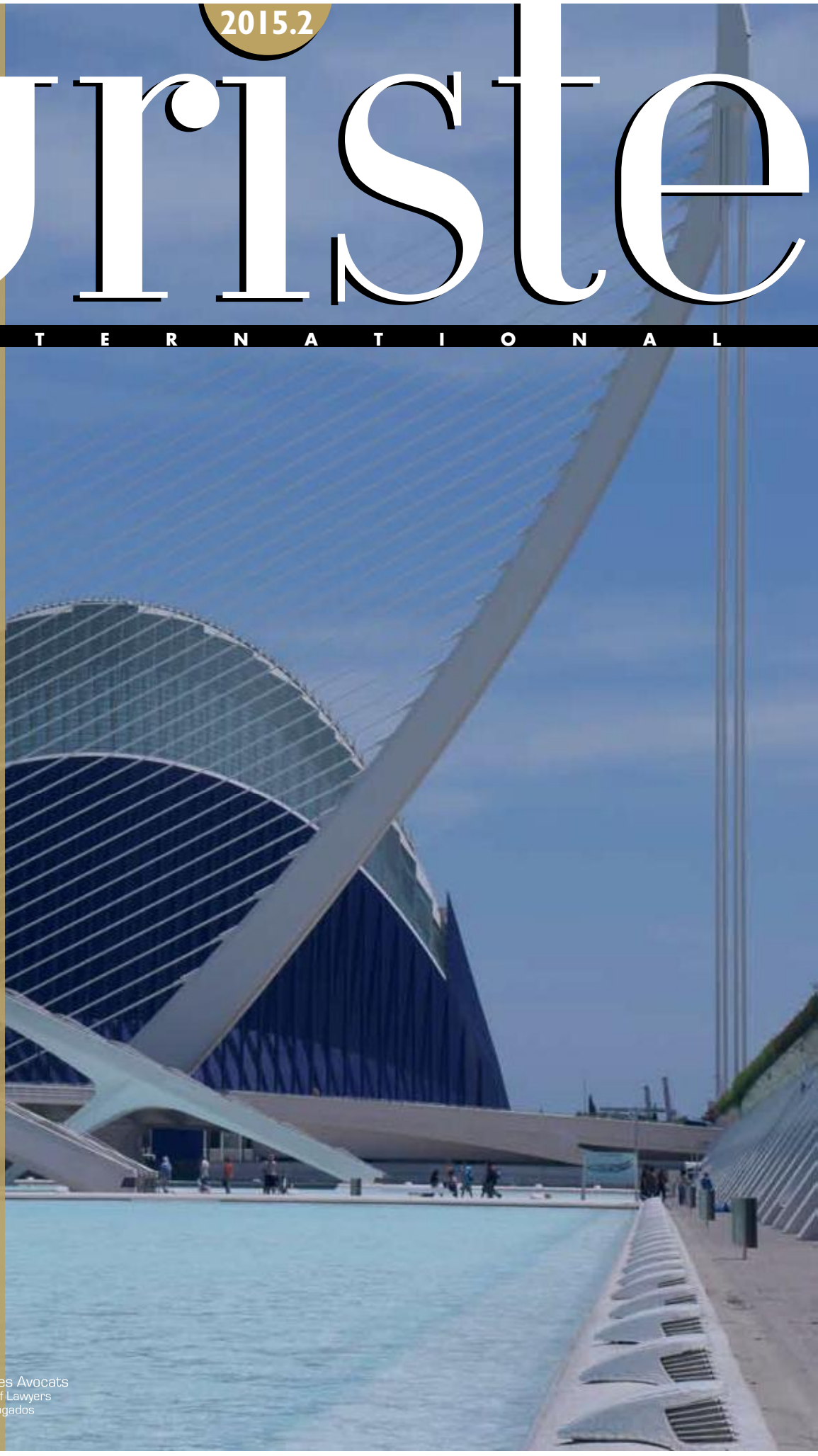
2015.2

juriste

INTERNATIONAL

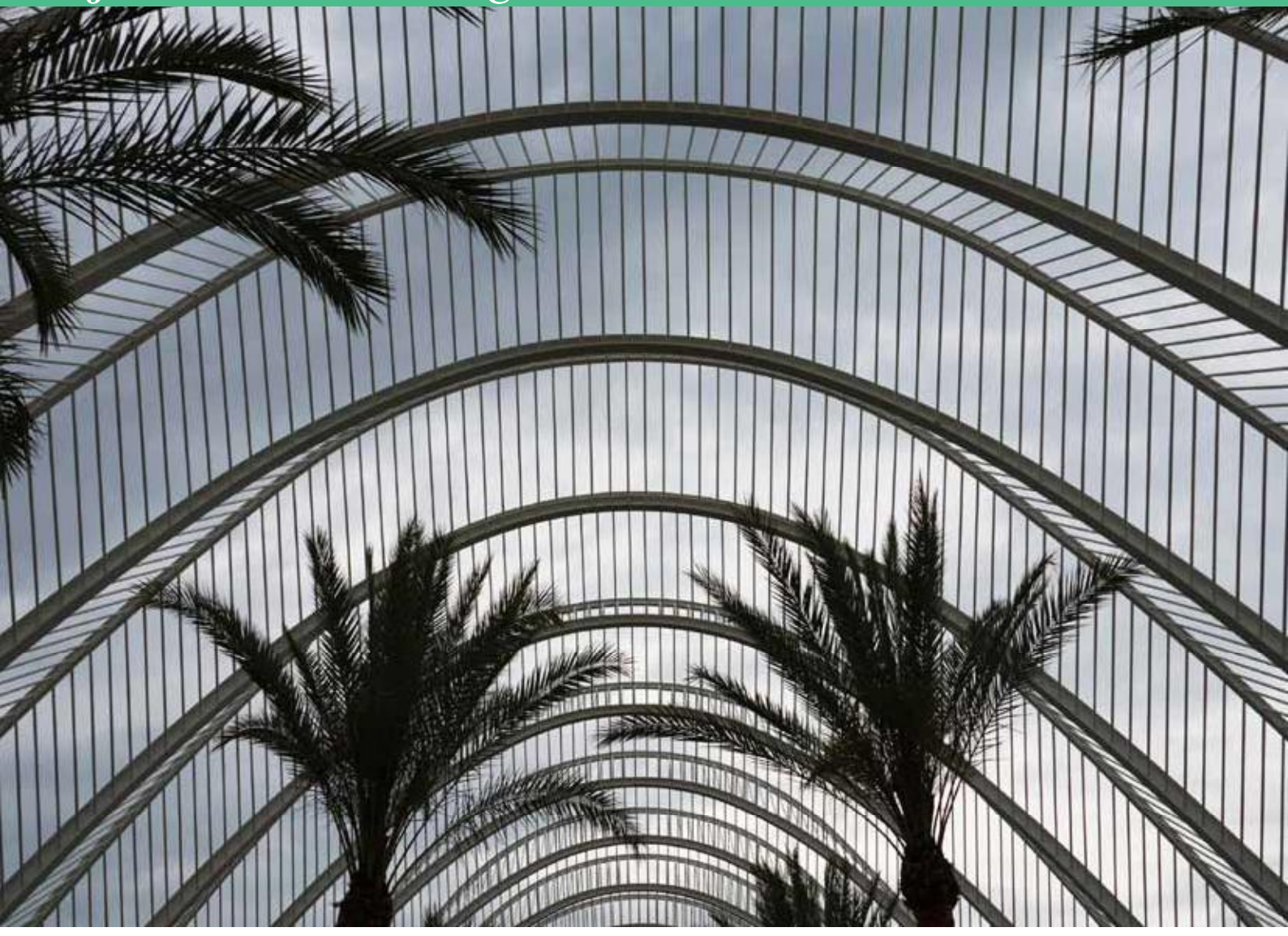


Union Internationale des Avocats

Rassembler les avocats du monde • Bringing Together the World's Lawyers • Reunir a los abogados del mundo

UIA
Union Internationale des Avocats
International Association of Lawyers
Unión Internacional de Abogados

Pratique du Droit
Legal Practice
Ejercicio de la Abogacía



Leniency and the Recognition of Compliance Programs as a Mitigating Factor: Can They Co-Exist in Competition Law Policy?

Gönenç GÜRKAYNAK, Öznur INANILIR & Ayşe Gizem YAŞARY ELIG

Les programmes de conformité sont un outil précieux dans la prévention de violation des lois antitrust. Certains soutiennent que le risque accru de découverte d'entente découlant de la mise en œuvre des programmes de démence qui aident les autorités de la concurrence à découvrir ces ententes, prévoit déjà une incitation suffisante pour mettre en œuvre des programmes de conformité. Cependant, il y a encore des infractions et de nouvelles méthodes d'application s'avèrent nécessaires. La reconnaissance des efforts authentiques de respect de la conformité en tant que circonstance atténuante est une politique créative d'application visant à encourager plus avant la conformité et est déjà mise en œuvre dans un certain nombre de juridictions soutenant la démence.

