

CORPORATE COMPLIANCE WITH COMPETITION LAW

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1.1 Introduction

The purpose of this paper is to discuss the manner in which competition authorities should engage with the compliance efforts of companies, with a view to achieving a better outcome in terms of the prevention and detection of anti-competitive collusive practices.

In spite of the increasing level of fines imposed on convicted companies, collusive behaviour remains a problem.² The hidden nature of cartel practices and the related difficulty of detecting them undermine the optimality of sanctions. Assuming a low probability of detection, the level of fines is currently sub-optimal.³ Introducing individual sanctions is a possible solution to the impossibility of fining companies optimally, but alternative methods are advocated to complement a strict sanction-based regime. Those methods entail addressing business perceptions of the morality of regulated behaviour.⁴ Psychological studies suggest, as pointed out by Wils, that a commitment to the norm is an important element that explains compliance with the law.⁵ In addition, it is widely admitted that corporate culture is an important factor in explaining the engagement of companies in competition law infringements.⁶ A decision

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² DD Sokol, 'Cartels, corporate compliance, and what practitioners really think about enforcement' (2012) 78 *Antitrust Law Journal* 201, 202.

³ Empirical studies on probability of detection. See: Error! Reference source not found. Wils also concludes that based on such probability of getting caught, the deterrent level of fine would be about 150% of the annual turnover in the products concerned by the infringement. WPJ Wils, *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International 2002) 200.

⁴ A Riley and M Bloom, 'Antitrust Compliance Programmes – Can Companies and Antitrust Agencies do More?' [2011] *Competition Law Journal* 21, 22.

⁵ WPJ Wils, 'Is criminalization of EU competition law the answer?' (2005) 28 *World Competition: Law and Economics Review* 117.

⁶ Factors that are external to the companies also play a key role in explaining the rate of infringements in certain industries. See **3.2.2.5.3**.

to behave anti-competitively typically emanates from the top of the hierarchy, and some companies have been known to perpetuate a tradition of antitrust infringements.⁷ This may suggest that establishing that cartel behaviour is morally ‘bad’, independently of its illegality, is as important as sanctions schemes.⁸ In the context of this discussion, the question is whether a culture of compliance, via the adoption of compliance programmes, is an effective ‘moral’ avenue to controlling conduct with regard to compliance (in combination with the ‘legal’ means that are sanctions).⁹

The underlying theoretical inquiry is whether, to tackle the cartel problem, competition authorities should move away from enforcement based on punishment and deterrence, to a less-restrictive approach to enforcement, based on a range of informal and softer tools to encourage self - or ‘management-based’ regulation.¹⁰ As a combination of both sanctions-based and ‘compliance’¹¹ approaches, responsive regulation seems to fit well with the enforcement approach advocated in that paper.¹² The theory of responsive regulation advocates the use of a range of instruments, with the most cooperative tools being at the base of the ‘regulatory pyramid’.¹³

The implementation of compliance programmes - schemes designed to educate employees about illegal activities, monitor their behaviour, and discipline them in cases

⁷ J Sonnenfeld and PR Lawrence, ‘Why Do Companies Succumb to Price Fixing’ (1978) Harvard Business Review 145.

⁸ For a legal theory discussion on the relationship between law and morality: J Garner, ‘Ethics and Law’ in J Skorupski (ed), *The Routledge Companion to Ethics* (Routledge 2010).

⁹ S Shavell, ‘Law versus Morality as Regulators of Conduct’ (2002) 4 American Law and Economics Review 227.

¹⁰ On one extreme of the enforcement spectrum lies the ‘deterrence’ or ‘sanctioning’ enforcement approach. At the other end of the spectrum, ‘compliance’ based enforcement embraces a range of informal techniques including education, advice, persuasion and negotiation. R Baldwin, M Cave, M Lodge *Understanding regulation: theory, strategy, and practice* (2nd edn, Oxford University Press 2012) 239.

Europe Economics, ‘Etat des lieux et perspectives des programmes de conformité, Une étude réalisée pour le Conseil de la concurrence’ (2008) para 10.11 available at

<http://www.autoritedelaconcurrence.fr/doc/etudecompliance_oct08.pdf>.

On Management-based regulation, see for example: C Coglianese and D Lazer, ‘Management-Based Regulation: Prescribing Private Management to Achieve Public Goals’(2003) 37 Law & Society Review 691: ‘A management-based approach requires firms to engage in their own planning and internal rule making efforts Management-based regulation directs regulated organizations to engage in a planning process that aims toward the achievement of public goals, offering firms flexibility in how they achieve public goals.’

¹¹ The term ‘compliance’ refers here to a specific regulation term relating to more soft-law based approach to enforcement. Distinction needs to be made between the concept of ‘corporate compliance’ and ‘compliance programmes’, object of study in this paper.

¹²The question of the use of compliance programmes as part of responsive regulation in EU competition law is addressed in K Voss, ‘Preventing the Cure: Corporate Compliance Programmes in EU Competition Law Enforcement’ (2013) 16 *Europarättslig Tidskrift* 28.

¹³ I Ayres and J Braithwaite, *Responsive Regulation* (Oxford University Press 1992).

of illegal conduct¹⁴ - is very much valued by competition authorities as a necessary avenue for the creation of a culture of compliance. A number of guidelines describe the steps that companies should take to avoid the risk of competition law infringement in the first place, while acknowledging that a ‘one-size-fits-all’ approach is not adequate in the context of compliance programmes.¹⁵

In spite of acknowledging the value of corporate compliance programmes, competition authorities are reluctant to provide concrete incentives for their implementation. The European Commission has affirmed that compliance programmes cannot constitute a mitigating factor in the context of a conviction.¹⁶ The US DoJ also refuses to consider compliance programmes in antitrust infringements.¹⁷ The French and UK competition authorities, however, may grant a 10% reduction of a fine for having effective compliance measures.¹⁸ In the field of anti-corruption, in contrast, companies in some jurisdictions can avoid liability completely for having implemented ‘adequate procedures’.¹⁹

This paper develops both descriptive and normative arguments. This paper will firstly discuss the manner in which different legal systems engage with corporate compliance to competition law. A continuum of approaches will be presented: at one extreme competition policies that disregard the manner in which compliance is organised; and at the other extreme, policies that provide some incentives for the implementation of compliance programmes. A comparison with anti-corruption policies shows an interesting contrast of approaches towards compliance programmes.

¹⁴ C Angelucci and MA Han, ‘Monitoring Managers Through Corporate Compliance Programs’, Amsterdam Center for Law & Economics Working Paper No. 2010-14, 2. Compliance programmes broadly refer to all the management tools used to prevent and detect misconduct. J Murphy in OECD, Policy Roundtable, ‘Promoting Compliance with Competition Law’ (2011) 14-15. Report available at <<http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>

¹⁵ The UK: Guidance provided by the CMA: OFT1340, How your business can achieve compliance with competition law (2011); France: Autorité de la Concurrence, Antitrust compliance and compliance programmes, Corporate tools for competing safely in the market place (2012); The EU: Commission (DG COMP) Compliance matters, What companies can do better to respect EU competition rules (2012).

¹⁶ J Almunia, Vice President of the Commission responsible for Competition Policy: ‘The main reward for a successful compliance programme is not getting involved in unlawful behaviour. Instead, a company involved in a cartel should not expect a reward from us for setting up a compliance programme, because that would be a failed programme by definition.’ SPEECH/11/268, 14 April 2011.

¹⁷ See further developments in section 1.2.1.1.

¹⁸ CMA : OFT423, OFT’s guidance as to the appropriate amount of a penalty (2012) para 2.15; Autorité de la Concurrence, Document-cadre du 10 février 2012 sur les programmes de conformité aux règles de concurrence (2012) para 31.

¹⁹ See for example the UK: Bribery Act 2010, s 7 (2).

The first section will reflect on whether competition authorities should open (further) the ‘black box’ of corporate compliance. The debate between Wils and Geradin illustrates conflicting views and important questions relating to compliance programmes: Wils suggests that competition authorities should solely regard the outcome of compliance programmes, while Geradin advocates giving credit to companies’ efforts with respect to the implementation of effective compliance programmes.²⁰ Taking stock of the debate, this paper will take a view on whether competition authorities should consider compliance programmes as part of their enforcement strategy. Feeding into the theoretical framework, this section will discuss the need to move away from pure sanctions-based enforcement and towards integrating softer enforcement tools.

After advocating the necessity for opening the ‘black box’ of corporate compliance, the second section will discuss possible options. It is argued that competition authorities are right not to prescribe the implementation of a compliance programme. However, they should convince companies that the organisation of compliance can be part of their business strategy. In addition, they should steer the incentives for the voluntary implementation of a strong compliance culture, materialised with concrete organisational steps. The potential strategic use of compliance in the organisation will be explained and illustrated.

The second section is largely informed by a range of interviews conducted with 11 general counsels or compliance officers of multi-national or large companies headquartered in the UK, Germany, France, the Netherlands and Switzerland. Large companies were targeted because only such companies have personnel specialised in competition law compliance; large companies characterised with complex corporate structures also fit well with the theoretical framework of this thesis. The panel of companies are from different jurisdictions and types of industries and have diverse infringement backgrounds. The first contact with the companies was made by email. The email presented the research and the context, and introduced the specific input sought from the interviews. The interviews were conducted on the phone, between August and October 2013. The format of the interviews was open-ended, but similar types of questions were posed. The first questions concerned the specific organisation of

²⁰ WPJ Wils, ‘Antitrust Compliance Programmes & Optimal Antitrust Enforcement’ (2013) 1 *Journal of Antitrust Enforcement* 52; D Geradin, ‘Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils’ (2013) 1 *Journal of Antitrust Enforcement* 325.

the compliance function in the company (a distinct unit for competition law?). These were followed by questions on the various challenges faced by the organisation of compliance (e.g. resources, how to organise compliance in a company that has subsidiaries in multiple jurisdictions). Then, individuals were consulted on the possible strategic use of compliance, either within the company or with third parties (Had any innovative process been developed? Was compliance used in communication with third parties? Did the company consider the compliance of business partners?). Individuals were also invited to describe and compare the organisation of competition compliance with that of anti-corruption compliance in their companies. The concluding part of the interview collected their views on the possibility of certifying compliance programmes and competition authorities' approaches to compliance programmes. Additional interviews were conducted with three (non-in house) legal and compliance experts on similar issues.

1.2 Corporate compliance – (not) opening the black box?

The first subsection will provide a continuum of different approaches: at one extreme competition policies that consider the organisation of compliance as a 'black box'; and at the other extreme, policies providing some incentives for the implementation of compliance programmes.²¹ (*Figure 1*) Different regulatory approaches will be compared to the approaches available in another area of law, anti-corruption law. In that field much greater consideration is given to compliance efforts. **(1.2.1)** Based on the observations on the current regulatory approaches, the second subsection will discuss whether or not competition authorities should engage further with the internal workings of corporate compliance. **(1.2.2)**

1.2.1 A continuum of regulatory approaches to corporate compliance

Wils defines compliance programmes in the context of competition law as:

‘A set of measures adopted within a company or corporate group to inform, educate and instruct its personnel about the antitrust prohibitions [...] and the company's or group's policy regarding respect for these prohibitions, and to control or monitor respect for these prohibitions or this policy. Antitrust compliance programmes are thus a type of

²¹ The continuum could be even broader: One extreme would be to use programmes against companies; the other would be excusing companies that have mere paper programmes.

organizational control system aimed at standardizing staff behaviour, specifically within the domain of antitrust compliance'.²²

In the remainder of the paper, the terms corporate compliance and compliance programmes will be used interchangeably, to refer broadly to the organisational and practical dimensions of companies' efforts to comply with the competition law. As pointed out by Geradin, corporate compliance can refer to a great variety of processes, from a simple 'check-list' to very sophisticated schemes.²³ No distinction of the degree of seriousness and sophistication of compliance programmes is made in the definition here. In addition, 'compliance efforts' will sometimes be referred to as a synonym of compliance programmes or corporate compliance.

Classifying regulatory approaches on a continuum enables a visual overview and comparison of the engagement of legal systems with the compliance efforts of companies. (*Figure 1*) The classification is based on competition law provisions and enforcement instruments that take concrete consideration of companies' compliance measures. For example, sanctions that would grant a reduction in a fine for a robust compliance programme are deemed to directly impact the incentives of companies. In contrast, approaches that consist of only providing guidance are deemed not to modify the incentives structure of companies significantly.²⁴ Most jurisdictions provide guidance on compliance to companies but they do not take into account compliance programmes in the enforcement of competition policy. For the purpose of our classification, those jurisdictions disregard the organisation of compliance and consider it as a 'black box' notwithstanding the existence of soft law instruments guiding the organisation of compliance.

