CALL FOR A UNIFIED ANTI-CORRUPTION AND COMPETITION LAW COMPLIANCE PROGRAMME:

WHY COMPLIANCE PROGRAMMES SHOULD BE VIEWED AS A MITIGATING FACTOR

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SYNOPSIS

Whether motivated by ethical reasons, the deterrent effect of fines and other sanctions, or both, an increasing number of companies coordinate compliance with anti-corruption regulations in conjunction with compliance with competition laws when establishing their corporate governance policy framework. This article advocates that at the macro level, the competent authorities should adopt a holistic approach regarding the efforts made by the companies for compliance with the competition law and anti-corruption laws and both should be subject to a unified legal enforcement policy concerning interacting compliance programmes. Furthermore, we argue that both anti-corruption and competition law compliance programmes should be considered by regulators and the Courts as mitigating factors in determining fines and sanctions for violating companies. This would encourage companies to develop thorough compliance programmes that go beyond mere legal compliance and additionally address behaviour, assist them in identifying and accumulating best practices over the years. In doing so, the impact and reach of regulation and legislation will increase; ultimately improving market efficiency. Such a broad scale upgrade

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in sanctions policy would eventually be of benefit to society and the economy in terms of both crime prevention and the procedural economy.

I. INTRODUCTION[*****]

An ever-growing number of companies design their corporate governance policies and compliance programmes to cover anti-corruption, as well as competition laws from a holistic perspective. Ethical and legal motivations, such as the threat of penalties and sanctions are amongst the most important reasons for companies to commit to compliance.[1] On a macro level, when making policy suggestions to governments, international organisations such as the International Chamber of Commerce[2] and the OECD[3], make a working link between anti-corruption policies and competition law regulations, and even emphasise this connectivity as crucial to the maintenance of a well-functioning free market[4].

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[1] IFF RESEARCH, *UK businesses' understanding of Competition Law* (26 March 2015), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses__understanding_of_competition_law_-_report.pdf (last visited September 18, 2015).

[2] International Chamber of Commerce [ICC], *ICC Antitrust Compliance Toolkit*, at 7 (Apr. 22, 2013), *available at* http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2013/ICC-Antitrust-Compliance-Toolkit/ (last visited July 24, 2015).

[3] The Organization for Economic Co-operation and Development [OECD], *Fighting Corruption and Promoting Competition*, OECD doc. DAF/COMP/GF(2014)13/Final (Nov. 20, 2014), *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)12/FINAL&doclanguage=en (last visited July 24, 2015).

[4] OECD, *Fighting Corruption and Promoting Competition*, at 3, OECD doc. DAF/COMP/GF(2014)13/Final (Nov 20, 2014) *available at*

The understanding at the core of this approach is that in a free market economy, competition promotes welfare, economic growth and productivity. However, corruption undermines these efforts by distorting the level of the playing field that is ultimately the goal of both competition and anti-corruption efforts.[5] Thus in order to ensure a society that can rely on institutional and market integrity, both policies need to go hand-in hand.

Defining and determining the purpose of competition law is of considerable importance, since it shapes and affects the policies and rules of competition law within a legal system. Accordingly, competition law, while aiming to maximise social welfare, also tries to ensure competitive markets. This suggests that competition law is the means to a narrow end, and that it does not specifically aim to protect competitors or consumers. Consequently, competition law should necessarily be considered as a means to "promote social welfare" and ought to have as its overarching objective to maximise social welfare through the promotion of economic efficiency. Therefore, competition law should target economic efficiency and aim to promote social welfare by all means possible.[6] In this sense, whereas enforcing compliance with competition law should be consistent and meaningful, the greater social "purpose" of competition law should always be

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http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)12/FINAL&doclanguage=en (last visited July 24, 2015).

[5] William Danvers, Deputy Secretary-General of OECD, Keynote Address at the 13th Global Forum on Competition, Paris (Feb. 27, 2014) *available at* http://www.oecd.org/competition/globalforum/GFC2014_SpeechbyW.Danvers.pdf (last visited July 24, 2015).

[6] Gönenç Gürkaynak, *Türk Rekabet Hukuku Uygulaması için "Hukuk ve İktisat" Perspektifinden "Amaç" Tartışması*, 3 (2003).

kept in mind.[7] In like manner, corporate policies on compliance programmes should also reinforce the goal of optimizing corporate mind-set, and through this, maximising social welfare.

Despite this private sector trend to link compliance with corruption regulations with compliance with competition law, enforcement authorities in various jurisdictions continue to evaluate anti-corruption and competition compliance programmes under separate criteria, constituting a stall against this unifying trend.

In some jurisdictions, an anti-corruption compliance programme is accepted as a mitigating factor in the face of violations, yet enforcers disregard the existence of competition law compliance programmes when calculating fines for competition violations. In other jurisdictions this relationship is completely reversed: anti-corruption compliance programmes are not, and competition law compliance programmes are seen as a mitigating factor. However, for companies both competition law and anti-corruption compliance programmes are indispensable to create a culture of ethics and compliance. In addition to that the elements of both competition law and anti-corruption compliance programmes are very similar.[8] Therefore, companies are compelled to treat and manage both compliance processes conjunctively, but are faced with a reality that adhering to the compliance programmes has different legal consequences for both disciplines. This inevitably creates challenges for the companies considering the resources they allocate to such programmes. Each programme must "stand-alone"; a coordinated approach is discouraged.

[7] *Id.* at.1.

[8] This will be explained in detail under Section IV of this article.

In light of this artificial separation between corruption and competition law compliance programmes, this article advocates that these two areas should be subject to a coordinated, if not unified legal enforcement policy. It has been shown that companies are more likely to comply with competition law because of ethical, reputational motivations, rather than the risk of fines or prosecution.[9] Therefore, positive general prevention tools, e.g. corporate self-policing can be more effectively employed when it comes to avoiding violations. First of all, this could lead to a procedural economy, in terms of administrative and judicial authorities engaging in less work, since many potential violations would be prevented within the company and potentially, other violations could be self-reported to them as and when caught by the compliance programme. Second, compliance programmes as prevention (as opposed to discovery) tools help foster a corporate compliance culture, which cannot develop without both anti-corruption and competition law perspectives, amongst others. Third, an over-arching, integrative approach is also desirable from the view point of companies which dedicate resources to both compliance programmes, only to find out that one programme has the ability to partially or completely shield the company from legal consequences, while the other programme has no effect at all on the regulatory environment. Taking these justifications into account, this article first examines the elements of competition law and anti-corruption compliance programme and points out the similarities. After capturing patterns of enforcement in different jurisdictions, this article proposes that both anti-corruption and competition law compliance programmes should be considered as a unified policy and therefore allowing an integrated approach, also as mitigating factors in determining fines for violations.

[9] *Supra* note 1 at 41.

II. THE LINK BETWEEN COMPETITION LAW AND ANTI-CORRUPTION LAW

Competition law and anti-corruption law are both regulatory compliance areas with similar social aims, and they both create similar types of problems for companies. With regard to their goals, both anti-corruption and competition law fields are intrinsically connected. Both of these regulatory areas aim for a level playing field where fair market choices dictate market rules, instead of secretive, unethical dealings between private or public persons. When competition law is violated, the result is an inefficient economy unable to support social welfare. Equally so, corruption acts counter to the efficient allocation of resources, undermines transparency and accountability, leading to lower levels of growth. Since a democratic system cannot be both corrupt and competitive, both these areas need to be fought simultaneously and conjointly.

The connection between the two areas becomes more apparent from a pragmatic point of view. As mentioned, both corrupt and uncompetitive behaviours require secretive and unethical environments to prosper. This manifests itself in companies as a culture of non-compliance. As the culture behind these violations foster each other, the acceptance and existence of one type of violation will increase the propensity to the other. In practice, as is often seen in internal investigations, a competition law violation is frequently accompanied by an anti-corruption law violation. Thus, it makes all the more sense for companies to fight these violations together and to embrace and promote the emergence of a transparent and ethical company culture instead.

It is true that, on a micro level, the content of dealing with both these areas differ. For example, from the perspective of competition law, employees will be educated about cartel, resale price

maintenance concepts, while on the corruption side; the employee will have to grasp the meaning of the concept of conflict of interest and "providing benefit". However, given it is the culture of non-compliance that leads to these violations, the real enemy in both fields is the crooked company culture, and the antidote is compliance programmes. Thus, even though the content may differ, the methods by which a company fights the good fight to comply with competition law and anti-corruption law are the same at the macro level. In practice, companies will commit a similar amount of resources for each field. Needless to say, the experiences of what works and what does not in one area, will lead to updates in the other.

In light of these similarities in terms of goals and methods encouraged by corporate efficiency, the artificial distinction in law between the evaluation of anti-corruption compliance programmes and competition law compliance programmes by the public authorities, remains irrelevant for the ultimate purposes of these legal enforcement areas. The violation of competition law and anti-corruption law may be initiated by either higher, or entry-level employees, and provide substantive, unfair competitive advantage to a company, and be rooted in the endemic nature of the company.[10] Hence, providing similar, if not equivalent incentives for holistic corporate initiatives addressing corporate culture would act only to reinforce each other.

III. WHY COMPLIANCE PROGRAMMES COUNT

[10] Francis Thépot, *Corporate Compliance with Competition Law*, at 21-24, http://ascola-tokyo-conference-2015.meiji.jp/pdf/Workshop%20Contributions/Florence%20Thepot_CORPORATE%20COMPLIANCE%20WITH%20COMPETITION%20LAW.pdf (last visited September 18, 2015).

Compliance programmes are necessary, both on ethical and pragmatic levels. Ethically speaking, distorting competition in the market both through anti-competitive practices and corruption results in the detriment of consumers by impeding innovation and economic development. However, ethics alone does not motivate all economic actors. Pragmatically speaking, compliance programmes safeguard companies from million dollar fines as a result of competition and anti-corruption law violations, as well as the devastating reputational consequences of these violations. Compliance programmes also help a company avoid the emergence of a crooked business culture that leads to these competition law and anti-corruption violations, not to speak of other misconduct and reputation risks. The desired effect of compliance programmes is to create a culture of compliance and ethics that prevents violations even before they take place. Therefore, compliance programmes are indispensable for companies, even without the encouragement of enforcement authorities.

In recent years, authorities, in parallel, have taken steps to promote competition law and anti-corruption compliance cultures through compliance programmes. However, the methods of encouraging these compliance programmes starkly differ. While in the field of anti-corruption law some enforcing authorities regard compliance programmes as a mitigating factor and even as a defence in the most extreme case, such as in the UK; in contrast competition law authorities solely published guidelines as to how compliance programmes should be established[11]. Therefore, in the field of anti-corruption law, compliance programmes have one more pragmatic advantage: in addition to detecting and deterring possible violations, effective compliance

[11] While there are some rules to be adhered to in given countries, these remain discretionary, and the outcome of a case as well as the allocation of fines will be determined based on the specific circumstances.

programmes are also instrumental in lowering or even eliminating the fines to be imposed on a company in the face of violations. In contrast, some competition authorities explicitly ignore existing compliance programmes in determining fines.