Introduction

Should compliance programs be treated as a mitigating factor in antitrust investigations? How compatible is this policy choice with existing enforcement policies? While there is no consensus on how to answer these questions, some competition authorities, albeit limited in number, have sided with compliance programs on this debate by rewarding genuine compliance efforts. On the other hand, authorities and scholars standing against the recognition of compliance programs as a mitigating factor have suggested *inter alia* that leniency programs already encourage compliance by deterrence and also by driving companies to implement compliance programs. According to these views, leniency programs are a better way to ensure compliance and competition authorities do not need to make policy alterations to reward compliance programs in antitrust investigations.

The success of leniency programs in helping competition authorities uncover and punish infringements and the deterrent effect of fines are widely accepted. Yet, infringements, both cartels and others, still occur and new enforcement tools are needed to spread the compliance culture. To achieve this end, competition agencies have been called to recognize genuine compliance efforts as a mitigating factor in their investigations.

Competition authorities rely on two factors in preventing competition law infringements: the deterrence of continuously increasing fines and leniency programs.

The following question, thus, emerges: Is it an optimal antitrust policy choice to grant fine reductions for compliance programs in jurisdictions that already have leniency regimes in place?

2 Compliance Programs

A competition law compliance program is "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."[1] Practice shows that there is no "one size fits all" type of compliance program for companies[2]. However, there are certain elements that are usually viewed as essential for an effective compliance program:[3]

(i) Active participation and commitment of senior management[4];

(ii) Training the employees, which necessitates creating clear rules and systematically communicating them to the employees, preferably in a compliance handbook;

(iii) Implementing effective measures to both prevent and spot infringements, including a system which allows the employees to report antitrust infringements within the company. This element also entails active monitoring and control of the compliance program,

(iv) Taking disciplinary actions against employees who fail to comply with the program and also putting in place incentives to encourage compliance,

(v) Adjusting the program to the company's commercial activities and other characteristics (such as the market position).

The need for compliance programs appears to be mainly associated with cartels, i.e.

the "supreme evil of antirust"[5]. Needless to say, there are many other ways to infringe competition law, such as restrictive agreements between a supplier and its distributors, or the abuse of a dominant position through discriminative practices, and compliance programs are ideally designed in a way to address all potential competition law issues that a certain company may face[6].

Many antitrust authorities and their officials have expressed the advantages of having an effective compliance program. Agencies also publish guidelines or best practices to provide guidance to undertakings on how they can implement robust compliance programs. Such guidelines are usually bright-lines rather than detailed compliance handbooks, as many authorities share the view that every compliance program should be "tailored" to the company's needs[7]. Practitioners also emphasize the need for effective compliance programs, drawing the companies' attention to the fast-increasing fines.

3 Cartels, Leniency and the Treatment of Compliance Programs as a Mitigating Factor

Despite the verbal encouragement, many agencies appear reluctant when it comes to taking pro-active steps to promote compliance programs to spread the compliance culture. The U.S. Department of Justice (DOJ) officials have explicitly pointed out that they do not see the need to reward companies with "failed" compliance programs[8] when setting fines (the adjective "failed" stems from the idea that since the company was involved in an infringement, the compliance program in place has malfunctioned, i.e. failed). The U.S. Federal Trade Commission (FTC), on the other hand, has not followed its fellow agency's approach and takes into consideration genuine compliance programs[9]. The European Commission's (Commission) stance is quite similar to the DOJ's,[10] advocating that compliance programs are their "own reward"[11], as they prevent infringements and thus fines. The Commission merely recognizes that a "failed" compliance program will not be seen as an aggravating factor.[12] On the other hand, albeit limited in number, jurisdictions such as France, U.K., Canada, Australia, Chile[13] and recently Italy[14] have adopted rules that allow competition authorities to reward compliance programs.