At the left extreme of this continuum, the approaches focus solely on the outcome of corporate compliance in response to competition law instruments. In that approach, competition authorities typically refuse to take into account compliance efforts by the infringing companies. The presumption is that a company that has infringed competition

²² WPJ Wils (n 20) 52.

²³ D Geradin (n 20) 327.

²⁴ Following the discussion in the introduction to this paper, guidance documents may affect incentives if they impact the 'moral' perception towards a greater culture of compliance. For the purpose of this section, however, pure guidance will not be deemed to produce a direct impact on incentives.

law necessarily failed in complying. This implies failed internal organisation of compliance.

At the other extreme of this continuum (the right), the regulatory approaches take full account of the means employed by a company to comply with competition law. Robust and credible compliance programmes would typically be rewarded, in spite of a non-compliance outcome. In this kind of approach, the manner in which compliance is organised matters for the competition authorities. At present, none of the legal systems examined has relieved a company from its liability on grounds related to compliance programmes.²⁵ The maximum incentive witnessed for antitrust programmes is a reduction in fine. In other areas of law, however, a complete defence seems possible, under certain circumstances. This is the case for anti-bribery law in the UK. In the US, the authorities may elect not to prosecute a company in the event of an effective compliance programme.

In addition to the US and EU approaches, the regulatory approaches of France, the UK, the Netherlands and Italy will be presented and located on the continuum. Such a selection of EU national jurisdictions constitutes a sample of the different regulatory approaches available in the EU. In addition, Brazil will be mentioned for its quite unique certification system of compliance programmes.

1.2.1.1 Left of the continuum – corporate compliance as a ‘black box’

The EU

In a speech in 2011, Joaquin Almunia, Vice President of the Commission responsible for Competition Policy, reaffirmed that compliance programmes implemented in companies that infringe competition law are ‘failed’ and therefore cannot constitute a mitigating factor in the assessment of the level of fine to be imposed.²⁶ In that respect, the Commission shall not consider the efforts undertaken by a convicted company. Similarly, the absence of compliance programmes cannot aggravate the level of fine. In

²⁵ Although in the US there are a few old cases where judges allowed companies to present their compliance programmes to juries in their defence in antitrust criminal cases: ‘If [...] you find that Koppers Company acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining whether or not to impute an agent or employee’s intent to the Koppers Company’. Jury instruction in *US v Koppers Co* Crim. No. 79-85 (D Conn 1980).

²⁶ J Almunia (n 16).

that conception, the organisation of compliance is indeed a ‘black box’ to the Commission. Solely the outcome of such programmes matters in the context of competition law enforcement. Such an approach may reflect either the willingness of the EU not to interfere with companies’ freedom to organise compliance, or a regulatory approach that ‘commands’ but does not ‘control or monitor’ the achievement of compliance by itself.

Interestingly, past decisional practice shows that the Commission used to consider compliance programmes in competition law cases. In *National Panasonic*, a case of export prohibition infringing ex-Article 101(1), the Commission considered the quality of the antitrust compliance programme as a mitigating factor in its assessment of the level of fine:

Th[e] constructive attitude [of conducting an audit and issuing a code of conduct] adopted by the management of MET [...] has also been taken into account in assessing the amount of the fine. The undertakings concerned have adopted a comprehensive practical detailed and carefully considered antitrust compliance programme, with appropriate legal advice.²⁷

Over the following years, the Commission similarly took account of compliance programmes in other export ban cases, in *Fisher-Price/Quaker-Oats Ltd - Toyco*²⁸, *Viho/Toshiba*²⁹ and *Viho/Parker Pen*.³⁰ In the abuse of dominant position cases, *Eurofix-Bauxo/Hilti* and *Napier Brown - British Sugar*, the Commission took into account the undertaking offered by companies to implement compliance programmes in its assessment of the amount of fines.³¹ In spite of commitments to implement an effective compliance programme, British Sugar was later prosecuted for being part of a cartel. On this occasion, the Commission considered for the first time the existence of a

²⁷ *National Panasonic* (Case COMP IV/30.070) Commission Decision **82/853/EEC** [1982] OJ **L354/28**, para 68.

²⁸ *Fisher-Price /Quaker-Oats Ltd – Toyco* (Case COMP IV/31.017) Commission Decision 88/86/ **EEC [1988] OJ L04/19** para 27.

²⁹ *Viho/Toshiba* (Case COMP IV/32.879) Commission Decision 91/532/EEC [1991] OJ L287/39 paras 28-30.

³⁰ *Viho/Parker Pen* (Case COMP IV/32.725) Commission Decision 92/426/EEC [1992] OJ L233 para 24.

³¹ *Eurofix-Bauxo / Hilti* (Case COMP IV/30.787 and 31.488) Commission decision 88/138/EEC [1987] OJ L65/19 para 10; *Napier Brown - British Sugar* (Case COMP IV/30.178) Commission decision 88/518/EEC [1988] OJ L284/41, para 86.

compliance programme to be an *aggravating* factor.³² Therefore, for a certain period, the Commission via its decisional practice, provided defensive incentives to companies for the implementation of compliance programmes, although never in cases of hard-core cartels.³³ In its recent practice, the Commission has not considered compliance programmes as a factor when setting fines.³⁴ It is argued that this change in its approach coincided with the increasing importance given to leniency policy.³⁵ Thus, the current regulatory approach of the EU can be placed at the left extreme of the continuum.

The US

The US adopts a quasi-neutral approach towards compliance programmes in antitrust.³⁶ The US Sentencing Guidelines that set out Federal courts' policy for individuals and companies convicted of felonies and serious misdemeanours in general, foresees the possible reduction in the level of fine if a convicted corporation had in place at the time of the infringement an 'effective compliance and ethics programme'. This means that in application of these guidelines, the US considers the organisation of compliance in the context of a corporate crime conviction. There is, however, a rebuttable presumption that a compliance programme is not effective when the offence involves 'high-level' or 'substantial authority' personnel.³⁷ Antitrust infringement always involves individuals who are able to exercise substantial authority within the scope of their responsibility,

³² *British Sugar plc* (Case COMP IV/F-3/33.708), *Tate & Lyle plc* (Case COMP IV/F-3/33.709), *Napier Brown & Company Ltd* (Case COMP IV/F-3/33.710), *James Budgett Sugars Ltd* (Case COMP IV/F-3/33.711) Commission Decision 1999/210/EC [1998] OJ L076/01 para 208.

³³ Defensive incentives refer to incentives available in the context of an infringement of competition (for example consisting of a fine reduction in the case of prosecution).

³⁴ Eg. *Amino Acids* para 312: 'The Commission welcomes ADM's initiative to set up a compliance policy. However, as the present case indicates, this initiative came too late and cannot, as a prevention tool, dispense the Commission from its duty to sanction the infringement of the competition rules which ADM has committed in the past' (Case COMP/36.545/F3) Commission Decision 2001/418/EC [2000] OJ L152; See also *Elevators and Escalators* (Case COMP/E-1/38.823) Commission Decision 2008/C 75/10 [2007] **OJ C075/19** paras 631, 687 et seq., 753 et seq; *Calcium carbide and magnesium based reagents for the steel and gas industries* (Case COMP/39.396) Commission Decision 2009/C 301/14 [2009] OJ C301/18 para 325.

³⁵ *Europe Economics* (n 10) para 8.89. Another argument explaining a change in its position may come from the *British Sugar* case. The compliance programme that was rewarded did not impede the subsequent infringement. The Commission's confidence in assessing the credibility of a compliance programme may have been affected.

³⁶ As explained, the US Sentencing Guidelines theoretically open the possibility for effective compliance measures to lead to a reduction in the fine. However, the conditions attached and the particular positions expressed towards antitrust infringements led us to qualify the US approach to the position as 'quasi-neutral'.

³⁷ US Sentencing Guidelines Manual (2012) §8C2.5 Culpability Score, (f) Effective Compliance and Ethics Program.

such as setting prices, negotiating and approving commercial contracts etc.³⁸ Therefore, antitrust cases typically fall within the categories of individuals that preclude a compliance defence for corporations.

Under very narrow circumstances, however, the involvement of senior executives does not rule out the possibility of being credited for an effective compliance programme. As part of the compliance programme, the compliance officer should have ‘express authority to communicate personally’ to the board or its audit committee ‘promptly on any matter involving criminal conduct or potential criminal conduct’. In addition, this officer must report ‘no less than annually’ about the compliance programme.³⁹ Despite such an inclusion in the Sentencing Guidelines, the DoJ Antitrust Division seems to clearly exclude the consideration of compliance programmes in the context of antitrust:⁴⁰ ‘[T]he Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program’. The justification relates to the supposed specificity of ‘antitrust violations, [that] by definition, go to the heart of the corporation's business’.⁴¹ Therefore, if in principle US Federal courts may consider compliance programmes as a mitigating factor in the context of corporate crimes, the conditions attached to it almost exclude this possibility for antitrust violations. In addition, most criminal cases against companies do not go to court but settle. This further limits the possibility of compliance efforts to be taken into consideration in antitrust cases. Unlike the DoJ, however, it seems that the Federal Trade Commission takes a more flexible approach towards compliance programmes, having listed specific corporate compliance elements in a settlement procedure.⁴² To date, private antitrust enforcement cases, where the

³⁸ US Sentencing Guidelines Manual (2012) §8A1.2: ‘The term [high-level personnel of an organization] includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest.’

The term [substantial authority personnel] includes high-level personnel of the organization, individuals who exercise substantial supervisory authority [...], and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts).’

³⁹ Ibid chapter 8, (f)(3)(C)(i) and §11.

⁴⁰ JE Murphy, ‘Making the Sentencing Guidelines Message Complete’ (2013) available at <http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_Murphy_Proposed_Priorities.pdf>.

⁴¹ United States Attorney's Manual, 9-28.400, Special Policy Concerns (2008) available at <http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrmm.htm>;

⁴² FTC: National Association of Music Merchants, Inc, Docket No. C-4255 FTC File No. 001 0203; 2009. See JE Murphy, ‘The FTC and antitrust compliance programs’ Compliance & Ethics Professional (2012) available at

Sentencing Guidelines do not apply, do not seem to address the question of compliance programmes.⁴³ As a result, the US are quasi-neutral to compliance programmes in competition law, hence their position at the right of the EU but still towards the left extreme of the continuum.

1.2.1.2 To the right of the continuum – defensive and positive incentives

So far, no competition authority has allowed a full defence based on the quality of compliance programmes. But competition authorities provide some sort of either positive or defensive incentives for the implementation of compliance programmes. Therefore they find their place in-between the extremes of regulatory approaches. Defensive incentives refer to credit given to companies for having effective compliance programmes, in the context of an investigation. This typically entails a reduction in the level of the fine for a convicted company. **(1.2.1.2.1)** In contrast, a positive incentive relates to an advantage acquired by a company for having a compliance programme, outside of the context of an investigation. A government giving recognition to companies with well-conceived compliance programmes in the context of a tender procedure is an example of a positive incentive. In that category are regulatory approaches that enable companies to obtain a certification of their compliance programmes, either from non-governmental bodies, or from the competition authorities. Those schemes are considered as being positive incentives because they constitute some sort of recognition for a well-conceived programme. The strength of the incentive depends on the potential advantage conferred by this certification to the company. **(1.2.1.2.2)**

1.2.1.2.1 Defensive incentives

Defensive incentives can either concern compliance programme existing at the time of the infringement, so-called *ante-factum*, or those implemented following the discovery of the infringement, *post-factum*.

The UK - *Ante-factum* and *post-factum*

http://www.joemurphycecp.com/wp-content/uploads/2012/08/Finalpublishedarticle_Murphy_ARTICLEcopy.pdf.

⁴³ Discussion with Joe Murphy, ethics and compliance expert.

In the UK, compliance programmes may be given recognition in the context of litigation. A policy document of 2011 states that ‘the amount of a financial penalty imposed for a competition law infringement may be reduced where adequate steps have been taken with a view to ensuring compliance’. Revised guidance on the setting of fines confirms the inclusion of effective compliance programmes as a possible mitigating factor.⁴⁴ Such defensive incentives are available for steps taken either before the infringement, or soon after the company had knowledge of it.⁴⁵ Assessed on a case-by-case basis, effective compliance programmes, if appropriate to the size of the business and to its level of competition risk, may lead to a maximum of a 10% reduction in the level of the fine. Companies need to demonstrate a clear compliance commitment that is disseminated throughout the organisation, as well as processes of risk identification, risk assessment and risk mitigation that are in place, and a plan for reviewing those processes.⁴⁶ Ordinarily, compliance programmes do not constitute an aggravating factor, except in particular cases where, for example, they have been used by companies to dissimulate or facilitate a violation, or to mislead the competition authority during its investigation.⁴⁷ Compliance programmes may also be recognised following the discovery of the infringement. The consideration of compliance programmes as a mitigating factor appears in the decisional practice, prior to the adoption of this policy in the OFT policy documents of 2011 and 2012. In a 2002 infringement decision, *Arriva plc and FirstGroup plc*, the OFT granted a 10% fine reduction to Arriva plc for implementing a compliance programme:

[The] Director recognised from copies of training manuals and evidence that training had taken place and from documents reporting contacts with competitors that the parties both had genuine compliance systems in place which appeared to generally followed and adhered to. As a result the penalties would be reduced by 10 per cent.⁴⁸

In the 2003 *Hasbro* case, the OFT considered compliance programmes in two different ways. A compliance programme was in place at the time of the infringement, in which senior management were involved. The OFT stated that the fact that senior management

⁴⁴ OFT423 (n 18) para 2.15.