Spreading this notion of cross disciplinary compliance throughout all the businesses in the world would require an effort of global and local authorities, as well as practitioners. It is undoubtable that guidelines for compliance published by the authorities are very useful and explanatory, but they mostly lack the explicit rewards that help motivate compliance.

This being said, while there is as yet nothing that can be termed a globally unified approach to compliance programmes, compliance programmes overlap across countries. This convergence can also be observed between competition law and anti-corruption law compliance programmes and provides optimism that better coordination at the macro, or global level is possible.

IV. COMPLIANCE PROGRAMMES AROUND THE WORLD

As explained above, authorities around the world provide guidelines for companies on how to establish their anti-corruption and competition law compliance programmes. These guidance documents demonstrate that the components of compliance programmes in both fields have similar elements. Accordingly, in this section we will elaborate on these similarities by drawing on the framework of the typical structures of effective compliance programmes in both fields by referring to the compliance guidance documents, some providing guidance for each area[12] and

[12] Although both anti-corruption and competition law compliance guidance does not exist simultaneously in many countries with the notable exceptions of US and UK, competition law compliance guidance in different countries and anti-corruption law compliance in different countries seem to converge on what the elements of an ideal anti-corruption and competition law compliance programme should be.

some providing guidance for both, in the United States[13], the United Kingdom[14], the European Union[15], France[16], Italy[17], Brazil[18], Turkey[19], and Spain[20].

[13] U.S. SENTENCING GUIDELINES MANUAL (2014) Available at: http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf. (last visited July 24, 2015). THE CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE AND THE ENFORCEMENT DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, (November 14, 2012), *available a*t http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf. (last visited July 24, 2015).

[14] UK COMPETITION AND MARKETS AUTHORITY [CMA], *Quick Guide to Complying with Competition Law* (2014), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306899/CMA19.pdf (last visited July 24, 2015); *see also* CMA, *How Your Business Can Achieve Compliance with Competition Law* (June 2011), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf (last visited July 24, 2015); *see also* UK Ministry of Justice, *The Bribery Act 2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (s*ection 9 of the Bribery Act 2010*) (March 2011), *available at* http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (last visited July 24, 2015).

[15] EUROPEAN COMMISSION [EC], *Compliance Matters: What companies can do better to respect EU competition rules* (2012), KD-32-11-985-EN-C, *available at bookshop.europa.eu/en/compliance-matters-pbKD3211985/* (last visited July 24, 2015).

[16] FRENCH COMP. AUTH., *Framework Document of 10 February 2012 on Antitrust Compliance Programmes* (Feb. 10, 2012), *available at* http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf (last visited July 24, 2015).

[17] ITALIAN COMP. AUTH., *Linee Guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorità in applicazione dell'articolo 15, comma 1, della legge n. 287/90* (in Italian), (The Guidelines on the method for setting fines for antitrust infringements) (2014) *available at* http://www.agcm.it/trasp-statistiche/doc_download/4498-lineeguidacriteriquantificazionesanzioni.html (last visited July 24, 2015).

[18] Decreto No. 8.420, de 18 de Março de 2015, D.O.U. de 19.03.2015 (Brazil).

[19] TURKISH COMPETITION AUTHORITY [TURK. COMP. AUTH], *Competition Law Compliance Program* (2011), *available at*

The main elements of a compliance and ethics programme may be drawn up as follows:

1. ***Commitment from senior management:*** The actions and the attitudes of senior management are deemed central to the compliance culture of a company, which is at the core of a successful compliance programme. Senior management, such as the board of directors and senior executives should lead the ethics and compliance culture of a company and evidence that leadership with a clear commitment to support and openly promote the compliance programme and a positive company culture. In this regard, it is necessary to maintain a clear, continuous and active involvement of management. Managers and employees will follow in the footsteps of corporate leaders, and thus, first and foremost it should be the top executives who affirm the values within the compliance programme to demonstrate that the programme is not a paper exercise, but is indeed enforced. With a visible and appropriate "tone at the top" in place, a compliant attitude can be expected to spread throughout all levels of the company, ensuring that employees are aware of their duties and do not engage in violations. Senior management is expected to clearly articulate company standards, communicate them in a clear and unambiguous manner, adhere to them and disseminate them throughout the organisation. If such a culture is not in place and enacted within the top level of management, and if employees are implicitly encouraged to engage in misconduct due to unrealistic

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http://www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FGeneral+Content%2FCompetition+Compliance+Program.pdf (last visited July 24, 2015).

[20] Ricardo Seoane Rayo, *Spanish Compliance: A 180° Change In Doing Business, available at* http://www.ethic-intelligence.com/experts/10094-spanish-compliance-360change-business/ (last visited January 29, 2016).

expectations or a lack of available support mechanisms, a "profit over compliance" culture can quickly take hold and any compliance programme would likely be rendered ineffective.

2. ***Clearly articulated code of conduct, and compliance policies and procedures:*** A compliance programme's efficient functioning is usually backed and evidenced by a written policy of the company. This document must be drafted in a clear, concise, accessible manner, remain current and effective, and be periodically reviewed and updated. Moreover, a profound understanding of the business risks of the company and consideration of its size and nature is indispensable in shaping the compliance code adequately. Local and cultural aspects need also to be considered, and the codes should be available in local languages. The policies and standards must apply to personnel at all levels. The company's compliance policy should be designed to prevent, and/or detect violations of anti-corruption and competition laws.

Besides these general principles, the compliance policy should also cover substantive issues and inform employees about its procedural steps and workflow. The employees should study, understand and agree with the content of the policy, and certify this in writing. There should be no confusion among employees about either the existence of a compliance programme, or its strict observance.

3. ***Continuous, tailor-made risk assessment for the company:*** In order to develop the risk minimizing policies of the compliance programme, companies have to assess the risks they encounter in business. As each corporation faces a different range or mix of risks that depends on their field of business, size, jurisdiction and potential business partners, there is no definitive, fixed compliance policy - no "one size fits all" programme. Compliance programmes need therefore to be tailored to the needs of the company and/or department, based on the results of an adequate risk assessment. Companies may request legal advice in identifying, and eventually mitigating their risks. The activities of employees, and the requirements of business, should be classified as posing high or low risks, and specific guidance for each of these possible risk scenarios should be established. Moreover, risk assessments should be conducted on a continuous basis, as the aforementioned risk factors will likely vary over time.

4. ***Custom made and continuously improved programme for the company:*** Compliance programmes should take into consideration the size, activity, markets, organisation, governance and culture of a company, along with evolving legislation, business environments and markets. In regard to the risk assessment portion of a compliance programme, each compliance programme should reflect these findings.

   One way of reviewing and monitoring programmes is to ask for employee feedback by conducting surveys and questionnaires. Companies may also require routine, formal reports from top-level management. All in all, a company should be able to

demonstrate thoughtful and targeted efforts to create a sustainable compliance programme.

5. ***An employee responsible for the programme's development and monitoring – with sufficient resources and autonomy:*** Guidance documents strongly suggest companies to designate a specific senior executive, with the appropriate resources, adequate authority, and necessary autonomy from management to develop, enforce and monitor the compliance programme. The specific high-level employee should be responsible for the development of the programme and its implementation within the company. The employee should also have the means to access top management and raise compliance issues easily.

6. ***Effective training for directors and employees:*** Developing and practicing training programmes for directors and employees within compliance programmes is deemed one of the most important attributes of an effective compliance programme. Although authorities advise companies to train all employees, certain competition law authorities may also acknowledge that not all employees can receive effective compliance training. Having said that, companies are well advised to train at least those managers and employees who make strategic and commercial decisions with respect to competition law. As one of the main aims of compliance programmes is to deter employees from engaging in breaches, the effectiveness of a compliance programme depends on the employee's comprehension of the law. Since

communication and comprehension of the rules cannot be separated, training becomes an indispensable component of a compliance programme.

Companies can implement various methods of training based on their budget, size or needs. However, some general rules apply. Training should be provided in local languages in order for employees to comprehend the compliance programme. Training should be periodic so that the rules remain fresh and employees can be apprised of any changes in the law. The company should also develop a system whereby employees may obtain urgent advice on compliance matters, whenever needed.

7. ***Effective control mechanisms: auditing, whistle-blowing mechanisms and internal investigations:*** In order to detect and deter violations, compliance programmes should have effective control mechanisms in place. Auditing, whistleblower hotlines and internal investigations are some of the ways a company gathers information on its own behaviour.

   Audits may take place on a pre-advised date, or without notice in order to detect any potential infringement. Investigations are best conducted by units free of conflicts of interest. When appropriate, investigations conducted by outside legal counsel or audit firms may be beneficial in ensuring objectivity.

   Conditions or requirements under compliance programmes may also be incorporated into employment contracts. Appointing consultants or establishing advisory hotlines is also highly recommended.

In order to promote a culture of "speaking-up", employees of the company should be protected from retaliatory measures in case they confidentially report any suspicious actions. Anonymous hotlines through which employees may report suspect conduct without fear of retaliation, i.e. with procedures and avenues ensuring confidential reporting, is also an important component of a compliance programme. This works towards ensuring the good functioning of a compliance programme, namely, detecting wrongdoing. To that end, companies should also put into effect a reliable system of investigating and reporting on such alerts.

8. ***Incentives and disciplinary measures:*** The key to a successful compliance programme is its enforcement. A compliance programme should not remain just a "paper programme", but should apply to everyone in the company, equally, and without regard to seniority. This means that, when faced with a breach, even the most senior managers should be penalized with disciplinary measures, fairly and consistently. The evidence shows that employees are rendered more aware of the necessity of compliance with laws if there are immediate disciplinary repercussions for failing to comply. Sanctions however, should be proportionate to the particular situation of the employee and the seriousness of their conduct. An example of such disciplinary measures might range from denying promotion or bonus payments, to terminating the employment of an employee who constantly engages in breaches.

Alternatively, companies should encourage compliance by providing benefits and rewards to employees who follow the rules. This policy will further strengthen the creation of a compliance culture.

9. ***Pre-acquisition due diligence and post-acquisition integration*** Acquired companies that lack a culture of compliance will likely continue to violate anti-corruption rules. Therefore it is essential that companies perform pre-acquisition due-diligence. Steps must also be taken to integrate two companies' compliance policies.