Competition authorities rely on two factors in preventing competition law infringements:
(i) the deterrence of continuously increasing fines and sentences[15],
(ii) leniency programs.[16]
A key role has been attributed to the latter, i.e. the whistleblowing mechanism, in encouraging undertakings to conduct internal audits[17]. In this scenario, as the cartelist first to report to the authority with evidence on a cartel usually receives immunity from fines, the companies are motivated to find out if the employees have participated in a cartel to be the first cartel member to blow the whistle. Going one step further, there is the view that compliance programs do not need to be given any credit as the leniency procedure already drives undertakings to implementing compliance programs and internal audits[18]. Murphy and Jalabert-Doury have observed that the DOJ's Antitrust Division disregards any compliance initiatives by undertakings due to the existence of the Division's leniency program[19]. Another approach to this conundrum is Wils's opinion that leniency programs *"are a much better way to incentivize companies to detect and report cartel behaviour engaged in by their employees than granting fine reductions or immunity to all companies that have a compliance programme"*[20]. According to Wils, treating compliance programs as a mitigating factor in cases where the relevant undertaking uncovers an infringement through the compliance program and does not report it, would contradict with the motivation created by leniency regimes to report infringements as soon as possible[21].

The foregoing views boil down to the following: Failed compliance programs do not need rewarding, since leniency programs are already deterrent as they increase the chances of cartel discovery. Furthermore, leniency programs encourage the implementation of effective compliance programs anyways, since compliance programs enable companies to uncover infringements and self-report as quickly as possible within the scope of the leniency regime. It is hard to deny the deterrence of fines and whistleblowing procedures. However, when it comes to antitrust enforcement (leaving aside the other areas of law), the point of view that "prosecutors are seldom positioned to stop a crime before it starts" and that "they must rely on deterrence"[22] may not be entirely justified. Fines and leniency regimes are about punishment and deterrence; whereas competition law enforcement also entails altering the way companies perceive competition rules so that they do not break the rules in the first place[23]. This is where compliance programs come into the picture[24]. The European Parliament has stressed the need for "encouraging compliance" in antitrust, calling for "more sophisticated instruments covering such issues [as] corporate compliance programs" in addition to penalties[25]. One way (maybe the most apparent way) to use compliance programs as part of antitrust enforcement is the mitigation of fines when the infringer has a credible compliance program[26]. Since compliance programs are first and foremost designed to prevent infringements[27], rewarding compliance programs would actually be a solid attempt to decrease the number of infringements[28].

On these grounds, arguing that leniency is a more efficient way to ensure compliance in order to avoid rewarding credible compliance efforts would be ignoring the fact that whichever enforcement methods (including leniency) are used and however efficient they may be, "completely eliminating antitrust infringements is an unattainable objective"[29]. Several tools may thus be used at the same time in an effort to diminish infringements as much as possible and to increase compliance awareness. There is no impediment against competition authorities applying both of these tools at the same time.[30]

Furthermore, even if authorities were to accept that leniency was more useful in encouraging companies to implement monitoring mechanisms, the leniency procedure is limited to a single type of infringement: Cartels. The discussion on compliance programs may be concentrating on the fight against cartels; yet, effective compliance programs ideally address all kinds of competition law risks that a company may face[31]. Relying on leniency to

promote compliance programs therefore seems like exaggerating the functions of leniency programs.

Finally, one could also argue that, even if the existence of leniency programs and an increased ability to prevent infringements already provides sufficient incentive to implement a compliance program, it is still fair to provide better treatment to a company which has demonstrated an effort to prevent infringements in comparison to one which has shown a general disregard for compliance[32].

4 Conclusion

Leniency is a valuable tool in the fight against cartels. That said, spreading a compliance culture is a challenging task for competition authorities, especially in jurisdictions where competition law enforcement is not yet mature (such as Turkey), and relying solely on the traditional enforcement tools may not be sufficient. This is when compliance programs, designed to prevent infringements, enter the scene. Regulators are therefore invited to think more "creatively"[33] in their enforcement choices and utilize compliance programs as a part of competition law enforcement. The most straightforward method to do so is to reward companies that implement credible compliance programs, as already accepted in a number of jurisdictions. Younger competition authorities in particular can and should take advantage of this creative tool of enforcement to ensure higher compliance in their jurisdictions where compliance culture has not yet penetrated into sectors and companies.

Gönenç GÜRKAYNAK, Esq.
Managing Partner
ELIG Attorneys-at-Law
Istanbul, Turkey
gonenc.gurkaynak@elig.com

Öznur INANILIR
Senior Associate
ELIG Attorneys-at-Law
Istanbul, Turkey
oznur.inanilir@elig.com

Ayşe Gizem YAŞAR
Associate
ELIG Attorneys-at-Law
Istanbul, Turkey
gizem.yasar@elig.com

[1] Wils, W. (2013) "Antitrust compliance programmes and optimal antitrust enforcement", Journal of Antitrust Enforcement, Vol. 1, No. 1 (2013), pp. 52–81, p.52, footnote 1.