⁴⁵ OFT1340 (n 15) para 7.2.

⁴⁶ *Ibid* para 7.3.

⁴⁷ OFT1340 (n 15) fn 26; OFT423 (n 18) para 7.5.

⁴⁸ Decision of the Director General of Fair Trading, No. CA98/9/2002 Market sharing by Arriva plc and FirstGroup plc. 30 January 2002 (Case CP/1163-00); para 66.

had blatantly ignored the compliance programme impeded the reduction in the level of fine.⁴⁹ However, the OFT gave credit for the disciplinary steps taken towards responsible employees as well as for the organisation of new compliance schemes in subsidiaries and for sales employees and senior management, following Hasbro's discovery of the infringement.⁵⁰ As a result, Hasbro received a 10% fine reduction. Therefore, the UK regulatory approach considers to some extent the manner in which compliance is organised, hence its position towards the right extreme of the continuum.

Italy – *Post-factum*

Italy also gives credit for compliance programmes in the context of litigation. In the *Farindustria/Codice di autoregolamentazione* case, the association of pharmaceutical companies in Italy, the competition authorities relieved the association of any fine, for cooperating during the investigation as well as for implementing a compliance programme.⁵¹ A similar approach was taken in the *Assirevi/Società di revisioni*. The case concerned the coordination of prices via Assirevi (the Italian Association of Auditors) that set out minimum hourly fees for audit services provided by 17 companies, who were members of the association. Compliance programmes as well as the cooperative behaviour of some firms during the investigation were taken into account by the Authority in the assessment of the gravity of the infringement.⁵² The Italian Competition Authority recently launched a consultation on the adoption of guidelines for the setting of fines, and is considering whether compliance programmes could count as a mitigating factor.⁵³ In a public speech in 2012, the Chair of the competition authority reaffirmed the approach of giving credit for effective compliance

⁴⁹ Decision of Director General of Fair Trading No. CA98/2/2003, Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games, 19 February 2003, (Case CP/0480-01) para 340.

⁵⁰ Decision of Director General of Fair Trading No. CA98/2/2003, Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games, 19 February 2003, (Case CP/0480-01) para 341.

⁵¹ *Farindustria/Codice di autoregolamentazione* I342, 1999/7807. L Longo, A Moretti, 'Chapter 10: Italy' in M Holmes, L Davey (eds), *A Practical Guide to National Competition Rules Across Europe* (Kluwer Law International 2007) 213.

⁵² *Assirevi/Società di revisioni* I266, 2000/7979.

⁵³ Italian Competition Authority (2014) available at <<http://www.agcm.it/stampa/news/6934-avviata-consultazione-pubblica-sulle-linee-guida-relative-alla-modalita-di-applicazione-dei-criteri-di-quantificazione-delle-sanzioni-irrogate-dall'autorita-in-materia-di-concorrenza.html>>.

programmes in the case of investigation.⁵⁴ Therefore, Italy's regulatory approach stands towards the right extreme of the continuum.

France – *Post-factum*

France considers the organisation of compliance programmes to a certain extent. Compliance programmes may be rewarded in the context of settlement procedures. During an antitrust investigation, an undertaking can benefit from a 10% reduction in the fine if it decides to settle an infringement case and offers to implement an antitrust compliance programme or enhance an existing one.⁵⁵ In addition, the undertaking can be granted up to an extra 10% reduction in the level of the fine if it offers a commitment to implement a new compliance programme or enhance an existing one.⁵⁶ The compliance programme needs to meet the following requirements: it should be clear, transparent, publicly adopted by executives, and an individual (high enough in the hierarchy) should be in charge of the programme. There should be effective information flows and training of staff as well as an effective control and reporting system.⁵⁷ The French competition authority has applied this policy at several instances.⁵⁸ As an example, following a violation of competition law in the cat and dog food market, Nestlé and Mars were respectively granted an 18% and 20% reduction in fine for waiving their right to challenge the charges and offering commitments related to their compliance programmes.⁵⁹ Apart from the settlement and commitment context, no recognition is given to compliance programmes existing at the time of the infringement.⁶⁰ Nor is the internal discovery of a violation by a company thanks to its compliance programme considered in the assessment of the fine.⁶¹ Therefore France provides defensive incentives in the context of cartel litigation, *ex post* the beginning of

⁵⁴ V Pinotti, M Sforza and N di Castelnuovo, 'Italy Chapter – Cartels' in N Parr and C Hammon (eds), *Cartels, Enforcement, Appeals & Damages actions* (Global Legal Group 2012)118.

⁵⁵ Procedure of 'non-contestation des griefs', conditions set out in Article L. 464-2 III, Code de Commerce.

⁵⁶ Autorité de la Concurrence (n 18) para 31.

⁵⁷ P Hubert and K Schallenberg, 'Moving in the right direction, France is taking antitrust compliance very seriously' (2012) Competition Law Insight 18.

⁵⁸ A list of decisions in which compliance programmes were considered can be found on the Autorité de la Concurrence website, available at

<http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=428>.

⁵⁹ Autorité de la Concurrence, Décision 12-D-10 du 20 mars 2012 relative à des pratiques mises en œuvre dans le secteur de l'alimentation pour chiens et chats, para 309 and 311.

⁶⁰ However, if a company does not qualify for leniency, it may receive a fine reduction if it had effective corporate compliance at the time of the infringement, provided that it can prove that the infringement ceased earlier than the start of the investigation. This concerns non-horizontal agreements cases. Autorité de la Concurrence (n 18) para 28.

⁶¹ *Ibid* para 23 and 27.

the investigation. As a result, compared to other regulatory approaches, France stands towards the right extreme of the continuum.

The Netherlands - *Post-factum*

The competition authority of the Netherlands ('NMa' until 1 April 2013, now Autoriteit Consument en Markt (ACM)) also has experience of providing incentives in a litigation context. In 2006 and 2007, following complaints about possible anti-competitive behaviour, the NMa started investigations in the pharmacy, real estate and advertising sectors. In the first two sectors, the NMa ended its investigation upon commitments offered by the members of the industry associations to implement compliance programmes. In the advertising sector, the NMa stopped its investigation due to a lack of evidence, and it welcomed the initiative by three large publishers to implement compliance programmes.⁶² Therefore, the Netherlands is also inclined to consider, in some cases, well-conceived compliance programmes in the context of an antitrust investigation.

1.2.1.2.2 Positive incentives

Brazil's regulatory approach entails a quite unique certification system. In Brazil, Ordinance No 14/2004 sets out the requirements for an effective compliance programme.⁶³ If a company's compliance programme meets those requirements, a certification of quality is issued by the Brazilian competition authority. The certificate confirms the existence of a compliance programme and attests that senior executives have taken certain steps to promote a culture of compliance within the company. Valid for two years, the certificate is delivered upon the receipt of documents describing the standards and procedures that employees need to follow, and upon the designation of managers in charge of coordinating and supervising the compliance programme's objectives.⁶⁴ In 2009, Ordinance No. 14 was amended to remove the possibility of convicted companies requesting the analysis of their certified compliance programme for a reduction in the level of the fine.⁶⁵ This means that the advantage attached to the

⁶² The ICC, 'Promoting Antitrust Compliance: the various approaches of national antitrust' (2011) 3.

⁶³ OECD, Annual Report on Competition Policy Developments in Brazil (2010), para 18.

⁶⁴ ICC (n 62) 6-7.

⁶⁵ MC de Azevedo Morgulis and L Inácio de Souza, 'Brazil: Compliance' (2013) Global Competition Review, *The Antitrust Review of the Americas 2013*, Section 5: Brazil. It seems that it was removed due to the fact that the potential non-objective benefit did not match the burden of certification for companies.

certification can no longer produce a defensive incentive in the event of a future conviction. There is very little experience with such certification system, probably explained by the amendment of the Ordinance, which may have reduced the incentive of companies to seek certification.

Other legal systems offer some positive incentives for the implementation of effective compliance programmes. Korea is known for reducing the severity of sanctions, not only with regard to rewarding an effective compliance programme but also for the use of the programme in its promotional materials.⁶⁶ Australia has developed a standard for compliance programmes, which consists of guidance principles that are provided to companies (that are not specific to competition law).⁶⁷ In parallel, the Australian competition authority may consider compliance measures as an acceptable formal administrative undertaking, in the context of a settlement procedure.⁶⁸

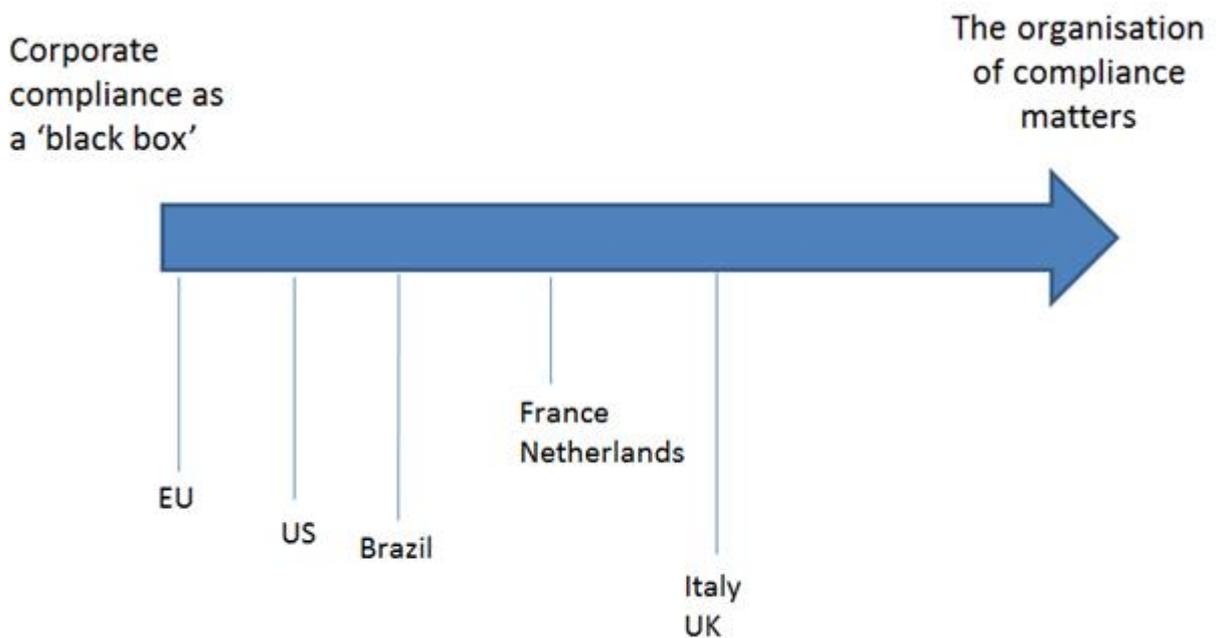


Figure 1 – *A continuum of regulatory approaches*

This continuum summarises the conclusion for the different regulatory approaches. The ordering on the continuum does not rely on specific measures.

⁶⁶ ICC (n 62) 6.

⁶⁷ See further developments below at 1.3.2.2.

⁶⁸ Australian Trade Practices Act 1974, s 87B.

1.2.1.3 Comparison with anti-corruption regulations

Anti-corruption policies across the jurisdictions offer an interesting point of comparison with competition policies, with regard to the manner in which they consider compliance programmes. The aim is to understand the extent to which approaches to compliance programmes are specific to competition law. Only a few competition policies give credit for compliance programmes in litigation, granting a maximum of a 10% reduction in the fine. In contrast some anti-corruption laws in the same jurisdictions offer the possibility that companies can be relieved from anti-corruption completely, on grounds related to compliance programmes. US antitrust policy is almost quasi-neutral to compliance programmes in the setting of fines. In comparison, the US anti-corruption policy foresees the possibility of not prosecuting the company at all, provided that it has an effective compliance programme:

Nine factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements:

[...]

