences et organisation de la conformité, (iv) Contrôles et (v) Surveillance et amélioration permanentes. C'est l'engagement de la direction qui définit la culture de l'entreprise ; il est donc fondamental. La culture ne se crée pas en un jour et doit se développer avec le temps ; la culture d'entreprise est au bout du compte ce qui motive les comportements. Un engagement authentique envers la conformité doit par conséquent être au cœur de la culture de l'entreprise et ne pas être considéré comme une initiative d'ordre juridique. Il ne doit pas simplement s'agir de « politique » d'entreprise, mais la conformité réelle doit être la façon d'opérer de l'entreprise dans la pratique. Les compétences, à travers les codes de conduite, et les formations permettent la répétition fréquente des messages et exigent que les responsables se les approprient. L'interactivité est importante, aussi, un message passif passant moins bien. Les contrôles, comme les lignes d'alerte dédiées jouent aussi un rôle important pour permettre aux collaborateurs de faire part anonymement de leurs préoccupations. Certaines entreprises s'assurent désormais que leurs collaborateurs qui participent aux réunions des associations professionnelles ont reçu auparavant la formation nécessaire. Enfin, une surveillance constante est fondamentale, car la conformité est en engagement permanent. Le programme doit être évalué régulièrement et actualisé et mis à jour. Les entreprises et les autorités de la concurrence doivent travailler main dans la main pour parvenir à une compréhension partagée de ce à quoi pourrait ressembler un programme de conformité et pour promouvoir des attentes et l'acceptation que la conformité est nécessaire.

Le Président invite les participants à exprimer leurs commentaires et poser leurs questions.

La délégation de l'Afrique du Sud souligne l'importance du gouvernement d'entreprise et de l'utilisation des programmes de conformité pour encourager une bonne gestion et un bon gouvernement d'entreprise. Les programmes de conformité permettent à la direction d'identifier les risques, de les surveiller et d'agir. Cependant, ils ne rendent pas une entreprise plus concurrentielle ; ils doivent donc être complétés par des stratégies de promotion de la concurrence. Ces deux outils sont nécessaires, sinon les entreprises savent uniquement ce qu'il ne faut pas faire, pas ce qu'il faut faire.

² Fiona Carlin de Baker & McKenzie parle en anglais des 5 C de la conformité.

M. Murphy répond que c'est peut-être le cas des programmes sommaires, mais les programmes de conformité et d'éthique sont différents et visent à mobiliser les collaborateurs de l'entreprise. Aucun système ne peut surveiller le comportement de centaines de milliers de collaborateurs répartis à travers le monde. Si un collaborateur enfreint la loi, cela ne veut pas dire que le gouvernement d'entreprise ou la moralité de l'entreprise est condamnable.

Mme Riley estime que la qualité des programmes de conformité et d'éthique est une affaire de comportement. Le gouvernement d'entreprise est un élément, mais les programmes ne devraient pas consister à dire aux collaborateurs ce qu'ils ne doivent pas faire, mais comment adhérer à un comportement de marché concurrentiel et éthique.

Le Président résume quatre messages clés à retenir de la table-ronde. Premièrement, il est important de clarifier les objectifs que doivent poursuivre les programmes de conformité en tant qu'outils à manier par les autorités de la concurrence car il existe de nombreuses interprétations différentes de ce que devraient être ces objectifs. Deuxièmement, il convient de prendre acte de la concurrence que se livrent au sein des entreprises les différentes exigences de conformité et ne pas s'attendre à ce que celles-ci allouent au droit de la concurrence la totalité de leurs ressources dans ce domaine. Troisièmement, les autorités de la concurrence doivent mieux comprendre les décisions des entreprises et engager le dialogue avec elles. Quatrièmement, certaines exigences de contenu ont été clairement esquissées : il est par exemple improbable qu'un programme de conformité sans éléments incitatifs puisse être efficace. La question est de savoir jusqu'où les autorités de la concurrence devraient aller. Une approche consiste à laisser aux entreprises la responsabilité des programmes de conformité, puisque c'est à elles qu'ils profitent. Toutefois, si les autorités de la concurrence veulent promouvoir la conformité au droit de la concurrence, on peut penser qu'il leur incombe d'engager le débat avec les entreprises et de travailler avec elles à l'établissement de certaines normes communes. Le Président remercie l'ensemble des participants et clôt la table-ronde.