In addition to the common characteristics of a compliance programme described above, anti-corruption compliance programmes also require continuous third party due diligence. Accordingly, corporations should check the reputation of their business partners and agents, as they could be held liable for eventual breaches by their counterparts, depending on their level of control and awareness of the activities. It is significant for corporations to understand the role of third parties in their various transactions and therefore explicitly set out their roles, even their implied behaviours and precautions, in agreements. Companies are therefore recommended to communicate their compliance policies and to exercise due diligence on business partners by way of, for example, audit rights provided in the relevant contract to verify compliance.

This article focuses on jurisdictions where enforcing authorities consider compliance programmes as mitigating factors in at least one of the respective fields of anti-corruption law or competition law. Explanations make frequent reference to the US and UK systems since these two jurisdictions have adopted arguably the most complex systems of mitigation with regard to

compliance programmes in at least one of the two fields. The UK in particular can be designated as the jurisdiction with a model system, as it regards compliance programmes in both competition law and anti-corruption law as mitigating factors; albeit more enforcement actions in the field of anti-corruption would shed more light on such a regulatory model.

V. EFFECTS OF COMPLIANCE PROGRAMMES ON ANTI-CORRUPTION LAW AND COMPETITION LAW INVESTIGATIONS

A. The United States

a. Anti-Corruption Law Perspective

Once a case is deemed to fall within the scope of the Foreign Corrupt Practices Act ("FCPA"), both the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") may choose either to prosecute a case or not, or enter into a plea agreement. Whether the company in question had an effective compliance programme, or whether in fact it became aware of the FCPA breach itself through its compliance programme and subsequently self-reported, these play an important role in determining whether a prosecutor agrees to prosecute, or offers a plea agreement.

In deciding whether or not to prosecute a case, the DOJ considers the principles set out in the Principles of Federal Prosecution of Business Organizations ("Principles"), which stipulate that under certain circumstances, it might be more advantageous to enter into plea agreements with business corporations rather than prosecuting them. According to the Principles, non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs") constitute "an important

middle ground between declining prosecution and obtaining the conviction of a corporation."[21] One of the factors considered by the DOJ, as stipulated under Section 9-28.300 of the Principles, is the existence and the effectiveness of the company's compliance policy that was in place before the wrongdoing.[22] Both a pre-existing compliance programme which would enable a corporation to become aware of the FCPA breach, disclose the relevant factors to enforcing authorities, and impose necessary disciplinary measures on those responsible for the breach, as well as a newly enforced or an improved compliance programme which would count as a remedial measure, play an important role in the DOJ's decision. However, in contrast to the UK system explained below, the Principles explicitly stipulate that the existence of such an effective compliance programme - one that is implemented in practice - does not, in and of itself release a corporation from criminal liability.[23]

According to the Principles, before giving the company credit for its compliance programme, prosecutors should consider:

(i) whether the compliance programme has been "designed for maximum effectiveness in preventing and detecting" any violations in the particular line of business of the

[21] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.200 B (*General Considerations of Corporate Liability*) (August 2008), *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.200 (last visited July 24, 2015).

[22] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.300 (*Factors to Be Considered*) (August 2008), *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.300 (last visited July 24, 2015).

[23] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.800 (*Corporate Compliance Programs*) (August 2008), *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.800.

corporation,

(ii) whether the senior management of the company genuinely enforces the compliance programme or whether they implicitly encourage illegal conduct by pressuring employees with business targets and

(iii) whether the senior management exercise scrutiny over the recommendations of the employees, or if they simply approve.[24]

Significantly, the compliance programme should not be a "paper programme". Instead, it should be implemented in practice and in good faith. The corporation should also appoint an adequate number of staff in order for the compliance programme to be properly executed. In essence, an effective compliance programme could result in the non-prosecution of the company itself, or serve as a mitigating factor during the prosecution.[25]

In addition to the Principles, a chapter entitled "Sentencing of Organizations" of the U.S. Sentencing Guidelines takes into account "the existence of an effective compliance and ethics programme"[26] as a mitigating factor, when calculating the corporation's punishment, along with self-reporting. Self-reporting is required for an effective compliance programme, which at least detects, if not deters wrongdoing. According to the Sentencing Guidelines, an effective

[24] U U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.800 (*Corporate Compliance Programs*) (August 2008), *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.800.

[25] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.800 (*Corporate Compliance Programs*) (August 2008), *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.800.

[26] U.S. SENTENCING GUIDELINES MANUAL, § 8B2.1 (2014).

compliance and ethics programme should keep the company exercising due diligence in order to generally prevent and detect criminal conduct, as well as promote a corporate culture.[27] In case the corporation facing criminal liability has an effective compliance programme in place prior to the occurrence of the breach, the culpability score of the relevant corporation is decreased.[28]

Even though the DOJ and SEC are criticized for not making their assessment criteria for declination decisions public, information disclosed in some cases is sufficient to demonstrate the importance of compliance programmes. In a benchmark declination case, *Garth Peterson*, the DOJ declined to prosecute the employing corporation *Morgan Stanley*, on the grounds that it had implanted an effective compliance programme. Mr. Garth Peterson, a former *Morgan Stanley* employee, was found to have acted on his own when engaging in the bribery of public officials in China, and was sentenced to jail time and a fine by the DOJ. According to the public statement published by the DOJ, *Morgan Stanley*'s compliance programme was:

- updated regularly,
- it was tailored to specific risks the company faced in different markets, and
- the compliance programme was communicated to employees through frequent trainings.

In fact, the company had provided 54 trainings between 2002 and 2008 to its Asia-based employees and Mr. Garth Peterson had himself been present in these trainings 7 times.[29] He had

[27] U.S. SENTENCING GUIDELINES MANUAL, § 8B2.1 (2014).

[28] U.S. SENTENCING GUIDELINES MANUAL, § 8C2.5 (2014).

[29] Press Release, OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF JUSTICE, *Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA* (Apr. 25, 2012) http://www.justice.gov/opa/pr/2012/April/12-crm-534.html (last visited July 24, 2015).

received at least 35 reminders to abide by the company's internal rules and applicable bribery legislation. Moreover, the company's compliance team regularly monitored business transactions, conducted audits and extensive due diligence on business partners. However, Mr. Garth Peterson had conspired to "evade *the company's* internal accounting controls", had "used a web of deceit to thwart *Morgan Stanley*'s efforts to maintain adequate controls designed to prevent corruption" and engaged in such actions "despite years of training" provided by *Morgan Stanley*.[30] Consequently, the DOJ held that the company's compliance programme "provided reasonable assurances that its employees were not bribing government officials," and declined to prosecute *Morgan Stanley*.[31]

Echoing this very informative decision, in 2012 SEC declined to prosecute *Pfizer* for illegal, pre-acquisition behaviour of Wyeth LLC, a company acquired by *Pfizer*, among others, due to Pfizer's extensive due diligence and integration of its internal system into its newly acquired subsidiary.[32]

Again in 2012, the Justice Department declined to prosecute *Dyncorp International Inc.*, *Huntsman Corporation and Hercules Offshore Inc*, based on, among others reasons, its past and

[30] *id.*

[31] *id.*

[32] Press Release, OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF JUSTICE, *Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation* (Aug. 7, 2012) http://www.justice.gov/opa/pr/2012/August/12-crm-980.html (last visited July 24, 2015).

continuing efforts to enhance its compliance programme.[33]

Many FCPA cases have also been settled through DPAs and NPAs, in which the compliance programme of a company played a role in the decision of authorities, resulting in reduced sentences.

Orthofix International's Mexican subsidiary had paid bribes to government officials. At the time the illegal acts took place, *Orthofix* did not have a rigorous compliance programme in place. Although the company had disseminated some compliance policy documents to its subsidiary, they were all in English. At one point, *Orthofix* had even realized that its subsidiary's spending was excessive, but undertook minimal efforts to investigate. In sum, *Orthofix* failed to (i) communicate its compliance policy to its subsidiaries for its international operations and (ii) to investigate the suspicious excessive spending. This being said, once *Orthofix* became aware of the FCPA breach, it immediately self-reported to SEC, and implemented significant remedial measures. *Orthofix* improved its compliance programme, provided annual mandatory training to its employees and business partners and ceased ties with its bribing executives. Subsequently, *Orthofix* entered into a DPA with the DOJ.[34] The DOJ accepted to enter into this agreement,

[33] Double Declination For Hercules Offshore http://www.fcpablog.com/blog/2012/8/14/double-declination-for-hercules-offshore.html (Aug. 14, 2012 7:38 EST); *see also* Posting of Richard L. Cassin to the FCPA Blog, http://www.fcpablog.com/blog/2012/8/6/huntsman-wins-declination.html (Aug. 6, 2012 11:28 EST); *see also* Posting of Richard L. Cassin to the FCPA Blog, Declination for DynCorp (Mar. 28, 2013 2:38 EST) http://www.fcpablog.com/blog/2013/3/28/declination-for-dyncorp.html.

[34] Deferred Prosecution Agreement, UNITED STATES OF AMERICA V. ORTHOFIX INTERNATIONAL, N.V. (E.D. Tex SHERMAN DIVISION 2012) *available at:* http://www.justice.gov/criminal/fraud/fcpa/cases/orthofix/2012-07-10-orthofix-dpa.pdf (last visited 27.02.2015).

based on, among others, the following components that a compliance programme should incorporate:

(i) *Orthofix*'s timely and voluntary disclosure to the SEC,

(ii) the internal investigation conducted on allegations of bribery and

(iii) remedial measures it undertook, including the implementation of an enhanced compliance programme. [35]

In 2013, *Ralph Lauren* ("RL") entered into a NPA with the DOJ, due to allegations of its Argentine subsidiary bribing Argentine customs officials. Within the period when the alleged misconduct took place, RL did not have a compliance programme and did not provide any FCPA training to its Argentine subsidiary. In 2010, RL launched an FCPA compliance policy and as a result, Argentine subsidiary's actions were subjected to internal investigation. RL self-reported its findings to the DOJ. As part of its remedial measures, RL:

(i) reviewed and improved its compliance policy and enforced these changes,

(ii) translated the compliance policy into 8 languages,

(iii) undertook to conduct more thorough due diligence into its business partners,

(iv) provided in-person training to some of its employees and

(v) carried out worldwide risk assessments.[36]

[35] *id*.

[36] Ralph Lauren Corporation, *S.E.C Non-Prosecution Agreement* (Apr. 18, 2013), *available at:* https://www.sec.gov/news/press/2013/2013-65-npa.pdf (last visited 27.02.2015)

Subsequently, the DOJ entered into a NPA with RL. Among the reasons that convinced the DOJ to execute a NPA with RL were the facts that (i) RL became aware of the FCPA breach through the new compliance programme it had launched and (ii) once RL became aware of the FCPA breach it voluntarily enhanced its compliance programme.