- the existence and effectiveness of the corporation's pre-existing compliance program⁶⁹

In the case of prosecution, companies can receive a reduction in their fine for having an effective compliance programme, according to the Sentencing Guidelines provisions. In contrast, the antitrust provisions fall short of those provisions.⁷⁰ The Morgan Stanley case, in which the company avoided charges despite corruption acts committed by a managing director, exemplifies such contrasting approach.⁷¹ The US antitrust approach lies towards the left extreme of the continuum, while it stands towards the right extreme in the context of anti-corruption.⁷²

⁶⁹ The Criminal Division of the DoJ and the Enforcement Division of the US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act (2012) 53.

⁷⁰ See 1.2.1.1.

⁷¹ DoJ, 'Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA', Press release available at <<http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>>.

⁷² For a discussion of this contrasted approach see section 1.2.2.1.

Anti-corruption legislation is defined at EU level by a framework decision of the Council.⁷³ Member States are free to implement measures in order to achieve the required goals set out in the decision. Therefore, national governments define their regulatory approaches towards compliance programmes in that area.

National anti-corruption policies also display a contrasting approach to compliance programmes. In the UK, Section 7 of the Bribery Act 2010 provides that companies can defend themselves from being liable for an employee's illegal conduct if, 'adequate procedures' are put in place by companies'.⁷⁴ In Italy, anti-corruption legislation also entails the consideration of compliance programmes as part of a company's defence, with a possible reduction in the level of the fine.⁷⁵ In France, anti-corruption law primarily targets perpetrators that are personally and criminally liable for such violations. In addition, companies are also criminally liable for the wrongdoing of their employees.⁷⁶ In the Netherlands - although not systematically- companies are criminally liable for the wrongdoing of their employees. A defence is available to them based on grounds related to 'meaningful' compliance efforts.⁷⁷ Recently enacted, the Brazilian Anti-Corruption Law introduced the liability of companies for the misconduct of their employees. Contrary to corporate liability in the field of competition law, judicial and administrative bodies can take compliance programmes into account in the setting of fines.⁷⁸

⁷³ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, [2003] OJ L192/54, art 5-6.

⁷⁴ UK Bribery Act, s 7 (2): Evidence brought by the company in their defence will be analysed on a case-by-case basis, in light of matters such as the level of control over the activities of the responsible employee and the level of corruption that requires prevention. Ministry of Justice, 'Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing' (2010) para 43.

⁷⁵ Decreto Legge no. 231/2001 a company can demonstrate that, before the violation was committed, it adopted and effectively implemented a model of organisation, management and control.

⁷⁶ International corruption: Articles 435-1 and seq of the French Criminal Code (French Statute of 13 November 2007, as amended by French Statute of 17 May 2011) Domestic corruption: Articles 432-11 and seq, 433-1 and seq, of the French Criminal Code (persons holding a public function) and Articles 445-1 and seq of the French Criminal Code (persons not holding a public function). In a pioneering decision in 2012, the French tribunal of commerce prosecuted the company Safran for corruption acts committed in Nigeria, while relaxing the responsible individuals from liability. Les Echos, 'Safran condamné pour corruption active' (2012) available at http://www.lesechos.fr/05/09/2012/lesechos.fr/0202249707571_safran-condamne-pour-corruption-active.htm

⁷⁷ OECD, 'Phase 3 Report on implementing the OECD anti-bribery convention in the Netherlands', para 37 available at <http://www.oecd.org/daf/anti-bribery/Netherlandsphase3reportEN.pdf>.

⁷⁸ Further guidance as to the manner in which compliance programmes will be evaluated will be issued. Felsberg e Associados, 'Brazil Enacts New Anti-Corruption Law' (2013) Mondaq available at <http://www.mondaq.com/x/258268/Constitutional+Administrative+Law/Brazil+enacts+new+AntiCorruption+Law>.

The contrast in regulatory positions towards compliance programmes is even perceptible in OECD documentation. In anti-corruption, the provision of positive incentives for the adoption of effective compliance measures is clearly advocated.⁷⁹ In contrast, the OECD report of the roundtable on Promoting Compliance with Competition Law in 2011 illustrates much more mitigated attitudes of its participants towards the reward for compliance programmes.⁸⁰

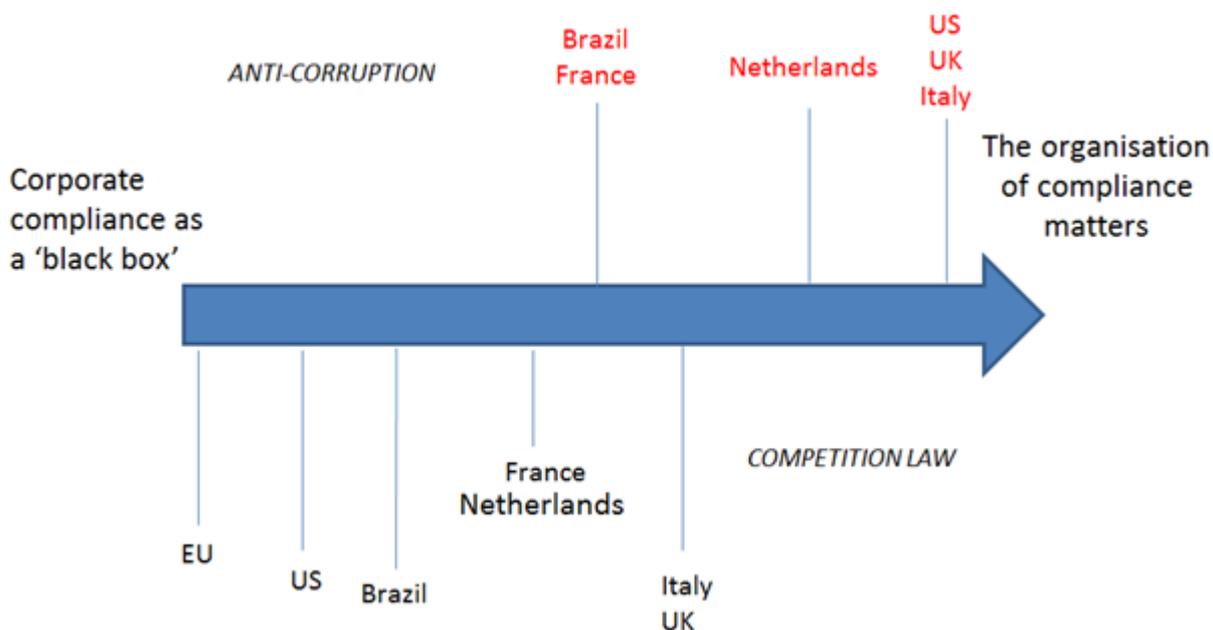


Figure 2 – A continuum of regulatory approaches: competition law and anti-corruption

In anti-corruption, companies have a greater chance of avoiding liability, due not only to the consideration of compliance efforts, but also due to a different approach to liability, in the first place. The continuum does not strictly distinguish strictly those two cases.

The comparison between the anti-corruption and the competition law regulatory approaches reveals an interesting contrast. (Figure 2) Anti-corruption regulations seem much less reluctant to open the ‘black box’ of compliance than competition authorities, even for a given country. The practice of producing audit reports and issuing certificates seems better developed in the field of anti- corruption.⁸¹ This may illustrate the fact that

⁷⁹ OECD, Working Group on Bribery in International Business Transactions, ‘Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions’ (2009) para 9.

⁸⁰ OECD, Policy Roundtable, ‘Promoting Compliance with Competition Law’ (2011) 14-15. Report available at <<http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>>.

⁸¹ See for example: <<http://www.mazars.fr/Accueil/Expertise/Audit-financier/Certification-Anti-Corruption>> and <<http://ethic-intelligence.com/about-us>>.

a company has more chance of avoiding liability in that field. An examination of the regulatory approaches indicates a clear difference in liability regimes, in the first place. In most of the jurisdictions under examination, companies may not be automatically charged if corruption acts are committed by an employee. In contrast, ‘undertakings’ are the designated subjects of competition law infringement decisions.⁸² Building on these legal insights, the next section will discuss the nature of the two types of infringements.

1.2.2 Opening the black box of compliance: should the organisation (of compliance) matter?

The scholarly debate *Wils v. Geradin* illustrates the regulatory hesitation as to whether or not to open the ‘black box’ of compliance. *Wils* suggests that competition authorities should solely regard the outcome of compliance programmes, while *Geradin* advocates giving credit for companies’ efforts with respect to the implementation of effective compliance programmes. Discussing such a question, which entails assessing the arguments and taking a position in the scholarly debate, needs to be done in the light of several other issues. The first set of questions concerns the nature of the infringement of competition law by companies and their individuals. Comparing the antitrust approach to compliance programmes with other areas of law requires, in the first place, a discussion of the specificity of antitrust infringement. In this respect, it is necessary to explain the foundations of this type of corporate crime, and to understand how the benefits are divided between the different actors in the company. **(1.2.2.1)** Second, the desirability to consider compliance programmes needs to be discussed in the light of other enforcement instruments, such as sanctions. As with any regulatory approach, the regulatory approach to compliance programmes is designed to impact the incentives (*ex ante* or *ex post*) of economic actors. Therefore, it is necessary to take into account the other enforcement instruments such as sanctions and leniency that modify the incentive structure of the actors within the company.⁸³ **(1.2.2.2)**

⁸² See **Error! Reference source not found.**

⁸³ Sanctions and leniency policy modify the structure of incentives within the company.

1.2.2.1 The nature of antitrust infringement: a specific regulatory approach?

The first set of question relates to the nature of the infringement of competition law by companies and their individuals.⁸⁴ Corruption refers to the misuse of public power for private benefit.⁸⁵ It can take the form of bribing officials with money, extortion, embezzlement or fraud. For the purpose of this section, no distinction between the different types of corruption will be made. Corruption emanating from companies will be the focus. Both corruption and cartel practices can be seen as unfair practices affecting the rules of competition and business between different players in a market. In companies, anti-corruption and antitrust compliance are often addressed together. However, a company can be relieved of liability on corporate measures grounds, in the case an act of corruption, but not in the case of a collusive behaviour committed by an employee. How different is antitrust infringement from corruption committed in a company? Does antitrust infringement resemble other types of white collar crimes, such as bribery and embezzlement, which affect companies adversely? Understanding the nature of antitrust infringement requires a comparison of several dimensions of the infringement, with that of corruption: first, one must explain whether the decision to engage in a cartel differs from the decision to engage in corruption practices. Do cartel practices emanate from the top of the hierarchy? In contrast, what kind of position is occupied by the individuals engaging in corruption? Second, attention must be devoted to the manner in which the infringement operates within the structure of the company: are cartel practices operated through the company's business processes? In contrast, do corruption practices stem from isolated act of 'rogue' employees? Finally, understanding how the benefits of cartel practices are divided between the company's actors provides further insight as to the potential nature of the violation. Abstracting from the morale dimension of both types of crimes, I will now focus on the dimensions of the wrongdoing that are specifically related to the company.

⁸⁴ As raised both by Wils and Geradin articles (n 20).

⁸⁵ S Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press 1999) 91. OECD glossary of statistical terms: 'active or passive misuse of the powers of Public officials (appointed or elected) for private financial or other benefits.'

Cartel practices typically involve senior executives of companies.⁸⁶ This is one of the reasons why the DoJ Antitrust Division refuses to give credit for a compliance programme in antitrust.⁸⁷ The systematic involvement of senior executives is questioned in itself. Sales people - not necessarily at a high level within the hierarchy - may initiate collusive practices. Also, the complex corporate structure of some companies implies that a subsidiary's senior executives may take part in a cartel, without the senior executives of the whole undertaking being involved. In addition, such characteristics of antitrust infringement also seem to be shared with other types of corporate crimes. This is exemplified by the Siemens corruption scandal, where senior managers, up to board level, were directly involved in the policy of making corrupt payments.⁸⁸ Whilst Siemens was heavily fined both in Germany and in the US, a defence based on compliance efforts remains a possibility: the involvement of an employee in a position of authority, in cases other than antitrust, does not preclude the consideration of a company's compliance efforts. The US Sentencing Guidelines were amended in 2010 to establish conditions for companies to obtain credit for their compliance programmes even when senior people are involved.⁸⁹ Despite corruption acts being committed by one of Morgan Stanley's managing directors, the company avoided liability for violating anti-corruption regulation, on grounds related to the compliance procedures in place.⁹⁰ Although cartel practices seem to involve a higher level of employees than in

⁸⁶ A Stephan 'See no Evil: Cartels and the Limits of Antitrust Compliance Programs' (2010) 31 The Company Lawyer 231, 236. In some cases the top level of management were personally involved, and in other cases the top management were permitting the collusion while not being directly involved.

⁸⁷ JE Murphy, 'Making The Sentencing Guidelines Message Complete' Letter to the Department of Justice: Proposed Revision to the Sentencing Guide available at <<http://www.compliance-network.com/wp-content/uploads/2012/08/4-5-13-filing-.pdf>>; M Volkov, 'Antitrust Compliance and Credit for an Effective Compliance Program'; <<http://corruptioncrimecompliance.com/2013/09/antitrust-compliance-and-credit-for-an-effective-compliance-program/>>.