[2] See e.g. Snyder, B. (2014) "Compliance is a Culture, Not Just a Policy", p.4, available at http://www.justice.gov/atr/public/speeches/308494.pdf ; Office of Fair Trading (2011) "How your business can achieve compliance with competition law", para. 1.2., available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf.

[3] See in general Riley, A. and Sokol, D. (2014) "Rethinking compliance", available at http://www.competitionlawyer.co.uk/ICLA/Documents_files/SSRN-id2475959.pdf; OECD Policy Roundtables (2011) "Promoting Compliance with Competition Law", available at http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf (OECD Report); Snyder (2014), supra note 2.

[4] Snyder (2014), supra note 2 at p.4; also see Italianer, A. (2013) "Fighting cartels in Europe and the US: different systems, common goals", p.6, available at http://ec.europa.eu/competition/speeches/text/sp2013_09_en.pdf.

[5] Mintz Levin Anitrust Alert (2014) "DOJ Antitrust Enforcers Take to the Bully Pulpit on Prosecuting Antitrust Crimes and Antitrust Compliance Programs", available at http://www.mintz.com/newsletter/2014/Advisories/4262-0914-NAT-AFR/.

[6] See e.g. European Commission (2012) "Compliance Matters", pp.15-16, available at http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD3211985.

[7] See e.g. Commission (2012), supra note 6 at p.15; Office of Fair Trading (2011), supra note 2 at para.1.13.

[8] See Tween, D. and Gates, A. (2014) "Benefits Of Compliance: US Antitrust Vs. Other Approaches", available at http://www.law360.com/articles/589112/benefitsofcomplianceusantitrustvsotherapproaches.

[9] Banks, T. and Jalabert-Doury, N. (2012) "Competition Law Compliance Programs and Government Support or Indifference", Concurrences No. 2-2012, p. 31.

[10] See Italianer (2013), supra note 4 at p.6.

[11] See e.g. Almunia, J. (2011) "Cartels: the priority in competition enforcement", available at http://europa.eu/rapid/press-release_SPEECH-11-268_en.htm?locale=en;

[12] See Commission (2012), supra note 6 at p.21; Global Competition Review (13 March 2015) "GE in-house counsel attacks DG Comp's indifference to compliance", available at http://globalcompetitionreview.com/news/article/38186/ge-in-house-counsel-attacks-dg-comps-indifference-compliance/.

[13] Tween and Gates (2014), supra note 8.

[14] Global Competition Review (31 October 2014) "Italy to recognise compliance programmes in setting fines", available at http://globalcompetitionreview.com/news/article/37172/italy-recognise-compliance-programmes-setting-fines/ .

[15] Snyder (2014), supra note 2 at p.2.

[16] Riley and Sokol (2014) supra note 3 at p.45; OECD Report, p.25.

[17] See Walkowiak, B. F. (2013) "DOJ Deputy Assistant AG Hammond emphasizes importance of effective antitrust compliance programs and internal investigations", available at http://www.lexology.com/library/detail.aspx?g=d4545d82-d4ba-4083-9c84-3bc3b0c22268; Wils (2013) supra note 1 at p.69; Madero Villarejo, C. (2012) "The point of view of the European Commission, Concurrences, 2-2012, p. 10.

[18] OECD Report, p.14.

[19] Murphy, J. and Jalabert-Doury, N. (2013) "Cartel Prevention and Compliance Regimes: It Is Time for a Smarter Approach", Business Compliance 03-04/2013, pp.82-92, p.86.

[20] Wils (2013), supra note 1 at p.76.

[21] Wils (2013), supra note 1 at p.70.

[22] Snyder (2014), supra note 2 at p.2.

[23] See Almunia, J. (2010) "Compliance and Competition policy", available at http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm.

[24] Riley and Sokol (2014), supra note 4 at p.20.

[25] European Parliament resolution of 12 June 2013 on the Annual Report on EU Competition Policy, para.38.

[26] Riley and Sokol (2014), supra note 3 at p.9.

[27] See e.g. Almunia (2011), supra note 11.

[28] Riley and Sokol (2014), supra note 3 at p.24.

[29] Wils (2013), supra note 1 at p.72.

[30] Geradin, D. (2013) "Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils" p.16, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241452.

[31] See in general Office of Fair Trading (2011), supra note 2.

[32] See Global Competition Review (2015), supra note 12.

[33] Riley and Sokol (2014), supra note 3 at p.9.