In 2013, *Parker Drilling* entered into a DPA with the DOJ, following allegations of payment of illegal funds to public officials through third party agents. Once the charges were brought against *Parker*, it enhanced its compliance programme, employed a full time compliance officer who reports to the executives of the company and employed a team to assist the compliance officer. The company also increased its due diligence requirements for third parties and provided anti-corruption trainings throughout the company. Additionally, the company ended its relationship with those employees held responsible for FCPA breaches.

While deciding whether to enter into a DPA with *Parker Drilling*, the DOJ considered the extensive remediation actions of the company, which significantly enhanced its due diligence process while cooperating with third parties. Other facts considered during the DOJ's decision process were:

(i) the employment of a compliance officer who directly reported to executive officers of the company,

(ii) the company "enhanced and was committed to enhancing its compliance programme," and

(iii) had "implemented a compliance awareness initiative."

Consequently, the DOJ decided on a US $ 11,760,000 penalty, granting *Parker* a 20% reduction from the lowest possible penalty in a range between US $ 14,700,000 and US $ 29,400,000.

In 2012 DOJ entered into a DPA with *Pfizer Inc.* ("Pfizer") many of whose subsidiaries from around the world were accused of providing improper payments to health officials. Importantly, Pfizer self-reported some of those instances and launched a compliance programme, which surfaced further FCPA violations, which were also disclosed to the SEC and DOJ. Pfizer also implemented significant disciplinary measures for all those that were involved along with instituting a proactive compliance programme.[37]

When entering into the DPA, the DOJ considered the fact that Pfizer had detected and disclosed potential violations and had employed remedial efforts early on with the improvement of its compliance programme.[38] Based on the aforementioned reasons, the DOJ reduced Pfizer's fine from between US $ 22,800,000 to US $45,600,000 to US $ 15,000,000, a 34% reduction on the lowest fine. It is important to note that among the factors that lead to the 34% reduction was the fact that the violations were detected by Pfizer itself, which meant that Pfizer already had an effective, working compliance programme.

The foregoing demonstrates and acknowledges that internal compliance programmes play a substantial role in FCPA enforcement. Both the existence of an effective compliance programme, or a compliance programme implemented as a remedial effort, are listed as factors of

[37] Pfizer H.C.P Corp. *Summary Deferred Prosecution Agreement*, (Aug. 2, 2012) *available at:* http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf (last visited July 24, 2015).

[38] *Id.*

consideration in the Principles and in the Sentencing Guidelines. Both the *Pfizer* and *Parker Drilling* cases make it apparent that remediation is held in high regard by the DOJ, as these companies obtained reductions, among other factors, for their efforts to enhance their compliance programmes.

It should be noted that when making its enforcement decisions, the enforcing authorities consider a variety of other factors also, and that compliance programmes, although among the most publicized factors, are not the only factors affecting such decisions.

b. The Competition Law Perspective

The competition law system in the US provides that anti-competitive behaviour of a company may be punished by up to US $100,000,000, and anti-competitive behaviour of natural persons by up to US $1,000,000, or imprisonment of up to 10 years. The competition law system in the US is enforced both in the administrative and criminal domains. Specifically, hardcore competition law violations (agreements among competitors to fix prices, rig bids and allocate customers) constitute criminal offences.[39]

The DOJ and the SEC have adopted measures to determine the effectiveness of a company's compliance programme and whether it is enough to justify a fine reduction.

Contrary to DOJ treatment of anti-corruption cases, even though the Sentencing Commission provides mitigation in determining a fine, the approach of the Antitrust Division of the DOJ is not

[39] U.S. DEP'T OF JUSTICE, *Antitrust Laws and You* (July 15, 2015), http://www.justice.gov/atr/about/antitrust-laws.html (last visited July 24, 2015).

to reward a failed compliance programme. On the other hand, the Federal Trade Commission ("FTC"), in some cases, takes the good faith of the company and the effectiveness of the compliance programme into consideration when settling with the defendant infringer.[40] Moreover, the FTC may also require companies to establish a compliance programme as part of a settlement agreement.[41]

In September 2014, Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice Brent Snyder underlined that a compliance programme that could not prevent a company from "conspiring to fix prices, rig bids, or allocate markets" should however, still enable the company to apply for leniency, by alerting the company of a possible violation at an earlier stage[42]. However, Snyder highlighted that the mere existence of a compliance programme does not allow a company to avoid criminal charges, and further reiterated that the position of the Antitrust Division would not change in the near future.

Differently, Judge Douglas Ginsburg from the US Court of Appeals for District of Columbia recently signalled that he does not entirely agree with this opinion. He promoted effective compliance programmes by saying that "*The fact that there's a violation doesn't mean the company hasn't done everything it could reasonably expected to do*". According to Judge

[40] THEODORE BANKS & NATHALIE JALABERT-DOURY, *Competition Law Compliance Programs and Government Support or Indifference*, 2-2012 CONCURRENCES, at 31 (2012).

[41] *Id*., at 48-54.

[42] Brent Snyder, Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice, Remarks to the International Chamber of Commerce at United States Council of International Business Joint Antitrust Compliance Workshop, *Compliance is a Culture Not Just a Policy*, (Sept. 9, 2014), at 3 http://www.justice.gov/atr/file/517796/download (last visited July 24, 2015).

Douglas Ginsburg, a company should not be held responsible because of a corrupt employee when it has done everything in order to ensure the compliance to competition law.[43] This recent statement and recent precedents could be interpreted as, maybe in the near future, US courts' approach would be more motivational towards the companies that have an effective compliance programme.

Recently, in December 2014, two trade associations, Professional Skaters Association, Inc. ("PSA") and Professional Lighting and Sign Management Companies of America, Inc., ("PLASMA"), agreed to develop competition law compliance programmes to settle with the FTC when their by-laws and policies were found to restrict competition unnecessarily. Although the relevant consent orders are subject to FTC's decision in order to be finalized,[44] they are helpful in tracing what is expected of an undertaking when settling after an investigation.

The FTC investigated whether the PSA's Code of Ethics restricted competition unnecessarily by prohibiting its members to solicit pupils of another member, and by proclaiming it unethical for its members to give free lessons. The PSA is required to establish a compliance programme, along with other requirements such as to cease and desist from any activity that would restrict coaches from soliciting pupils or would limit price competition. Similarly, the FTC conducted an investigation on PLASMA's Bylaws and Standard Operating Procedures and found that the

[43] Pallavi Guniganti, *Ginsburg: US agencies need realism on compliance and consistency in litigation*, (Jan. 27, 2016) *at* http://globalcompetitionreview.com/news/article/40403/ginsburg-us-agencies-need-realism-compliance-consistency-litigation (last visited January 28, 2016).

[44] Press Release, F.T.C., *To Settle FTC Charges, Two Trade Associations Agree to Eliminate Rules that Restrict Competition* (23 December 2014), http://216.128.243.109/news-events/press-releases/2014/12/settle-ftc-charges-two-trade-associations-agree-eliminate-rules (last visited July 24, 2015).

company restricted competition by limiting the service area for its members, interfering with prices and restricting solicitation of customers. PLASMA was required to establish a compliance programme similar to that of PSA.

In case the court finds the company liable for competition law violations, it may order the company to further develop its compliance programme and appoint an external monitor. In *Apple*,[45] the District Court found that Apple was engaged in a price-fixing scheme concerning e-books, and ordered Apple to modify or terminate its agreements and to establish a competition law compliance programme. Apple also appointed an outside counsel (external compliance monitor) to monitor the company's compliance with competition laws. The third and the latest of these reports[46] was delivered on April 14, 2015, which reviewed the status of Apple's compliance programme to date and its progress from October 2014,[47] when the second report was published. The report provided recommendations from multiple aspects of Apple's compliance programme, such as implementation of formal risk assessment, the coverage of compliance policy, training and the behaviour of senior managers.

c. Analysis

[45] United States v. Apple, Inc., et al., No. 1:12–CV–2826, 1:12–CV–3394, 2013 U.S. Dist. WL 4774755 (S.D.N.Y. Sept. 5, 2013).

[46] Michael R. Bromwich, External Compliance Monitor, *Third Report of the External Compliance Monitor*, United States v. Apple, Inc., et al., No. 1:12–CV–2826, 1:12–CV–3394, 2013 U.S. Dist. WL 4774755 (S.D.N.Y. Sept. 5, 2013) (Apr. 16, 2015), *available at* https://regmedia.co.uk/2015/04/17/applesettlementreport.pdf.

[47] Michael R. Bromwich, External Compliance Monitor, Second Report of the External Compliance Monitor, United States v. Apple, Inc., et al., No. 1:12–CV–2826, 1:12–CV–3394, 2013 U.S. Dist. WL 4774755 (S.D.N.Y. Sept. 5, 2013) (Oct. 14, 2015), *available at* http://www.justice.gov/file/486631/download.

In the US, the mitigation effects of anti-corruption law and competition law compliance programmes are not unified. This is despite the Sentencing Guidelines which does not make a distinction between competition and anti-corruption laws when prescribing, among other things, what effects compliance programmes can have in the sentencing of a corporation. The US system measures a culpability score for companies that increases legal certainty for stakeholders in the event of compliance breaches and is therefore considered to be among the best practices. A scoring system that systematically evaluates the effectiveness of compliance programmes could also guide companies in the establishment their compliance and ethics programme.

B. United Kingdom

a. Anti-Corruption Law Perspective

The UK Bribery Act ("Act"), which came into force on July 1st, 2011, criminalizes:

(i) offering of bribes (active bribery),

(ii) receiving bribes (passive bribery),

(iii) bribery of foreign public officials and

(iv) the corporate offence of failure to prevent bribery.

Unlike the FPCA, the Act creates a full defence for corporations whose employees had committed an offence within the scope of the Act, if company can prove it had in place adequate mechanisms to prevent bribery. A company will be held liable under Section 7 of the Act if a person acting on behalf of the company provides bribes to third parties in order to retain business for the company. This being said, in case the organisation proves that it had adequate

mechanisms in force to prevent bribery, such a compliance programme will constitute a full defence for the commercial organisation. The burden of proof to demonstrate that the commercial organisation qualifies for this defence however, lies with the commercial organisation and the standard of proof is in terms of the "balance of probabilities".[48]

The decision to prosecute is at the discretion of the public prosecutors, who take into account the sufficiency of evidence, and public interest, in the decision to prosecute a certain case. Furthermore, the Company's Act 2006 provides that the Serious Fraud Office ("SFO") has the ability to impose further civil penalties on these companies due to failures of accounting provisions.[49] The Proceeds of Crime Act 2002 also enables the SFO to rule for civil recovery actions. In 2014, legislation allowing prosecutors to use DPAs as an enforcement tool came into force in the UK. According to the DPAs Code of Practice, the existence of a compliance programme is one of the factors that would incline prosecutors towards DPAs. Similarly, the absence of a compliance programme, and the failure to implement one once a violation is uncovered, is among the factors that incline prosecutors towards prosecution.