⁸⁸ 'Statement of Siemens Aktiengesellschaft: Investigation and Summary of Findings with respect to the Proceedings in Munich and the US' 11-12.

Available at <<http://www.siemens.com/press/pool/de/events/2008-12-PK/summary-e.pdf>>.

⁸⁹ See 1.2.1.1. US Sentencing Guidelines manual (2012) chapter 8, (f)(3)(C)(i) and §11.

⁹⁰ 'Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws.[...]. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners.[...] After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct.'

DoJ, Press release available at <<http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>>.

corruption in general, this is not necessarily always the case. Therefore it is advocated that no absolute rule can be established on the basis of facts that may not always be verified.⁹¹

Another possible aspect of the uniqueness of antitrust infringement is that it goes to the 'heart of businesses'. The DoJ Antitrust Division advances this specificity of antitrust infringement to explain that compliance efforts can never be considered.⁹² Cartels appearing as the operational mode in use in the whole industry certainly constitute the business mode in itself.⁹³ However, price-fixing practices can also originate from the isolated actions of sales employees who depart from accepted business standards. Once more the example of the Siemens corruption scandal shows that a violation as a business operation standard is not the exclusivity of antitrust infringement. In that case, the corruption seemed to have been organised as a 'standard operating procedure'.⁹⁴ Cash desks were located within the company so that employees could withdraw large sums of cash up to one million euros at a time. In addition, Post-it notes were used to sign payment authorisations so that the identity of the subscriber could be concealed in case of payment control.⁹⁵ Most corruption cases do not seem as organised as the Siemens case. However, the widespread use of corruption in some countries may suggest that companies take into account of such reality in their standard business practices.⁹⁶ Thus, competition authorities disregard compliance efforts because of characteristics that cannot systematically be attributed to the nature of antitrust infringement.

Finally, understanding how the benefits of cartel practices are divided between the company's actors provides further insight into the potential nature of the violation. Competition authorities are reluctant to consider compliance programmes because the company seems largely to benefit from the colluded prices. The profitability of an undetected and sustained cartel is not questioned.⁹⁷ A breach of anti-corruption law can also bring considerable economic advantages. Bribing an official with money can serve

⁹¹ D Geradin (n 20) 329 and JE Murphy (87) 7.

⁹² United States Attorney's Manual 9-28.400, Special Policy Concerns (2008)

⁹³ J Sonnenfeld and PR Lawrence (n 7) Examples of industries where price-fixing was widespread in the industry.

⁹⁴ Press Release, Department. of Justice, 'Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines: 'bribery was nothing less than standard operating procedure for Siemens'.

⁹⁵ K Sidhu, 'Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal' (2009) 10 German Law Journal 1343, 1346.

⁹⁶ Ibid. However, this does not seem to be the case in the jurisdictions of interest in this paper.

⁹⁷ See Error! Reference source not found..

the purpose of getting favoured treatment in contracts, concessions or licencing processes, or of obtaining some relevant information or influencing the terms of contracts. The economic benefits stem from the substantial competitive advantage over other companies, acquired outside the scope of the fair competitive process.⁹⁸ Therefore, a breach of either antitrust or anti-corruption law by an employee can bring considerable economic advantage to their company. Cartel decision-making and operation involve different types of actors within the firm. The cost and benefit of a cartel engagement therefore differ from one actor to another. These different types of agency relation, which are not specific to antitrust violation, suggest that considering a company as acting in unity of will and action may yield erroneous conclusions. The same considerations surely hold for corruption infringements.⁹⁹ Further developments on the complexity of internal relations in the context of a corporate crime will be provided in the next section.

No definite answer emerged from the comparison of antitrust infringement with corruption. Even though cartel offence on average may take place at a higher level than corruption acts, I take the view that this does not justify a systematic rejection of a company's compliance efforts. Therefore, the specific nature of antitrust infringement does not provide a satisfying justification for different regulatory approaches towards compliance programmes.

1.2.2.2 The articulation with sanctions: a matter of corporate governance

The previous section discussed the nature of the engagement of a company into an illegal practice. This section will consider antitrust infringements in the longer-run, that is, when the cartel is detected and sanctioned. Discussing the necessity for competition authorities to consider compliance programmes requires analysing its potential articulation with sanctions. It has been argued that sanctions that target individuals in addition to companies are desirable whenever the corporate structure is such that it is

⁹⁸ R Calderón Cuadrado and JL Alvarez Arce, 'The Complexity of Corruption: Nature and Ethical Suggestions': Working Paper 05/06 Facultad de Ciencias Económicas y Empresariales Universidad de Navarra 26-27.

⁹⁹ Acknowledging the need to understand a more complex view of corporate crime does not imply that companies should not be responsible for their employees' acts.

difficult for shareholders to have a tight control over the actions of executives.¹⁰⁰ Similarly, this paper contends that the parameters of corporate governance determine the desirability of considering compliance programmes, when taking into account their interplay with sanction policy. Insights into anti-corruption liability regimes will shed some light on a possible different approach to compliance programmes.

This section will assume the value and effectiveness of compliance programmes. As explained before, there is an increasing awareness among regulators and companies of the value of procedures and trainings, which need to be put in place to achieve a culture of compliance. While it is difficult to ascertain the effectiveness of compliance programmes in a systematic fashion, the value of taking organisational steps towards compliance programmes seems nonetheless to be recognised. The more practical dimension of the value and effectiveness of compliance programmes will be addressed in the second section of this paper.

1.2.2.2.1 Compliance programmes in light of the agency relation

It has been argued that the impact of different enforcement instruments on the agency relation determine the effectiveness of such instruments.¹⁰¹ Along the same logic, this section will discuss how giving credit to compliance programmes would impact the incentives in the agency relation. This will determine the desirability to ‘open the black box’ of compliance, in each of the different sanctions scheme in place.

1.2.2.2.2 Considering compliance programmes in the case of strict corporate liability

First of all, a very important element of the effectiveness of sanctions is the perceived probability that an illegal act is detected. The threat of a jail sentence or a high pecuniary sanction deters the wrongdoing only if detection can be expected. An important value of considering compliance programmes, in the presence of corporate and individual liability, stems from the informational advantage held by the company. If the probability of cartel detection is low, harsh penalties may not translate into

¹⁰⁰ F. Thépot, *The Interaction between Competition Law and Corporate Governance: Opening the ‘Black Box’* PhD Thesis, 2014.

¹⁰¹ *Ibid.*

organisational compliance.¹⁰² The remainder of this section will assume that detection can be expected.

Corporate liability, in the absence of liability of individuals exacerbates the agency problem between shareholders and managers. This is because it imposes the sanction on shareholders and not on the responsible managers.¹⁰³ Therefore, a company that is willing to reduce the agency problem needs to incur some costs. To do so a company can seek to mitigate the risk that individuals expose the company to liability.¹⁰⁴ Therefore, some authors consider, as a result of strict corporate liability, that companies have a natural incentive to implement a compliance programme.

However, it is argued that strict corporate liability is optimal only if it induces ‘firms to implement optimal compliance programmes, self-report, and cooperate with the authorities.’¹⁰⁵ Corporate liability does not automatically translate into corporate compliance.¹⁰⁶ First, the incentive to adopt compliance programmes may be mitigated by the ‘perverse’ effects of strict corporate liability. A company may fear that implementing internal measures to prevent and detect the wrongdoing of its employees will increase the probability of detection.¹⁰⁷ In weighing the costs and benefits of implementing a compliance programme, a company may decide not to incur any of those expenses if it expects that the costs of detection are higher than the expected benefit of detecting the crime internally.

In addition, the view that companies have ‘effective methods of preventing individuals from committing acts that impose huge liabilities on them’¹⁰⁸ needs to be mitigated. It has been argued that corporate liability is not effective if the mismatch of interest is too severe, because companies may have neither the incentive nor the means to address

¹⁰² For more discussion on the importance of the probability of detection see Error! Reference source not found..

¹⁰³ Assuming that managers do not hold a significant part of the stock, in which case the agency problem is reduced.

¹⁰⁴ Of course this depends on the level of the fine and the probability of detection.

¹⁰⁵ ‘[C]orporate criminal sanctions will not deter corporate crime effectively unless they induce corporate policing: specifically, monitoring, self-reporting, and cooperation’ J Arlen ‘The Failure of the Organizational Sentencing Guidelines’ (2012) 66 University of Miami Law Review 321, 336.

¹⁰⁶ DD Sokol (n 2).

¹⁰⁷ J Arlen, ‘The Potentially Perverse Effects of Corporate Criminal Liability’ (1994) 23 The Journal of Legal Studies 833-867.

¹⁰⁸ RA Posner, *Antitrust Law: an Economic Perspective* (University of Chicago Press 1976) 225 in WPJ Wils, *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International 2002)200.

it.¹⁰⁹ The extent to which a company is capable of monitoring its employees adequately depends on the quality of corporate governance in place. Corporate governance schemes that fail to reach the objectives for which they have been designed, are not likely to be highly effective in preventing individuals from committing illegal acts. Considering compliance programmes can help mitigate the discrepancy between managers and shareholders, in a manner that makes corporate liability more effective. Therefore, compliance programmes can complement corporate liability regimes by addressing the internal workings of companies, especially in cases where companies have neither the incentives nor the means to address such issues internally.

1.2.2.2.3 Considering compliance programmes in the case of individual liability

Introducing individual sanctions may reduce the moral hazard situation that characterises collusive price-fixing conduct in a regime of strict corporate liability. In contrast to the previous situation, individuals can no longer operate behind the shield of their company's liability. What would be the value of giving credit to companies in that situation?

The introduction of individual sanctions typically concerns specific categories of people within the company's hierarchy. In the case of individual liability companies still face the risk of huge fines being imposed upon them. Even though the incentives of some individuals may be aligned with those of the company towards sanctions, there may still be some mismatch of interests between the individual and the company. By acting on the social norms of the company, effective compliance programmes may reduce the possible discrepancies that remain between the different actors, which in turn enhance the effectiveness of sanctions.

In the presence of individual sanctions, compliance programmes potentially have a greater effect on company's employees than when they are not personally liable. A senior executive may pay greater attention to compliance training if pecuniary or jail sanctions are part of the non-compliance risk. More efforts may be put towards internal prevention and detection in the presence of individual sanctions. Therefore, compliance programmes may yield much greater value to the company.

¹⁰⁹ F. Thépot (n 100).

This paper takes the view that authorities should leverage the potential of greater value that compliance programmes constitute for companies. Promoting compliance programmes puts the onus *ex ante* on prevention and internal detection rather than on prosecuting the infringement. Prosecuting an individual is indeed a costly and lengthy process that requires a huge amount of evidence, which makes it beneficial to ‘recruit’ companies in the fight against cartels.¹¹⁰ Competition authorities should seek to reward compliance programmes that affect social norms and direct corporate culture towards increased compliance.¹¹¹ A stronger corporate culture, in turn is deemed to reduce agency costs: if a culture of compliance emanates from the top and is spread throughout the company, less resources are necessary to monitor the lower layers of the hierarchy.¹¹² As a result, the reward for compliance programmes by competition authorities could have a ‘spillover’ effect of increasing compliance, through its potential effect on social norms, thereby offsetting the competition authorities’ resources that are dedicated to this. On a more conceptual note, competition policies that include individual sanctions admit the value of considering subunits – or ‘opening the black box’ of companies. Therefore, a similar interest in the internal working of companies could logically be dedicated in the context of compliance programmes.

1.2.2.2.4 Strict individual liability and compliance programmes for a full defence

It has been argued that individual sanctions are desirable when the situation of moral hazard between the responsible individual and the company’s owner is too large.¹¹³ Similarly, if companies were not liable for the infringement of their employees, a situation of moral hazard would arise between the individual and the company.¹¹⁴ Operating behind the shield of strict individual liability, companies would have little incentive to implement compliance programmes. Therefore, such a situation is not desirable from a competition policy perspective. A related question is whether or not enabling a company to obtain full defence for implementing an effective programme

¹¹⁰ JE Murphy and D Boehme, ‘Fear no evil: a compliance and ethics professionals’ response to Dr Stephan’ (2011) available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965733>.

¹¹¹ For a discussion of the concept of social norms see See A Stephan, ‘Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures’ (2010) 37 *Journal of Law and Society* 345, 354.

¹¹² DD Sokol (n 2) 216.

¹¹³ F. Thépot (n 100).