One of the most frequent criticisms against the UKBA is a lack of its enforcement to date. Therefore, it is hard to discern crystal clear patterns when assessing the few enforcement actions that have taken place under the UKBA. Still, the effects of compliance programmes on enforcement patterns are apparent.

[48] UK Ministry of Justice, *supra.* note 14 at 15.

[49] Celia Wells, *Who's afraid of the Bribery Act 2010?*, 2012 J. Bus. L., at 420, 428 (2012).

In 2012 *Oxford Publishing Ltd.* ("Oxford") self-reported to the SFO regarding bribery related conduct by several of its subsidiaries. The SFO subsequently ruled for the disgorgement of the profits the subsidiaries had obtained due to illegal payments. In explaining why the SFO had used civil recovery powers and not enforced criminal sanctions, the SFO provided various reasons.[50] Among them was the fact that Oxford became aware of the breach through its own internal investigation and that top-level management had not been involved in the decision making process that lead to the breaches.

In 2010, *Macmillan Publishers Ltd.* ("Macmillan") self-reported to the SFO that it had paid bribes in a World Bank tender. Here again the SFO ruled for a civil recovery. According to the press release published by the SFO, among the reasons the SFO considered in not pursuing criminal charges, were the facts that the company had self-reported, cooperated and complied with the SFO, and had immediately taken action to put in place an appropriate compliance programme once it became aware of the breach.[51]

Notwithstanding the lack of cases brought under the Act, current enforcement actions along with several guidance documents hint that compliance programmes have some significance for the enforcement policy of the Act. In its civil recovery orders, the SFO has repeatedly stated that

[50] Press Release, SERIOUS FRAUD OFFICE, *Oxford Publishing Ltd to pay almost £1.9 million as settlement after admitting unlawful conduct in its East African operation* (July 3, 2012) http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/oxford-publishing-ltd-to-pay-almost-19-million-as-settlement-after-admitting-unlawful-conduct-in-its-east-african-operations.aspx (last visited July 24, 2015).

[51] Press Release, SERIOUS FRAUD OFFICE, *Action on Macmillan Publishers Limited* (July 22, 2011) http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/action-on-macmillan-publishers-limited.aspx (last visited July 24, 2015).

self-reporting was prominent among the reasons the SFO decided to enforce via civil proceedings. From this comment, it is possible to infer that having a robust compliance programme, capable of detecting a breach of the Act, could result in civil instead of criminal proceedings.

b. Competition Law Perspective

The UK's Competition and Markets Authority ("CMA") published a guide titled "How Your Business Can Achieve Compliance with Competition Law" ("Compliance Guidance"), which explicitly indicates that the existence of a competition law compliance programme may be considered as a mitigating, or its absence an aggravating, factor. The Compliance Guidance provides that if a company has taken steps considered appropriate (relating to competition law "risk identification, risk assessment, risk mitigation and review activities")[52] for a compliance programme, and if the compliance programme is appropriate to the company's size, and the company is committed at every level of its employees including managers, then the CMA may consider reducing the fine by up to 10%. This provision is further supplemented by the CMA's guide concerning monetary fines, which stipulates that appropriate compliance steps are among the mitigating factors.[53]

[52] UK OFFICE OF FAIR TRADING [OFT], *OFT's guidance as to the appropriate amount of a penalty*, (adopted by the CMA Board), OFT423, (September 2012), at 12, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf (last visited July 24, 2015).

[53] *Id.* at 7.

However, the Compliance Guidance also provides that, exceptionally the CMA may consider increasing the fine if the existing compliance programme facilitates or worse, attempts to conceal the infringement. The proportion of any adjustment is at the sole discretion of the CMA, to be decided on a case by case basis.[54]

In the case of *Arriva/First Group,*[55] it was held that Arriva and First Group had infringed competition law by way of a market sharing agreement, whereby the CMA imposed fines of GBP 318,175 and GBP 529,852 on Arriva and First Group respectively. Among factors taken into account in setting the fines, the Director of the CMA considered that (i) both parties to the agreement had trained their employees, (ii) their compliance programmes were working and (iii) their employees generally followed the guidelines. The court therefore granted a reduction in the final penalty of 10%. In the case, *Construction Recruitment Forum*[56], the defendants argued in their statement of objections that they had introduced a compliance policy and had disseminated it to its employees. The court held that some of the Parties had taken the appropriate actions to introduce compliance measures, and that these measures were appropriate. Other parties to the lawsuit had no compliance measures in effect. Overall, reductions between 0 and10% were granted to the parties.

[54] THEODORE BANKS & NATHALIE JALABERT-DOURY, *supra* note 40 at 39.

[55] Market sharing by Arriva plc and FirstGroup plc., Case CP/1163-00, (OFT, Jan. 30, 2002).

[56] Construction Recruitment Forum, Case CE/7510-06, (OFT, Sept. 29, 2009), *available at* https://assets.digital.cabinet-office.gov.uk/media/555de2a2ed915d7ae5000014/CE7510-06_Decision_290909_N1.pdf (last accessed July 24, 2015).

More recently, in the *Dairy Retail Price Initiatives*[57] case, it was found that the Competition Act was infringed by concerted practices in certain dairy products, whereby retail price increases were maintained through the indirect exchange of pricing information. The competition authority found nine companies to have violated the Competition Act by coordinating retail price increases for cheddar and other British cheeses and fresh liquid milk. Accordingly, financial penalties were imposed on all undertakings except for one party that was granted full immunity under the leniency programme. The decision explained that the steps taken in ensuring compliance following the start of the investigation are noted in determining the penalty. All eight undertakings facing financial penalties were granted a reduction by 5-10% since the competition authority was satisfied that the relevant firms had taken adequate steps to ensure compliance with Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). It is, nevertheless, not evident from the decision text whether one of the steps to ensure compliance is, in fact, establishing a running compliance programme, although we might be tempted to assume so.

The Competition Appeal Tribunal's ("CAT") *Cardiff Bus*[58] decision is certainly a good example as to what could have been avoided if the company's board and employees had been trained on competition law regulations, and if the company had had a well-functioning compliance policy.

[57] Dairy retail price initiatives, Case CE/3094-03, (OFT, July 26, 2011), *available at* http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/ca-and-cartels/dairy-decision.pdf (last accessed July 24, 2015).

[58] Travel Group Plc (In Liquidation) - And - Cardiff City Transport Services Limited, Case No. 1178/5/7/11, (Competition Appeal Tribunal, 2012), *available at* http://www.catribunal.org.uk/files/1178_2Travel_Judgment_CAT_19_040712.pdf (last visited July 24, 2015).

The CAT decided that Cardiff Bus had infringed competition law by abusing its dominant position by engaging in exclusionary practices against its competitor, 2-Travel. The decision outlines the conditions[59] under which "exemplary" damages might be imposed, and states that it should be imposed only under very limited circumstances. One of the conditions of imposing exemplary damages is when a "knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk" is in evidence.[60] The CAT decided that a project designed by two directors of the company constituted exclusionary behaviour towards 2-Travel. However, both of these directors disregarded the risk of anti-competitive behaviour and failed to seek legal advice for the project.[61] The CAT decided that these two directors deliberately avoided legal advice on competition law concerns, which may arise from the planned project with the intention of exclusionary behaviour. Moreover, the directors also informed the board of directors of Cardiff Bus that the project complied with competition law along with other regulations. The CAT imposed a fine amounting to £ 60,000.

Even though the CAT did not explicitly fine the company for not having a compliance programme, it certainly indicated that a well-functioning compliance programme within the company could have prevented the anti-competitive intentions of employees and thus could have saved the company from the fine, or even better, the anti-competitive conduct in the first place.

c. Analysis

[59] *See* other conditions: *Id.* at para 451.

[60] *Id.* at para 486.

[61] Project was called White Service which intends to monitor 2 Travel's fares and undercut its prices.

For the purposes of this article, the UK can be held as a model country as it retains a unified approach to compliance programmes in both anti-corruption and competition law fields. In both arenas, compliance programmes are accepted as mitigating factors during investigations. This, of course, does not mean that the approach is precisely the same: depending on the circumstances a compliance programme can serve as a defence under anti-corruption proceedings, but also as an aggravating factor in competition law proceedings. Although the approach of each area has some differences, it is sufficiently uniform to encourage companies to develop well-suited compliance programmes through a holistic understanding of both policy areas. Considering that both compliance policies require similar elements, and serve a common purpose, a singular understanding of both should prove more effective and efficient for companies.

C. European Union

a. Anti-Corruption Law Perspective

Currently, the European Union (”EU”) does not have a unifying anti-corruption policy at Union level. The EU’s 2003 Framework Decision on Combatting Corruption in the Private Sector stipulates that member states are expected to ensure that legal persons are liable for acts of bribery; however, this document does not mention compliance programmes.[62] According to the Draft Report on Organised Crime, Corruption and Money Laundering (“Draft Report”),

[62] THE COUNCIL OF THE EUROPEAN UNION, *Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector* (2012), http://bookshop.europa.eu/en/compliance-matters-pbKD3211985/downloads/KD-32-11-985-EN-C/KD3211985ENC_002.pdf?FileName=KD3211985ENC_002.pdf&SKU=KD3211985ENC_PDF&CatalogueNumber=KD-32-11-985-EN-C (last visited July 24, 2015).

businesses are recommended to adopt self-regulation with regard to corruption and policies that monitor the business' compliance with that self-regulation.[63] This being said, despite recognizing the need for a common policy with regard to corruption to be adopted within the EU, the Draft Report does not mention how the existence of compliance programmes would affect the prosecutions of businesses.[64] Accordingly, the EU could be expected to recommend Member States to adopt legislation on anti-corruption compliance programmes, as a union-wide policy on corruption emerges.

b. Competition Law Perspective

With regard to competition law,[65] there is no unified approach towards compliance programmes. To date, the European Commission's approach is aligned with that of some national competition authorities, such as the German Federal Cartel Office, which does not consider compliance

[63] THE EUROPEAN PARLIAMENT, *Draft Report on organised crime, corruption, and money laundering: recommendations on action and initiatives to be taken (interim report)* (Feb. 22, 2013) (2012/2117(INI)), at para. 32, *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-506.051%2B01%2BDOC%2BPDF%2BV0%2F%2FEN (last visited July 24, 2015)

[64] Special Committee on Organised Crime, Corruption and Money Laundering, European Parliament, *Draft Report on Organised Crime, corruption, and money laundering: recommendations on action and initiatives to be taken (interim report) (2012/2117(INI))*, at. 9-10, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-506.051%2B01%2BDOC%2BPDF%2BV0%2F%2FEN (last visited July 24, 2015).