¹¹⁴ WPJ Wils (n 20) 59.

produces a situation of moral hazard similar to cases of strict individual liability. Would the incentives be reduced to prevent the infringement internally as this would be enough to show that adequate resources were in place? Once more, this is a matter of verifiability of the effectiveness of compliance programmes. If competition authorities are capable of verifying the effectiveness of compliance programmes, the option to grant full defence, under certain conditions, may be valuable. However if cosmetic compliance is made possible, a situation of moral hazard may arise, and produce effects that may be equivalent to when a company is not liable *ex ante*. This question of verifiability of effective compliance programmes will be addressed in section **1.3.2.1.2** of this paper.

1.2.2.2.5 The interplay of compliance programmes with leniency policy

Leniency programmes are designed to undermine cartel stability by granting immunity to companies that self-report, under certain conditions. It has been argued that giving credit to compliance programmes may undermine the value of leniency policy because it modifies the cost of detection, thereby changing the payoffs of the cartel members with regard to cartel activity. As a result the incentive would not be as strong to self-report if a company could otherwise benefit from a fine reduction for its compliance programme.¹¹⁵

This discrepancy of incentives to apply for leniency between a company and the individuals that exist when individuals are either not liable personally, or not covered by the immunity scheme, can be addressed by encouraging effective compliance programmes. A company that is better able to prevent and detect an infringement internally is also equipped with better tools to constitute a leniency application. In addition, this can help the company detect the infringement earlier than the other cartel members.¹¹⁶ The efficiency of leniency programmes can be enhanced if compliance programmes are encouraged.

¹¹⁵ Ibid 69.

¹¹⁶ D Geradin (n 20) 342.

1.2.2.3 Interaction with sanctions: comparison with anti-corruption liability regime

Anti-corruption and competition law seem to be characterised by different trends in the attribution of liability. In anti-corruption legislations, individuals are typically subject to criminal sanctions, while companies have not been systematically charged for corruption committed by their employees.¹¹⁷ In some jurisdictions, a company will be charged if it failed to introduce adequate internal measures. The consideration of a lack of compliance efforts may thus be crucial in determining responsibility in corruption cases. In the fight against anti-corruption, the OECD provides recommendations to countries to introduce corporate liability in addition to individual liability within a company.¹¹⁸ In contrast, in the area of competition law, discussions concern the adoption of sanctions targeted to individuals, to complement corporate liability.¹¹⁹ This illustrates that competition law and corruption laws, in spite of both targeting corporate crimes, evolve in different directions due to a different approach to liability in the first place. Therefore, contrasted approaches to compliance efforts may perhaps be explained by a difference of liability regimes in the first place. As such, the interaction with sanctions is of utmost importance to understand different approaches.

1.2.2.4 Intermediary conclusion: opening the ‘black box’ of compliance

Should competition policy open the ‘black box’ of corporate compliance? No definite answer emerged from the comparison of antitrust infringement and corruption. Even though on average cartel offence may take place at a higher level than corruption acts, this does not justify the systematic rejection of a company’s compliance efforts. A more insightful approach has been to consider compliance programmes in the light of other enforcement instruments. Adopting an agency theory approach enables one to take into account the incentives of the various actors in the cartel decision-making and operation within the firm. It seems desirable that competition authorities consider a company’s compliance effort for several reasons: for example, compliance programmes can help mitigate the mismatch of interests that alters the effectiveness of corporate sanctions.

¹¹⁷ Cf. section 1.2.1.3. In Brazil, corporate liability was introduced with the recently enacted anti-corruption Act; in France, companies were rarely charged for the wrongdoing of their employees.

¹¹⁸ OECD, Working Group on Bribery in International Business Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009).

¹¹⁹ OECD, Cartel Sanctions Against Individuals (2003).

The consideration of compliance programmes by competition authorities, under certain conditions, affects the payoffs of the actors engaged in a cartel, in a manner that may enhance the effectiveness of sanctions. When individuals are personally liable, compliance programmes potentially have a greater impact on the agent of the agency relation. Therefore, competition authorities should leverage this potential in considering a company's compliance effort. Competition authorities, facing the issue of cartel detection, would then benefit from the informational advantage that companies have with regard to their managers and employees. Leniency programmes are also deemed to have limited impact on cartel termination if there is a mismatch of interests between an individual and the company when seeking leniency. A compliance programme could then enhance the effectiveness of leniency if it enabled companies to better monitor and collect information relevant to a leniency application. For now, this paper takes the perhaps more cautious position that competition policies should consider compliance programmes, but not to the point of fully relieving a company from liability. A mixed regime of corporate liability with the possibility of obtaining a substantial sanction reduction is advocated here.¹²⁰ The following section will suggest how, in practice, competition authorities can 'open the black box' of compliance, without interfering with companies' internal matters.

1.3 For a pragmatic and incentive-based approach to corporate compliance

After exposing the theoretical foundations justifying the desirability of 'opening the black box' of corporate compliance, this section suggests a regulatory framework for considering compliance programmes. An adequate regulatory approach, it is argued, is one that incentivises companies to endorse a culture of compliance that is materialised by concrete organisational steps. Competition authorities should adopt a two-fold pragmatic attitude towards compliance programmes. First, competition authorities should build a positive discourse around the organisation of compliance, showing the potential strategic dimension of the voluntary implementation of compliance programmes. **(1.3.1)** Second, competition authorities should strengthen the potential strategic interest of companies, and leverage the benefit that can arise if companies adopt compliance programmes as part of their business strategy. Further options available to competition authorities to strengthen the potential strategic interest of companies will then be discussed. **(1.3.2)**

¹²⁰ Following, for example, the view of J. Arlen (n 107).

1.3.1 The potential strategic use of compliance programmes

Competition authorities should engage in building positive motivations for the voluntary implementation of compliance programmes. This section will outline the potential strategic dimension of the organisation of compliance that competition authorities should stress and promote. This section focuses on the organisational dimension of compliance. The value of compliance has been commented on extensively.¹²¹ Working in an ethical environment and avoiding the reputational and monetary cost of a prosecution are among the strategic interests of a company to comply with competition law. This section focuses on the organisational dimension of compliance. Assuming the value of complying with the law, I will focus on how the organisation of compliance can be a source of competitive advantage if it is addressed strategically.

1.3.1.1 Compliance and risk management

Companies face various regulatory constraints, which, in addition to other sources of uncertainty, constitute the risk that needs to be taken into account. Risk management is used by companies strategically in order to minimise the cost of the occurrence of uncertainty. Competition law is seen as a serious source of risk by companies, especially if company executives are liable for breach of competition law provisions.¹²² A direct consequence is that antitrust compliance needs to be organised so as to minimise the antitrust risk. Thus, compliance programmes can be seen as an ‘investment in risk management’.¹²³ In dealing with such a risk, companies can optimise the way in which they identify the business units and practices that are particularly prone to such practices and the manner they tackle them.¹²⁴ The effectiveness of resources and processes is partly determined by the assessment of risk in the first place. Prioritising high-risk areas and employees enables resources to be allocated in a strategic manner, which is paramount to the effectiveness of corporate compliance. In its Antitrust

¹²¹ Ibid.

¹²² Survey by Baker McKenzie (2008) ‘Anti-trust/competition was most frequently identified as the number one legal risk (18.1% of respondents) and was the most likely to be identified in the top three legal risks (38.6% of respondents)’. Survey showing that one core reason for implementing compliance programmes relates to legal risk faced by company executives. Götz, Herold, Paha – Research Project on Competition Law Compliance

¹²³ A Riley and M Bloom (n 4) 21.

¹²⁴ For example, there exists guidance on how to assess the legal antitrust risk. Baker McKenzie, ‘Conducting an Effective Global Antitrust/Competition Risk Assessment’ 2013 available at http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Antitrust%20&%20Competition/p_antitrust_strategiesriskassessment_mar13.pdf.

Compliance Toolkit, the International Chamber of Commerce provides practical guidance on how the antitrust risk should be assessed. It is suggested that a company should link its approach to antitrust risk to that of the company's general risk management methodology.¹²⁵ The CMA rightly provides a risk-based framework for the organisation of compliance, so that compliance can be tailored to the specific risks of a company.¹²⁶ As such, the CMA also encourages companies to address competition risk as part of a wider risk management strategy, which enables antitrust compliance to be more integrated into business practice. In other words, there is a strategic choice to be made, prior to the implementation of a compliance programme.

1.3.1.2 The organisation as a source of competitive advantage

As long as there is no prescription from the public authorities, companies are free to implement compliance within their budget constraints, tailored to the needs of the company.¹²⁷ This does not mean that the organisation of compliance does not require resources. Yet, there is room for using resources in a manner that confers competitive advantage over companies that would spend resources with a view to avoiding risk. For example, Murphy proposes an organisation of compliance to small companies for 'a Dollar a Day' that meets the principles set out in the US Sentencing Guidelines and OECD Good Practice Guidance.¹²⁸ The key is to use management tools to set up a culture of compliance, from the top, which is then materialised by concrete managerial steps to make the compliance happen. In other words, 'the same types of management tools that make a company run successfully also need to be used to make sure it runs legally and ethically.'¹²⁹ This also means that a company can incorporate antitrust compliance in other processes of internal control or existing programmes. As long as antitrust benefits from sufficient resources, a holistic approach to antitrust compliance presents a number of advantages. For example, if antitrust appears among other central

¹²⁵ ICC, 'The ICC Antitrust Compliance Toolkit, Practical antitrust compliance tools for SMEs and larger companies', 16.

Available at <<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Competition/ICC-Antitrust-Compliance-Toolkit/>>.

¹²⁶ OFT1340 (n 15).

¹²⁷ JE Murphy, 'A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs' (2010) available at <<http://www.hcca-info.org/Portals/0/PDFs/Resources/ResourceOverview/CEProgramDollarADay-Murphy.pdf>>.

¹²⁸ OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance (2010). This guidance particularly addresses compliance with anti-bribery rules, but set principles that can be applied to other areas of compliance.

¹²⁹ JE Murphy (n 127) 3-4.

corporate risks, appropriate procedures can be designed more easily and implemented consistently within the company.¹³⁰

The management of compliance may even be seen as an investment in improving the internal organisation of a company. Wagner and Dittmar explain how some companies have adopted a strategic approach to compliance with Sarbanes-Oxley regulations to improve the quality of their existing processes (internal control, audit management, documentation system...).¹³¹ Similar improvements could be witnessed in the context of competition law. Following convictions for antitrust or anti-bribery infringements, some companies reported drastic changes in their organisation of compliance.¹³² Changes aimed at strengthening compliance concerned the role of compliance and legal functions within the firm, as well as internal control processes. Surely these changes also serve wider purposes than just compliance with a specific area of the law. In addition, a company could also gain informational advantage if a compliance programme enhances the company's awareness and adaptability regarding changes in the law, which could affect business decisions.

Bagley also posits that legally astute management teams practise strategic compliance management in viewing the cost of compliance as an investment, not an expense. Instead of just complying with the letter of the law, they adopt operational changes that enable them to develop innovations based on regulatory obligations.¹³³ Companies that face budgetary constraints employ creative methods for the organisation of compliance. One company reported having developed a smartphone application for compliance purposes.¹³⁴ Companies that face the challenge of being very large corporations, spread across various countries, elaborate techniques to deliver training online in an interactive fashion. In these cases the companies can either make use of innovative tools that are in place, or create such tools that can then be used for other purposes.

¹³⁰ ICC (n 125) 7.

¹³¹ 'Two approaches to Sarbanes-Oxley predominate. Some executives dutifully meet SOX requirements, but at minimum cost and utilizing the fewest possible resources. Others leverage the resources expended on compliance to obtain a return on their investment' S Wagner and L Dittmar, 'The Unexpected Benefits of Sarbanes-Oxley' (2006) 84 Harvard Business Review 133.

¹³² Heads of competition law & compliance and general counsels of companies that have received major fines for cartel and corruption infringements.

¹³³ CE Bagley, *Winning legally: How to use the law to create value, marshal resources, and manage risk* (Harvard Business School Press 2005) in CE Bagley, 'Winning Legally: the Value of Legal Astuteness' (2008) 33 Academy of Management Review 378, 386.

¹³⁴ Interview with Associate General Counsel (competition) of a multi-national company.

1.3.1.3 *The external dimension of the strategic use of compliance*

Antitrust compliance may also be used strategically in the context of relations with third parties. The intuition, supported by some empirical studies, is that customers, suppliers and investors have an interest in interacting with a company that complies with competition law.¹³⁵ The interaction with such actors is crucial to the performance and development of a company. Therefore, companies may be willing to invest in compliance if they can signal to third parties that effective compliance steps have been undertaken. The question of compliance programmes' certification by competition authorities or NGOs will be discussed in the next section.