[65] The European Commission ("EC" or "Commission"), the competent authority in determining the violation and maintaining the EU markets competitive has supranational authority to impose monetary fines to companies for competition law violations in the EU whereas it cannot impose monetary fines to individuals which falls under the jurisdiction of national civil courts. The final amount of the administrative monetary fine on the infringing company can be up to 10% of the company's worldwide annual turnover in the preceding business year.

programmes as a mitigating factor; a stricter approach than when compared to other Member States such as France or the UK.[66] In 2010, Joaquín Almunia, the Vice President of the European Commission ("EC") from 2010 to 2014, explicitly stated the reluctance of the EC to allow compliance programmes as a mitigating factor as follows:

> "*[w]e reward cooperation in discovering the cartel, we reward cooperation during the proceedings before the Commission, we reward companies that have had a limited participation in the cartel, but that, I think is enough […]. If we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed? The benefit of a compliance programme is that your company reduces the risk that it is involved in a cartel in the first place. That is where you earn your reward."*[67]

Almunia has restated the EC's position in his speech in 2011: "*The main reward for a successful compliance programme is not getting involved in unlawful behaviour*."[68]

The EC's current approach to this issue presumably has its roots in an old case, the *British Sugar Case*.[69] Back in the 1980s, the EC assessed the complaints of sugar merchants against a company,

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[66] Frederic Manin, Rainer Velte, Gustaf Duhs & Gonçalo Anastacio, *Competition law compliance across Europe: a multi-jurisdictional challenge*, EUR. COMPETITION L. REV. Jan-Feb. 2013, at 6, 10 (2013).

[67] Joaquin Almunia, Vice President of the European Commission responsible for Competition Policy, Remarks at BusinessEurope & US Chamber of Commerce Competition conference in Brussels, Compliance and Competition policy, *available at* http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm (Oct. 25, 2010).

[68] Joaquin Almunia, Vice President of the European Commission responsible for Competition Policy, Remarks at 15th International Conference on Competition: A Spotlight on Cartel Prosecution, Berlin, Cartels: the priority in competition enforcement, *available at* http://europa.eu/rapid/press-release_SPEECH-11-268_en.htm?locale=en (Apr. 14, 2011).

[69] Case No IV/30.178 Napier Brown–British Sugar [1988].

British Sugar, for abusing its dominant position. The EC started its investigation against British Sugar in 1986.[70] In the same year, British Sugar established a competition law compliance programme and ensured the authority that it would comply with competition law regulation expressing that this would be its company policy.[71] In 1991, the Commission decided that British Sugar and its competitor (Tate & Lyle plc) were in collusive agreements.[72] The EC pointed to British Sugar's abovementioned expressed commitment of 1986, stated that British Sugar did not fulfil its commitment to compliance with competition law regulation[73] and stated that the violation was intentional.[74] Therefore, the failed compliance programme was considered as an *aggravating* factor for the administrative monetary fine.[75] In this odd case, the EC considered the

[70] THEODORE BANKS & NATHALIE JALABERT-DOURY, *supra* note 40 at 5.

[71] *Id*.

[72] 1999/210/EC: Commission Decision of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd (notified under number C(1998) 3061), Official Journal L 076 , 22/03/1999 P. 0001 – 0066, *available at:* http://ec.europa.eu/competition/antitrust/cases/dec_docs/33708/33708_6_7.pdf (last visited July 24, 2015).

[73] *Id*. at para. 208: "*British Sugar acted in a manner contrary to the clear wording contained in its compliance programme, which it announced to the Commission in October 1986 and introduced in December 1986. As is clear from the Napier Brown Decision (424), the introduction of the same compliance programme was taken into account as a mitigating factor in fixing the fine in that decision, as a result of which British Sugar benefited from a significant reduction of the fine by comparison with the amount which would have been imposed in the absence of the programme. As was set out in detail (425), the compliance programme covered the whole range of the company's obligations under Article 85 and 86, and specifically mentioned agreements and/or concerted practices concerning pricing. Moreover, British Sugar promised in its compliance programme to take every step to ensure compliance with the Community competition rules, even to go beyond its strict legal obligations and avoid any doubtful behaviour, and to pass this message on to every level of the company's hierarchy. The infringement found in this Decision shows that this promise has not been fulfilled.*"

[74] *Id*. at para. 192.

[75] *Id*. at para 209-210.

existence of a compliance programme as an aggravating factor in determining the monetary fine for competition law violation, because the violation was admitted as intentional.

In 2007, the European Court of Justice ("ECJ") upheld the long-standing case-law in *Schindler v Commission,*[76] arguing that a compliance programme, that is unsuccessful at effectively preventing long-term cartel offence, has no positive effect on the protection of competition; rather, it makes it more difficult to uncover infringements. Therefore, the highest court in the EU does not signal any sympathy with the view that the existence of a compliance programme might be considered a mitigating factor when determining a fine.

In December 2014, the General Court upheld an EC decision imposing fines on Pilkington and its subsidiaries, amounting to € 357 million, for their participation in the car glass cartel in the EU market[77] despite the Pilkington Group having an existing compliance programme. The General Court upheld the Commission's argument in light of the other European court decisions,[78] and ruled that the competition law compliance programme was not a mitigation factor for the fine, because it does "not alter the fact that infringements have been committed." The General Court's approach is compatible with that of the EC, in that compliance programmes are deemed useful only to the extent they prevent further infringements.

c. Analysis

[76] Case C-501/11P Schindler Holding Ltd v European Commission [2013].

[77] Case T-72/09Pilkington v European Commission, [2014].

[78] Joined Cases T-101/05 and T-111/05 BASF and UCB v Commission [2007]; Case T-38/07 Shell Petroleum and Others v Commission [2011], para. 96; and Case T-138/07 Schindler Holding and Others v Commission [2011], para. 282.

In light of the foregoing case law, the EC Guide, and the approach of the European Commission to compliance programmes in competition law points to the benefit to companies, of minimizing their risk of anti-competitive behaviour as a means to preventing violation, and consequent sanctions. However, the EC does not apply any reduction on monetary fines for a company that has a competition law compliance programme; nor does the EU have any intention of applying such a policy in the near future. With regard to anti-corruption law, it seems that at the EU level, there is a little discussion of a unified approach to considering compliance programmes as a mitigant, although individual Member States may have their own regulations.

D. France

a. Anti-Corruption Law Perspective

In France, corporations can be held criminally liable for any bribery of foreign public officials since 2000. However, as yet the French courts and corruption enforcement authorities have failed to produce case law on the matter.[79] As for the effects of anti-corruption compliance programmes on the enforcement of anti-bribery laws, the French laws currently do not provide for a compliance programme as a defence or a mitigating factor.[80] However, current practice encourages the implementation of such compliance programmes, in particular for businesses deemed to be 'risky'. Moreover, due to FCPA enforcements and the newly enacted Act, most aimed at combating bribery and corruption. The Service Central de la Prévention de la Corruption

[79] OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France* (October 2012), at .55, *available at* http://www.oecd.org/daf/anti-bribery/Francephase3reportEN.pdf (last visited July 24, 2015).

[80] *Id*. at 22.

("SCPC" - the main enforcement body of corruption related offences) also encourages companies to adopt anti-bribery compliance programmes. According to the OECD Working Group on Bribery's Phase 3 Report on France, small and medium sized enterprises are lagging behind the larger companies in the adoption of such compliance programmes. In its follow up report of 2014, the OECD Working Group on Bribery recommended that France increase its efforts to raise awareness among French companies for the need to promote the adoption and implementation of compliance programmes in SMEs involved in international trade. The follow-up report explains that the General Confederation of Small and Medium-Sized Enterprises ("CGPME") has started working on this with the SCPC, and will continue to do so in 2014.

b. Competition Law Perspective

With respect to competition law, the French Commercial Code[81] provides that the French Competition Authority (Autorité de la Concurrence) may impose fines on the company up to 10% of its highest yearly worldwide turnover "*achieved in one of the financial years ended after the financial year preceding that in which the practices were perpetrated*".[82] The Competition Authority may fine individuals up to €3 million depending on "the seriousness of the infringement".[83] The Competition Authority may also order the company to cease the violation

[81] Law No. 2001-420 of May 15, 2001, Journal Officiel de la République Français [J.O.] [Official Gazette of France], May 16, 2001 (Translated text into English), *available at* http://www.legifrance.gouv.fr/content/download/8016/107146/version/3/file/code_commerce_part_L_EN_20130701.pdf (last visited July 24, 2015).

[82] *Id.*

[83] THEODORE BANKS & NATHALIE JALABERT-DOURY, *supra* note 40 at 35, 11.

and "accept commitments from them to discontinue the non-competitive practices".[84] Individuals may also be sentenced to imprisonment for a competition law violation for a period of up to 4 years, and may incur a criminal fine of up to €75,000 fine.[85] The judgment of the Criminal Courts may be made independent of the Competition Authority's action against companies.[86]

The Framework Document has different rules applicable for cartel cases than for other competition law violations. In cartel cases, the existence of a competition law compliance programme in itself would not be considered as an aggravating or mitigating factor in determining the administrative monetary fine. The Framework Document explicitly follows the logic that if a company is involved in an anti-competitive behaviour despite its compliance programme, that compliance programme cannot be considered as successful and the company cannot be exempted from the legal consequences of creating economic harm in the market.

According to the Framework Document, one involved in cartel behaviour has an obligation to make a leniency application because the leniency application "*is the most consistent"* behaviour within "*an ethical commitment with respect to compliance".* Therefore, thanks to the compliance program, in case a company realize to be in a cartel, the ethical action to take is to apply for leniency.[87] If the company does not choose to apply for a leniency and it may settle after receiving the statement of objection. At that stage, partial or full immunity granted to the

[84] Article L464-2 *(Act No. 2001-420 of 15 May 2001 Art. 73 Official Journal of 16 May 2001). (Order No. 2004-1173 of 4 November 2004 Art. 10 Official Journal of 5 November 2004), available at* http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (last visited July 24, 2015).

[85] Article L420-6 of the French Commercial Code.

[86] THEODORE BANKS & NATHALIE JALABERT-DOURY, *supra* note 40 at 35, 11.

[87] FRENCH COMP. AUTH, *supra* note 16 at para. 27.

company would be aside from any potential reduction of fine because of the existence of a compliance programme. The proportion of the reduction possible is not set out in the document.[88]

In any case, the Framework Document states that a compliance programme would not be considered as an aggravating factor in determining the administrative monetary fine, even when executives have taken an active part in the infringement.[89]

On the other hand, in non-cartel cases, when the French Competition Authority starts an investigation or any inspection, the Framework Document provides that if the company discovers a competition law violation (non-cartel), it should immediately take steps to stop the violation. In case the company proves that it took appropriate measures to stop the violation, the Competition Authority might consider the compliance programme as a mitigating factor.[90] However, if a company does not have a compliance programme, it can waive its rights to make an objection to the Authority's allegations and may still commit to establish a compliance programme intended to change future behaviour, which might be taken into account in settlement procedures.[91]

In July 2014, the French Competition Authority imposed a fine amounting to €46 million on the mobile phone operator, la Société Française du Radiotéléphone ("SFR"), and its subsidiary, la Société Réunionnaise du Radiotéléphone ("SRR"), based on its abuse of their dominant position

[88] "*The complete or partial immunity that can be granted when an undertaking chooses one or the other of these procedures is exclusive of any other fine reduction that may be granted on the grounds of the existence of its compliance programme." id* at para. 27.

[89] *Id* at para. 26.

[90] FRENCH COMP. AUTH, *supra* note 16 at para. 28.

[91] FRENCH COMP. AUTH, *supra* note 16 at para. 29.

(a non-cartel case) on the Islands of Réunion and Mayotte.[92] The Competition Authority held that SRR was charging substantially higher rates for calls made, and short messages sent, to numbers outside the network than calls and short messages made to other SRR numbers within the network. In this way, SRR charged more than the cost incurred upon itself for connecting calls to other operators, which constituted a form of excessive pricing behaviour. Such practices are deemed anti-competitive by its creating a network effect, degrading the competitor's image and blocking them from making price competitive moves.[93] SRR did not contest the accuracy of the situation[94] and undertook to implement a competition law compliance programme which helped reduce the fine by 18% from the initial amount of €56,024,100.

c. Analysis

The French Competition Authority makes a clear distinction between cartels, and non-cartel activity. It rewards an efficient compliance programme only in non-cartel cases, where, as shown, case-law confirms that a company's efforts at prevention are taken into account if they establish the existence of an efficient compliance programme. On the other hand, in cartel cases the Authority will not reward a failed compliance programme. On the anti-corruption law front, even though as a matter of French law anti-corruption compliance programmes do not have any effect on the investigation process. Nevertheless, companies choose to implement compliance

[92] Décision n° 14-D-05 du 13 juin 2014 relative à des pratiques mises en œuvre dans le secteur de la téléphonie mobile à destination de la clientèle résidentielle à La Réunion et à Mayotte, Authorité de la Concurrence (French Competition Authority), *available at* http://www.autoritedelaconcurrence.fr/pdf/avis/14d05.pdf (last visited July 24, 2015).

[93] *Id.* at para. 169.

[94] Article L. 464-2 of the French Commercial Code.

programmes, as SCPC displays a pro-compliance programme approach. This echoes a worldwide discussion in the anti-corruption field towards considering compliance programmes as a mitigating factor.

E. Italy

a. Anti-Corruption Law Perspective

Italian Criminal Corporate Law, Decree No. 231 of 2001, ("Decree") provides that a company, where top management or employees commit criminal offences, such as corruption for the benefit of the company, can be held criminally liable. This decree also provides, however, that when a company can prove it adopted effective and specific internal compliance measures, the company can be exempted from liability for the relevant offence committed by an employee. Thus, under the Italian legal system, compliance programmes can be used to shield a company from liability arising from corruption crimes. The Decree retains a harsher approach, however, when the crime is perpetrated by a manager of a corporation rather than an employee. In other words, the existence of internal mechanisms is not enough when the perpetrator is a manager—the company would then also have to prove that the manager circumscribed internal mechanisms fraudulently.[95]

b. Competition Law Perspective

[95] Francesca Chiara Bevilacqua, *Corporate Compliance Programs Under Italian Law,* Ethikos (Nov.-Dec. 2006), http://www.corporatecompliance.org/Portals/0/PDFs/Resources/library/ItalyCorporateCompliance.pdf (last visited July 24, 2015).

The Italian Competition and Fair Trading Act of 1990[96] ("CFTA") applies to agreements and abuses of dominant positions outside the scope of the TFEU, and establishes the Italian Competition Authority ("ICA"). ICA has only recently applied the EC's guidelines in determining the fines for competition law infringements,[97] adopting the measures in October 2014.

If, after an investigation, ICA determines that competition law has been violated, it has the authority to impose fines up to 10% of the turnover of the undertaking or entity under Section 15 of the CFTA. There are no criminal sanctions stipulated under the CFTA; however, certain cartel activities may be prosecuted under the Italian Criminal Code,[98] resulting in imprisonment and monetary fines.

In October 2014, the ICA released new guidelines on how to apply the criteria of quantification of the fines imposed by the Authority pursuant to Article 15, paragraph 1, of Law No. 287/90 ("Italian Fining Guidelines").[99] In the Italian Fining Guidelines, compliance programmes are introduced as one of the potential mitigating factors.[100] The Italian Fining Guidelines are well

[96] Law No. 287 of October 10th, 1990, Italian Competition and Fair Trading Act (English translation), http://www.agcm.it/en/comp/1727-law-no-287-of-october-10th-1990.html (last visited July 24, 2015).

[97] Francesca Ammassari, *Guidelines on the Method of Setting Fines for Infringements of Competition Rules: Key Issues*, Italian Antitrust Review, Sectoral Columns Antitrust and Jurisprudence Observatory No:3, at 231 (2014).

[98] Alessandro Boso Caretta, Carlo Edoardo Cazzato, Giovanni Scoccini & Francesca Sutti, *Italy: Cartels*, GLOBAL COMPETITION REV., *available at* http://globalcompetitionreview.com/reviews/62/sections/210/chapters/2496/italy-cartels (last visited July 24, 2015).

[99] ITALIAN COMP. AUTH., *supra* note 17.

[100] *Id*.

received in the way that they grant reductions in fines for virtuous companies who promote and invest in a culture of compliance.[101]

Under paragraph 20, ICA has the authority to reduce the fine up to 15% of the base amount for each of the mitigating factors, and to reduce fines up to 50% overall.

c. Analysis

The ICA recently slightly diverged from the approach of the European Commission in determining monetary fines for companies that have violated competition law. The ICA, in its guidelines on fines, committed to granting reductions on monetary fines for any infringer that has an efficient and effective compliance programme. It remains to be seen how the ICA evaluates compliance programmes as a mitigating factor in future cases. Similar to this approach, Italian law recognises that a company can be barred from anti-corruption law liability if it is able to demonstrate that it has an effective compliance programme.

F. Brazil

a. Anti-Corruption Law Perspective

Recently, Brazil enacted legislation that confirms compliance programmes as one of a number of possible mitigating factors to be applied when determining the scope of a fine to be imposed on a legal entity following corrupt behaviour. The Decree No. 8.420 was enacted within the scope of the Clean Companies Act, which imposes civil and administrative fines on companies. Mitigating

[101] Andrea Cicala & Grant Murray, *New Italian fining guidelines may encourage compliance programmes and more self-reporting of cartels*, 36 EUR. COMPETITION L. REV. 140, 143 (2015).

factors include: self-reporting, cooperation during an investigation, and having a compliance programme

The decree also sets out the numerous components of what is to be considered to constitute an effective compliance programme, namely:

(i) An appropriate tone at the top,

(ii) compliance policies applicable to everyone in the company,

(iii) policies applicable to third parties,

(iv) periodic training,

(v) periodic risk assessments,

(vi) accurate books and records,

(vii) internal controls to assure the reliability of financial statements,

(viii) specific public procurement policies and policies for the interaction with government officials,

(ix) independence of the compliance officer,

(x) a whistleblowing hotline and measures to prevent retaliation,

(xi) enforcement of disciplinary measures in cases of wrongdoing,

(xii) immediate suspension of any identified irregularities, and effective remediation procedures,

(xiii) due diligence procedures for third parties,

(xiv) mergers and acquisition due diligence procedures,

(xv) continuous monitoring of the programme and

(xvi) transparency over political contributions.[102]

Moreover, the decree recognizes that one size does not fit all when it comes to compliance programmes. Therefore, the decree sets out that when determining the effectiveness of a compliance programme, the following should be considered:

(i) number of employees,

(ii) the nature of the company's business as demonstrated by the number of different departments,

(iii) whether it uses third parties,

(iv) industry of the company,

(v) the countries in which the company operates, directly or indirectly,

(vi) its relationship with the public sector,

(vii) number and location of companies within the same economic group and whether the entity is a small size company.[103]

This new development in Brazil is in line with its older counterparts in the US and the UK, but it remains to be seen how this legislative development will turn into enforcement actions and outcomes.

b. Competition Law Perspective

[102] Posting of Carlos Ayres to FCP Americas Blog, http://fcpamericas.com/english/anti-corruption-compliance/highlights-brazils-regulation-clean-companies-act/# (March 23, 2015).

[103] *Id*.

Competition law in Brazil is regulated under Article 173 section 4º of the Federal Constitution and Law 12,529/2011 ("Brazilian Competition Law"). The Administrative Council for Economic Defence ("CADE") is the competition authority in Brazil. In March 2013, the CADE amended its rules for settling cartel investigations, referred to as cease-and-desist agreements.[104] Thus far CADE does not recognise compliance programmes as a mitigating factor in fining companies for competition law violations.

c. Analysis

Brazil followed the international trend towards anti-corruption law compliance programmes by adopting an approach similar to the FCPA and the UK Bribery Act. Unlike the policies for anti-corruption compliance programmes, the CADE does not yet consider compliance programmes for competition laws as a mitigating factor in determining fines. However, in the upcoming years, the CADE is expected to be one of the pioneers, along with the CMA of the UK, the Italian Competition Authority and the French Competition Authority to consider compliance programmes as a mitigating factor when determining fines. However, the Draft Guidelines for Competition Compliance Programs which was published by CADE on August 19, 2015,

[104] Vinícius Marques de Carvalho, *The Antitrust Rev. of the Americas 2015 - Brazil: Administrative Council for Economic Defence*, 2015 GLOBAL COMPETITION REV., *available at* http://globalcompetitionreview.com/reviews/63/sections/216/chapters/2549/brazil-administrative-council-economic-defence/ (last visited July 24, 2015).

indicates that the Tribunal might consider a well-established compliance programme as good faith of the company and might apply reduction in fines.[105]

E. Spain

a. Anti-Corruption Law Perspective

On March 2015, Spain became one of the most recent countries to join the global trend towards regulating the legal consequences of a compliance programme. Effective as of July 2015, the amended Spanish Criminal Code provides that in case the employees or directors of a company has committed a corruption crime and the company has an effective compliance programme that abides by the requirements set forth by the legislation, then that company can be shielded from criminal liability. However, enacting a compliance programme is not just a voluntary defensive mechanism, but a positive obligation burdened upon the directors of the company. In order to qualify for a defence, the compliance programme should be supervised by a compliance body, either consisting of individual(s) or department(s) with sufficient supervision authority and this compliance body should have discharged this duty duly. Finally, the employee or the director should have committed a crime by breaching the compliance programme.