Investors may be reluctant to invest in companies that have a reputation for not complying with competition law. Gaining investors' confidence can confer a real strategic dimension to the organisation of compliance.¹³⁶ A company that fixes prices with its competitors is likely to offer prices to its customers that are inflated. A supplier may also be negatively affected by a downstream company that abuses its dominant position, or may not be able to sell its products at an interesting price if companies downstream collude or engage into bid-rigging. Codes of conduct, covering a wide range of compliance areas, to be signed off by business partners illustrate a strategic interest in dealing with compliant suppliers.¹³⁷

With a view to protecting themselves from purchasing from cartelised upstream industry, Deutsche Bahn is currently rolling out a system of 'cartel damages prevention'. The key idea is to increase compliance awareness among potential bidders. The system consists of identifying four categories of cartel risk among potential bidding companies. To each risk group are assigned various compliance requirements. The riskiest companies - those for instance for which an infringement decision has been issued - are requested to comply with a higher standard of compliance in order to participate in the tendering procedure launched by Deutsche Bahn. This includes a contractual clause of 'liquidity damages' that need to be paid to Deutsche Bahn in the

¹³⁵ Götz, Herold, Paha – Research Project on Competition Law Compliance

¹³⁶ Interviews with Heads of competition law of multinational companies (headquartered in UK, Germany, Switzerland and Netherlands).

¹³⁷ See for example code of conducts by Deutsche Bahn available at http://www.deutschebahn.com/file/3194198/data/businesspartners_code_of_conduct.pdf, and ThyssenKrupp available at http://www.thyssenkrupp.com/documents/einkauf/code_of_conduct/TKSCoC_en.pdf.

event of future cartel conviction. In addition, companies may even be excluded from a call for tenders. Categories of companies for which there exists clear suspicion of cartel risk, for example because of an on-going investigation, need to provide evidence of high compliance standards that are applied consistently within the company. Companies operating in industries that present characteristics prone to cartelisation must also comply with the compliance standards of cartel prevention defined by Deutsche Bahn. Finally, low risk companies can also receive compliance support and need to sign a general integrity clause.¹³⁸ This demonstrates a strong strategic incentive for companies to signal to third parties that compliance measures have been implemented internally. In the case of Deutsche Bahn, the third-party takes the initiative of imposing on its business partners a certain standard of compliance. Another company also reported the increasing importance of compliance programmes in convincing business partners of their reliability, in particular with respect to state-owned companies. Other companies could be willing to pro-actively signal the quality of their compliance organisation. In that context, the development of standards could enable companies to voluntarily adopt compliance programmes instead of merely complying with the requirements imposed by other companies. For example, a company reported that it would readily recognise a company's own programme if it were based on similar principles set out in their code of conduct.¹³⁹

A collective strategic interest in the organisation of compliance is witnessed in particular in the area of corruption. Collective actions are designed to create a business environment of compliance, in industries or countries that are particularly prone to corruption. Because a single company has no incentive to comply if corruption is a commonly accepted practice, collective efforts of compliance are more attractive to the business community. In antitrust, even though challenges of compliance may be different, similar actions could be undertaken by companies that find a strategic interest in cooperating in compliance.¹⁴⁰ However, the benefits of collective actions would need to be balanced with competition risks associated with any types of cooperation between competing companies. Collective actions may then be undertaken specifically to tackle risks of collusion in trade association meetings, which are typically prone to the

¹³⁸ Best in Procurement, Das Magazin für Manager, im Einkauf und Logistik, 'Kartell Prävention im Einkauf' (2013).

¹³⁹ Interview with Head of Competition Law & Compliance of a multinational company.

¹⁴⁰ World Bank Institute, Fighting corruption through collective action, presentation, available at <http://www.unglobalcompact.org/docs/news_events/8.1/fighting_corruption_through_collective_action.pdf>.

discussion of anti-competitive agreements.¹⁴¹ The ICC suggests undertaking due diligence on the activities of trade associations. Ensuring that a definite agenda of the meeting is circulated beforehand, and seeking legal advice before reaching agreements on potentially sensitive competition issues are examples of initiatives that help create a business environment of compliance with competition law, via the trade association.¹⁴² As suggested by the ICC, these steps can be undertaken by an individual company. One can imagine these measures being endorsed by the trade association, in order to set a clear compliance message for the collective benefit of company members. Once more, such a collective interest stems from the importance of having business partners and competitors playing by the same rules.

The antitrust risk presented by a company can also impact its relationships with various other actors. Customers may be reluctant to trust and cooperate with a company that has been convicted for an infringement of competition law. In addition, joint venture or merger projects may be undermined if the target company does not have adequate compliance procedures in place. The acquisition price can be affected if a company presents an antitrust risk that is not adequately mitigated by internal compliance procedures. In addition, it is very important for an acquiring company to ensure that a culture of compliance can be easily implemented post-merger. One company reported the increasing importance of compliance programmes in the context of mergers and acquisitions.¹⁴³ The ICC advocates and provides guidance on the conduct of antitrust due-diligence prior to entering into joint ventures or merger and acquisition deals. Due diligence consists of identifying the antitrust risk of the target and assessing how this risk could affect the acquiring company post-transaction. In that respect, due-diligence involves checking the history of antitrust convictions and verifying that a compliance programme is in place and that compliance is part of the corporate culture.¹⁴⁴

The exposition of all of the potential strategic benefits may suggest that companies have a natural incentive to implement effective compliance programmes. One could conclude that competition authorities do not need to provide further incentives. However, this

¹⁴¹ DoJ, JM Griffin, 'An Inside Look at a Cartel at Work: Common Characteristics of International Cartels' ABA Section of Antitrust Law 48th Annual Spring Meeting (2000). 'Another characteristic of international cartels is that they frequently use trade associations as a means of providing "cover" for their cartel activities.'

¹⁴² ICC (n 125) 53.

¹⁴³ Interview with the Head of competition law & compliance of a multi-national company.

¹⁴⁴ ICC (n 125) 54.

strategic dimension of compliance programmes is only a part of the bigger picture. Companies reported various types of challenges in the short-run. For example, companies, especially small ones, may have very limited resources to dedicate to competition compliance compared to other areas of compliance. Another challenge for large companies stems from the complex corporate structure of multinational companies. Delivering consistent but tailored compliance training is difficult for large companies. Added to the substantial benefit of not complying and to the difficulty that competition authorities have with regards to detecting cartels, challenges for organising compliance should be taken into account. In other words, competition authorities should convince companies that there is potential for a strategic organisation of compliance, and should steer such a strategic interest. As a result, positive discourse needs to be endorsed so that companies see compliance programmes not just as a burden to avoid risk but also as a potential source of value. In that respect, the French Competition Authority rightly employs a positive narrative in the guidance provided to companies: the guidance refers to the implementation programmes with terms such as ‘useful risk management’ or ‘winning investment’. The guidance outlines the ‘positive impacts in terms of [...] commercial development’ that can, among other things ‘increase the confidence of customers’. Therefore, the French Competition Authority encourages companies to ‘adopt proactive strategy’ and offers the possibility of granting a 10% reduction in the level of a fine in the context of commitments procedures, for ‘steering’ the company towards voluntary compliance with the rules.¹⁴⁵

Without considering the effect of this specific guidance, I take the view that competition authorities should aim to convince companies to pro-actively implement an effective compliance programme, but they should also acknowledge that they can leverage this effect by ‘steering’ voluntary implementation. Competition authorities are right not to interfere with companies’ internal matters as this may affect the freedom of enterprise, and impose an unnecessary burden on businesses. However, authorities should build on the positive motivations behind the organisation of compliance, and exploit the potential strategic interest of companies in the organisation of compliance. Authorities themselves have a strategic interest in promoting the implementation of compliance programmes: that of placing further emphasis on *ex ante* enforcement, and hence theoretically balancing the need (and cost of) *ex post* enforcement. Competition

¹⁴⁵ Autorité de la Concurrence (n 15).

authorities should direct their efforts, not only to detecting and punishing violations, but also to inducing the business community to direct the social norms towards more compliance.

1.3.2 For an incentive-based regulatory approach to compliance programmes.

This section will expose the manner in which competition authorities can steer the voluntary implementation of an effective compliance programme. Two options will be examined: first, the possibility of companies being rewarded (in the case of an antitrust conviction, settlement procedure, or outside the scope of an infringement); and, second, the possibility of certifying the adoption of corporate compliance.

1.3.2.1 Rewarding companies for the implementation of compliance programmes

Providing incentives to companies to implement compliance programmes in the form of reward poses a number of issues. Prior to discussing the manner in which competition authorities should reward companies, it is required to discuss the concept of ‘effective compliance programmes’. What steps undertaken by a company reflect the real endorsement of a compliance culture? While no one-size-fits-all detailed standard for corporate compliance can be established, the key foundations of an effective compliance programme will be outlined.

In addition, verifying and testing the effectiveness of compliance programmes is a core challenge in rewarding of compliance efforts. What constitutes ‘adequate procedures’? How can competition authorities make sure that they are not rewarding ‘cosmetic’ compliance programmes? A related issue stems from the possible perverse incentives provided by a badly designed reward system.

1.3.2.1.1 The key foundations of an effective compliance programme

As illustrated by the scholarly debate, one of the core issues around compliance programmes lies in the identification of what constitutes an effective compliance

programme. The OFT and the Autorité de la Concurrence commissioned studies to understand the drivers of compliance and to identify the steps that companies need to undertake in order to achieve compliance.¹⁴⁶ Subsequently, guidelines were issued by the authorities, outlining the key features of effective compliance programmes. Business organisations also provided guidance to the authorities, and the ICC even issued a guidance document. Based on all of this literature, as well as on interviews conducted with persons responsible for in-house competition law compliance, this section will briefly outline the key factors for a successful compliance programme.

More than the mere training sessions delivered to employees, a compliance programme encompasses all of the different types of compliance efforts and processes undertaken by a company. As a result, corporate compliance is a matter of degree and depends on resources allocated to achieving compliance.

The first essential foundation of effective corporate compliance lies in the culture embedded from the top of the hierarchy. For example, in one company, a strong culture of compliance throughout the organisation was partly explained by the personal strong commitment from the CEO due to his educational background.¹⁴⁷ The CMA describes how a clear and unambiguous commitment by senior management serves the purpose of setting the high compliance standard throughout the firm.¹⁴⁸ For such a core commitment to be strongly communicated within the company, it needs to be reflected in actions of the top management. To ensure that the senior management's commitment is supported by a real awareness of the organisation of compliance, the board members need to be part of the compliance effort. For example, having one board member who is expressly responsible for questions of compliance enables compliance issues to be steered from the top.¹⁴⁹ In addition, the board member responsible for compliance needs to be regularly supported by the compliance department.

Communication constitutes another key dimension of compliance programmes. Communicating a strong message of compliance throughout the organisation involves holding training sessions to teach employees about the compliance risks and procedures,

¹⁴⁶ OFT 1227, Drivers of Compliance and Non-compliance with Competition Law (2010); Autorité de la concurrence: Europe Economics (n 10)

¹⁴⁷ Interview with Head of Competition Law of a multinational company.

¹⁴⁸ OFT1340 (n 15) para 2.1-2.3.

¹⁴⁹ Even though it depends on the function of the board (supervisory or executive).

especially those exposed to competitors. In addition to delivering educational training on competition law, compliance programmes need to motivate the employees, so as to raise the compliance awareness within the company.¹⁵⁰ Therefore, compliance needs to work hand in hand with communication so as to ‘impact emotionally’ and avoid training fatigue. Communication is also essential with respect to relations with third parties. A written code of conduct supported by a strong compliance programme directed to business partners signals a clear commitment. As exposed previously, corporate compliance stands to be more effective if the business environment is compliant.

Related to the communication dimension, the organisation of compliance needs to be structured around an ‘ambassador’ of competition law compliance. With a sufficient degree of responsibility, this person, either as part of legal services or the compliance department needs to have room to advocate for compliance with competition law. The issue of compliance cannot be diluted and given a lower level of priority compared to other areas of business. Although especially true for large companies, the need for a ‘compliance ambassador’ also stands for smaller companies that can hand the compliance responsibility to someone who is particularly sensitive to this issue.

Training should not be the only dimension of the compliance programme. Effective corporate compliance entails procedures of prevention, detection and response. Training needs to be delivered in a targeted fashion to employees with a view to preventing them from putting the company at risk, including senior executives. In addition, an effective compliance programme needs to ensure that codes of conduct and training sessions translate into actual compliance. To do this, procedures to monitor risky business activities and provide legal advice need to be clearly established. Sophisticated techniques such as screening can be used to detect the red flags of cartel behaviour.¹⁵¹ In addition, the eventuality of an infringement needs to be addressed, for example by alert systems (including strong protections against retaliation) and credible sanctioning schemes including disciplining managers for failure to take reasonable steps to prevent and detect violations.¹⁵²

¹⁵⁰ Interview with Heads of compliance and general counsels of multi-national companies.

¹⁵¹ RM Abrantes-Metz, P Bajari and J Murphy, ‘Enhancing Compliance Programs Through Antitrust Screening’ (2010) 4.5 The Antitrust Counselor 4.