According to the legislation, the components of an effective compliance programme are engaging in risk assessment and periodic review of the programme, putting in place policies and controls to

[105] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENCE, *Draft Guidelines for Competition Compliance Programs* (Aug. 19, 2015) available at http://www.cade.gov.br/upload/Guidelines%20for%20Competition%20Compliance%20Programs.pdf

prevent the risks, financial controls and implementing disciplinary measures in the face of breaches of the compliance programme.[106]

b. Competition Law Perspective

The above explained development under Spanish Criminal Code is not applicable under competition law regulation. Competition law in Spain is regulated under Law on the Defence of Competition No. 15/2007 ("Law No. 15/2007"). The provisions of the Law No. 15/2007 have been implemented by the Defence of Competition Regulation No. 261/2008 (Royal Decree No. 261/2008) and a number of guidelines with regard to issues such as the method of setting fines. The National Commission for Markets and Competition (Comisión Nacional de los Mercados y la Competencia, "CNMC") is the competent authority in Spain. The Competition Directorate within the CNMC investigates competition law violations at national or supra regional level in Spain.[107]

Currently, CNMC is not considering compliance programs as a mitigating factor in administrative fines. However, it is safe to assume that this positive development regarding compliance programmes under Spanish Criminal Code would motivate companies to establish a well-structured compliance programme. From an optimistic point of view, the benefits of

[106] *Supra* note 20.
[107] Borja Martinez Corral, *Spain: Cartels - 3rd Edition*, GLOBAL LEGAL INSIGHTS, *available at* http://www.globallegalinsights.com/practice-areas/cartels/cartels-3rd-edition/spain#chaptercontent13 (last visited January 25, 2016).

encouraging compliance programmes for the society and the markets could be acknowledged by the CNMC, as well.[108]

c. Analysis

On the anti-corruption front, Spain has entered rather dramatically to the list of countries which attribute legal consequence to compliance programmes. This is not only because Spain's legal system imposes upon companies a positive obligation to adopt compliance programmes, but also compliance programmes which meet legislative requirements can serve as a defence in the face of corporate criminal liability. However, this is not to be confused with attributing mitigation outcome to the compliance programmes. Accordingly, Spain's system is both similar and unlike the UK system, where compliance programmes are accepted both as mitigation and a defence tool. Unlike the acknowledged value of the compliance programmes under corporate criminal liability, currently there is no development at the competition law front. However, this new perspective could prove the significance of incentivising compliance programmes to CNMC along with the companies which intend to establish compliance as a whole within their company policies.

VI. ANALYSIS AND CONCLUSION

[108] Nathalie Jalabert-Doury, David Harrison, & Jens-Peter Schmidt, *Enforcers' Consideration of Compliance Programs in Europe: A Long and Winding—but Increasingly Interesting—Road*, COMPETITION POLICY INTERNATIONAL ANTITRUST CHRONICLE, https://www.competitionpolicyinternational.com/enforcers-consideration-of-compliance-programs-in-europe-a-long-and-windingbut-increasingly-interestingroad/ (Jun. 2015) *available at* (last visited January 25, 2016).

Ignorantia juris non excusat[109] and persons are obliged to comply with the law. However, the fines for violation of the law are not fixed. The relevant authorities always consider the dynamics of each case to decide whether the breaches can be remedied with higher or lower restitution. Deliberating on severity and circumstance when adjudicating infringements of the law, is a dynamic aspect of law, embodied in the discretionary powers of the judge. This is also what prevents legal systems from being algorithmic equations and calculations. Every violation, be it civil, criminal or administrative needs to be considered in accordance with the circumstances surrounding each case and evaluated in equitable terms. This is why this article suggests that both anti-corruption and competition law compliance programmes should be evaluated in the same manner: if a company did the best that it could in terms of educating the employees through whom the company discharges its functions, sincerely takes every possible step to prevent breaches yet the breach takes place anyway – in this case most probably due to a rogue act - the fact that the company did everything within its power that it could reasonably do, should be considered as a mitigating factor – for the company. Although the decision to consider compliance programmes as a mitigating factor is, ultimately, a policy decision, this could be easily applicable both in the field of competition law and anti-corruption law.

In the anti-corruption arena, the analysis suggests an American leadership in terms of concepts and enforcement patterns, while most countries in Europe is struggling to find ways to fit the Anglo-American concepts into its legal systems. Within competition law, some Continental European countries, even though not in step with the legislation and enforcement patterns

[109] Ignorance of the law is no excuse.

promoted by the EC and European Union Court of Justice, choose to follow a more motivational approach with regard to compliance programmes.

Aside from the ethical aspects of maintaining competitive, non-corrupt markets, the regulatory areas of competition law and anti-corruption law, feed economic growth and consumer welfare at the macro level. Although these policy areas are usually administered by separate bodies in most jurisdictions, both promote free markets, and democratic institutions[110] in the broader sense. Therefore, the authors of this article suggest that companies should not treat these areas as separate concerns. The desired results of each are connected, thus, a unification and coordinated approach should be encouraged and facilitated through the adoption of a unified approach by the enforcing authorities in both fields.

There are legal policy reasons for this approach. First, considering the limited resources of the competent authorities who cannot be "all-seeing", breaches could go unnoticed in a vast number of markets and innumerable business transactions; therefore positive general prevention efforts of others, in other words, "corporate self-policing"[111] proves to be more efficient and beneficial for the ultimate aim of preventing violations. This would lead to a procedural economy where public institutions need not allocate resources to certain fields where they are confident the corporates

[110] OECD Secretariat, *Executive Summary*, Global Forum on Competition: Fighting Corruption and Promoting Competition, 8 (DAF/COMP/GF/WD 2014) *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)12/FINAL&doclanguage=en (last visited July 24, 2015).

[111] Joseph E. Murphy, *Can the Scandals Teach Us Anything*, 12 Bus L. Today 11, 11 (2003).

would see a benefit to report themselves, and instead use the limited resources they have on issues that require more attention.

It has been observed above, that many of the competition law authorities examined in this article developed corporate self-policing tools, either by recommending best practices for compliance programmes or, taking it a step further, providing reductions in fines if the company had implemented compliance programmes. Worldwide, legislative trends in the first half of the 2010s have been to encourage the development of corporate compliance programmes by listing it among the mitigating factors in determining fines; Italy, France and the UK have implemented policies in this direction. Even in jurisdictions where compliance programmes are not considered as mitigating factors, authorities may choose to enforce the establishment of such programmes as one of the settlement conditions or as part of a commitment package. This factor alone indicates the authorities' belief in the effectiveness and benefit of compliance programmes.

Second, both anti-corruption and competition laws are enforced using a combination of positive and negative general prevention tools.[112] Positive prevention tools are defined as those that "foster the development of a competition and anti-corruption culture", and negative prevention tools are based on sanctioning only after an infringement.[113] While almost all jurisdictions attempt to deter anti-competitive and corrupt behaviour with high fines, and criminal sanctions, compliance programmes are relatively contemporary positive prevention tools. Compliance programmes help companies develop a culture that praises upholding law as an effective method

[112] Alberto Pera & Giulia C. Pisanelli, *Prevention of Antitrust Violations*, 34 EUR. COMPETITION L. REV. 267, 267 (2013).

[113] *Id*., at 267.

and ensures that numerous infringement cases can be avoided. Incentives for companies to take steps that would promote a compliance culture should not be seen as taking the place of high penalties, but rather as a way to supplement their deterrent effect. Alternative positive measures of prevention motivate companies to comply with the law.[114]

An integrative approach to compliance programmes is also desirable for companies. Generally, a company which implements a compliance programme utilises significant financial and human resources. For instance, even if a company has an established compliance policy at its headquarters, most companies also retain local law firms in order to adapt compliance policies to the sensitivities of other jurisdictions. Companies allocate their human resources by establishing a multiple stepped reporting mechanism where the directors and executive are also involved and responsible. Such a company also provides trainings of anti-corruption and competition laws to executives and employees on a regular basis. Additionally, the employees and executives who do not comply with this company policy face serious consequences, such as the termination of their employment contract. In response to these efforts, the competent authorities should have the discretion to consider the compliance programme in effect as a mitigating factor in calculating the appropriate fine. This reduction in fines may also be viewed as a long-term investment in a company's compliance programme and thus an investment in competitive markets. In addition, such a reduction in fines would also have a motivational effect on companies in order for them to establish compliance programmes.

[114] *Id*., at 273.

Company compliance officers would support the view that competition law compliance programmes should be listed as a mitigating factor when calculating the amount of fines for anti-competitive and corrupt behaviour. If competition authorities were to take an effective compliance programme into consideration as a mitigating factor, as is the case in the UK, Italy and France, companies would be encouraged more to adopt these practices. This in turn would be a more efficient and functional way to prevent competition law violation.

Unifying the approach of these two policy areas would arguably further accentuate the welfare for the whole society, since companies engaging in greater efforts to comply with these laws could lead to a more level playing field and therefore increased market efficiency. The US system that measures the culpability score of companies increases legal certainty for stakeholders, and is therefore considered to be among best practices. It is a pragmatic solution towards less non-compliance, and in effect towards more transparency, a better allocation of resources, to a level playing field, more innovation and finally, more social welfare.

Legislation with regard to the promotion of anti-corruption compliance programmes and its enforcement is less well-established in much of Europe. The EU is at the stage of advising businesses to have a union-wide anti-corruption policy, while encouraging businesses to adopt codes of conduct and monitoring procedures as a component of fighting corruption in the private sector. The same approach is also applicable for competition law compliance programmes. Taking the UK as a model regulatory jurisdiction for the purposes of this article, considering compliance programmes as a mitigating factor within a unified system could be a practical and beneficial solution. By doing so companies would see greater benefits, and be more motivated to

apply these two policies hand in hand within their individual corporate policies. In addition, countries could provide legal certainty on the enforcement of such mitigation by implementing a supplementary scoring system similar to the US's culpability score system. Scoring programs boost efficiency by allowing companies to discern the optimal, and most effective level of investment in compliance. Following such legislative innovation, companies would be in a position to accumulate best practices over the years, ultimately increasing market efficiency. Such an upgrade in legislative policy would eventually benefit companies, society and the broader economy .