¹⁵² Eg. Canada Competition Bureau, Corporate Compliance (2010), para 4 ‘Basic requirements for a credible and effective corporate compliance program’ available at

1.3.2.1.2 The verifiability of compliance programmes

Most of the debate about compliance programmes crystallises around the verifiability of the quality of the compliance programme. Some argue that the inherent difficulty in evaluating a compliance effort may create perverse incentives: companies will then adopt ‘cosmetic’ compliance programmes to ensure a reduction in the level of the fine.¹⁵³ As a result, infringing competition law becomes less costly. This argument may be rejected on grounds similar to those advocating the use of leniency programmes. The fine eventually imposed no longer matches the gravity of the infringement, in order to stimulate the level of detection. Therefore, the competition authority operates a trade-off between reducing the potential deterrent effect of fines, at the benefit of an increased level of detection.

It is argued that the effectiveness of compliance programmes can be verified. The difficulty of testing the quality may stem from the hesitation of competition authorities to penetrate the boundaries of the firm. As exposed at several instances, undertakings are the object of competition law. Competition authorities, especially in the EU, are reluctant to address the internal workings of companies, including in the field of sanctions. As a result, competition authorities have rarely had the opportunity to really analyse competition law issues from the perspective of the company. The OFT and the French Competition Authority, as an example, commissioned studies to better understand the internal dimension of compliance.¹⁵⁴ Incidentally, those competition authorities subsequently admitted the possibility of considering compliance programmes.

In contrast, in anti-corruption, authorities have not been reluctant to address and learn about compliance programmes. For example, in the US, programmes are typically imposed on companies with monitors assigned to ensure that the programmes are implemented.¹⁵⁵ The authorities examine compliance programmes during their investigation. An agency will see company materials and interview company

<[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)>

The ICC (n 125) provides a whole range of practical solutions to implement an effective compliance programme, which are relevant not only to large companies, but also to those of a much smaller size that are constrained with resources.

¹⁵³ WJP Wils (n 20).

¹⁵⁴ Cf (n 146)

¹⁵⁵ <<http://www.ethic-intelligence.com/advisory-and-training/59-anti-corruption-compliance-monitoring/>>

employees; this process can reveal whether or not a programme is valid. The burden of proof is on the undertaking, so that it must prove each of the elements of an effective programme. Some agencies, such as the FBI in the US, have even implemented their own internal compliance programme.¹⁵⁶ In addition, the anti-corruption legislation targets individuals as well as companies.¹⁵⁷ Being more conversant with the internal dimension of the infringement, these authorities may possess better tools to assess the quality of compliance programmes. Therefore, it is argued that competition authorities should learn from the experience of authorities that manage to assess the quality of a compliance effort. Competition authority staff should strengthen their practical understanding of compliance by undertaking in-house training for example.¹⁵⁸

Based on the foundations of effective compliance programmes, tangible elements can be required by competition authorities to demonstrate appropriate compliance efforts. To attest that there is a core commitment to competition compliance, competition authorities could require evidence that compliance is being discussed regularly at board meetings and that senior management have attended training. The authority may also want to verify that there is an empowered, independent senior officer responsible for compliance, and the frequency with which the compliance unit reports to the board. The communication dimension of an effective compliance programme lies in internal communication and training material, considering both its accuracy and its emotional impact: the availability of a code of conduct adopted internally, and also directed to business partners, is part of compliance communication, but only if it is actually implemented. In addition, the mention of compliance in top executives' speeches or other internal communication, as well as the involvement of communication department in compliance can attest to an effective communication of compliance. The actual implementation of compliance can be evidenced by training attendance records, and through the simple act of talking to company employees during an investigation. In particular, competition authorities can request proof that senior executives, sales managers and other high-risk positions have attended training, and whether or not anyone was disciplined for not attending. Companies can also demonstrate that clear procedures are in place, in hiring employees (human resources can indicate that an

¹⁵⁶ See E Moschella, DoJ review: FBI's Integrity and Compliance Program <https://camlaw.rutgers.edu/sites/default/files/CEP_0312_Moschella.pdf>

¹⁵⁷ Cf 1.2.1.3

¹⁵⁸ Interview with General Counsel of a multi-national company: a Commission official asked how to know of the validity of a compliance programme. The general counsel responded in saying 'come on secondment'.

employee has no past history of antitrust infringement) and in monitoring risky business areas, such as trade association meetings. In addition, the availability of sanctioning procedures and the history of sanction cases are signs that compliance comprises a wider range of procedures than just training sessions. The availability of corporate compliance audit reports signals a willingness to continually adapt the compliance programme and to search for actual misconduct.¹⁵⁹

Based on the elements outlined, the validity of compliance efforts seems verifiable. However, such a process requires gathering and checking an amount of evidence and this incurs a cost. In addition, such an inquiry may interfere with a company's internal affairs and may concern sensitive information. Therefore, competition authorities should give credit to compliance programmes, but only in the context of an investigation. Upon cooperation and sufficient evidence of adequate compliance efforts, a company should benefit from a reduction - possibly substantial - in the level of the fine, assessed on a case-by-case basis. The amount of benefit given to a company for its programme should thus be along a continuum, reflecting the seriousness of the offence, any involvement of senior management on the one hand, and the degree of the programme diligence on the other hand. Because it holds an informational advantage over the competition authorities, the burden of proof should lie with the company. In terms of timing, rewarded compliance programmes may have proven effectiveness at the time of the infringement. A commitment from a company to introduce or improve an existing compliance programme may be rewarded.¹⁶⁰

However, the reward should not just focus on post-infringement compliance programmes. The objective is to encourage the implementation of compliance efforts *ex ante*. *Ex post* consideration of compliance may undermine the impact that such a reward is designed to have on the prevention of cartels in the first place. *Ex ante* consideration of compliance efforts also supports the view that in spite of all of the efforts to mitigate antitrust risk, a residual risk exists. Similarly to any other compliance area, in which the concept of residual risk is admitted, a company that organises compliance in the most effective manner still faces the eventuality that an individual may put the company at risk. In addition, such an occurrence typically involves hidden behaviour, which

¹⁵⁹ Based on an interview with the Head of competition law & compliance of a multi-national company.

¹⁶⁰ One may wonder whether, and how, compliance efforts with respect to third parties may be rewarded. While, in principle, this would promote the adoption of a culture of compliance within business networks (suppliers, customers), granting the reward may raise further legal issues if several undertakings are potentially involved. (eg. how to attribute the reward among the different undertakings, what types of evidence, and burden of proof issues)

complicates the risk mitigation. This view contrasts with that of the Commission, according to which a company's compliance efforts have necessarily failed in the case of a conviction.¹⁶¹

1.3.2.2 The question of certification and standards

The certification and standards for compliance programmes may further steer the voluntary implementation of compliance programmes by companies. As was suggested previously, a company may have a strategic incentive to signal that it has implemented an effective compliance programme. The use of certification based on a standard could help companies to implement compliance voluntarily, with broader objectives than solely to reduce antitrust risk. In the context of requirements imposed on suppliers or bidding companies, a widely accepted standard may encourage a company to voluntarily adopt a compliance programme on their own instead of adopting the principles imposed by the third-party company.

Initiatives to certify compliance programmes do exist. In Brazil, companies can obtain a certificate if their compliance programmes fulfil certain requirements.¹⁶² However, it seems that this certification system is no longer used by companies.¹⁶³ The non-governmental body ISO is currently reflecting on the adoption of a corporate compliance standard, based on the existing Australian/New Zealand 3806-2006 standard for compliance programmes. Not specific to competition compliance, this standard would provide principles and guidance for the design, implementation, maintenance and improvement of an effective compliance programme. The aim is to offer companies the possibility to demonstrate their commitment with compliance, based on a standard recognised internationally.¹⁶⁴ The current 3806-2006 standard sets out 12 principles grouped into four categories: commitment, implementation, monitoring and maintenance, and continual improvement. These aspirational principles set the basis for a voluntarily implementation by companies.

¹⁶¹ While in the field of corruption the DoJ understands that 'no compliance program can ever prevent all criminal activity by a corporation's employees' and they do not hold companies to a standard of perfection. United States Attorney's Manual, 9-28.400.

¹⁶² Ordinance No. 14, Brazilian Secretariat of Economic Law. However, a new competition law regime is foreseen and an increasing interest in competition compliance has been reported; this can probably be attributed to a general trend and a global move against corruption.

¹⁶³ Email exchange with Brazilian lawyers.

¹⁶⁴ ISO, 'New work item proposal – Compliance programs', available at http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Links%20Within%20Stories/ISO_NWIP_Compliance%20Progams.pdf.

In 2011, The German Public Auditors' Institute put in place an audit standard called the 'Principles of proper auditing of compliance management system'. The standard encompasses three layers of audit. The first type of audit consists of assessing the conceptual content and documentation of the compliance system. The actual design corresponding to the compliance principles set out by the company is the object of the second layer of the audit. The effectiveness of the processes in place is tested in the third type of audit.¹⁶⁵ Management and supervisory boards can then request a targeted type of auditing, according to the particularities of their company. ThyssenKrupp AG was the first company to have its compliance programme audited following this standard, and it advertised this certification widely.¹⁶⁶

Certification and standards for compliance programmes seem to be a good concept, but they are difficult to establish for various reasons. Businesses welcome these initiatives, while acknowledging the lack of experience and the potential cost of conducting an external audit. In addition, the current standard and certification systems rely on wide and vague concepts. A more effective approach to certification would be to elaborate a standard based on flexible but more concrete requirements. They could also suggest a desired number of compliance officers, frequency of trainings, and indicate the types of procedures that need to be available for a certain range of size and the degree of risk.¹⁶⁷ Following a procedure of certification (or equivalent) by an external body, companies could be granted a label of 'antitrust compliance' that would send a positive signal to third parties.¹⁶⁸ Companies could also have their antitrust compliance system certified as part of other compliance areas. The voluntary dimension of the adoption of such a standard would reduce the risk of fraudulent compliance programmes.

Resources spent on voluntary compliance standards would constitute a strategic investment for a company, which would be decided along with other strategies, possibly sending a strong signal to third parties. Also, the certification of a compliance programme may facilitate cooperation with competition authorities in the event of an investigation. The compliance incentive would certainly be strengthened if the certification were coupled with the possibility of obtaining a fine reduction, under

¹⁶⁵ German Public Auditors' Institute available at http://www.idw.de/idw/download/Summary_IDW_AssS_980.pdf?id=611304&property=Datei.

¹⁶⁶ Translated and shorter version of the audit report; available at <http://www.thyssenkrupp.com/documents/investor/TK-PS-980-Short-version-30-09-2011.pdf>.

¹⁶⁷ Interview with the head of competition law & compliance of a multi-national company.

¹⁶⁸ Although one must bear in mind the potential risks of setting up too detailed standards – the minimum standards becoming the maximum.

conditions described above. The investment in compliance certification should remain a business incentive rather than a systematic guarantee of benefitting from a fine reduction. Competition authorities should take the opportunity to engage in such an exercise, as it constitutes a potential source of voluntary implementation of effective compliance programmes.

1.4 Conclusion

This paper provided theoretical and practical arguments supporting the desirability of opening the black box of compliance programmes. Competition authorities rarely give credit to companies' compliance efforts. In contrast, other areas of compliance, namely anti-corruption regulations seem to consider compliance programmes differently. No systematic difference in the nature of antitrust and corruption infringements can explain these divergent regulatory approaches. Rather, regulators in both fields seem to display different mind-sets. Competition rules that target the undertaking rather than the individual, as was seen, seem more hesitant to address the internal dimension of companies than anti-corruption regulators.

The desirability of considering compliance programmes has been analysed in the light of enforcement instruments. The interaction of compliance programmes and enforcement instruments, such as sanctions, impacts the incentive structure of the actors of the agency relation that are, the shareholders and managers. The diverging interests in the agency relation undermine the effectiveness of sanctions. In the light of those impacts, compliance programmes can help address the mismatch of interest between shareholders and managers, or address the potential shortcomings of sanction policies. In spite of the increasing levels of fines and the introduction of individual sanctions, competition authorities face the difficulty of preventing and detecting cartels. The consideration of compliance programmes could then leverage the potential deterrent effect of harsh sanctions.

Companies can find a strategic interest in the organisation of compliance, with respect to internal processes and in relations with business partners and potential investors. It is argued that competition authorities should steer this strategic interest and provide incentives for the voluntary implementation of effective compliance programmes. Giving credit to effective compliance programmes seems possible and desirable in the context of an investigation. Competition authorities should also engage further with the

development of certification and standards that would facilitate the strategic use of compliance programmes by companies. Although not systematically, certification coupled with a defensive incentive could further strengthen the compliance efforts of companies. Greater engagement with companies' compliance efforts would help to align the incentives of companies and competition authorities in the fight against cartels.

