

COMPETITION LAW COMPLIANCE

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ABSTRACT¹: Competition within the economy is so good for business and for consumers. The benefits are innumerable. Strong competition regimes encourage open and dynamic markets, driving also productivity, innovation and value for consumers. In connection with consumers they ensure lower prices and a greater variety of goods and services. The achievement and maintenance of these regimes are therefore essential. Compliance programmes are particularly important, as managers and employees require specific guidance on how to implement competition rules. The significance is highlighted because companies whose market behaviour fails to comply with competition rules run the risk of incurring high fines and facing other negative consequences. The high costs of non-compliance, apart from being seen as doing business ethically, are important reasons why a company should comply with competition rules. An active strategy of compliance with the law and business ethics can enhance also a company's reputation and attractiveness for promotional and recruitment purposes. Staff members who are aware of what constitutes illegal behavior will be more alert to wrongdoing by competitors or other commercial partners. What matters finally is that the rules are complied with. This article discusses the costs of non-compliance and the possible ways of implementing a successful competition compliance programme within companies.

KEY WORDS: Competition Law, compliance programmes, fines, private enforcement, leniency, prevention of anticompetitive conducts.

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RESUMEN: Un régimen de libre competencia beneficia tanto a las empresas como a los consumidores. Los beneficios que se derivan de este modelo son numerosos, al promover la existencia de mercados abiertos y dinámicos. Al mismo tiempo se impulsan la productividad y la innovación en la oferta de productos y servicios de cara a los consumidores y usuarios. Los programas de cumplimiento adquieren una gran relevancia en la práctica, ya que tanto directivos como empleados tienen que ser informados de cómo implementar y cumplir con este sector normativo. La importancia de este tipo de programas se acentúa además teniendo en cuenta que las empresas que no cumplan estas normas podrían tener que hacer frente a elevadas multas, entre otras posibles consecuencias jurídicas negativas. Estos riesgos que se derivan del incumplimiento normativo, además del impacto negativo que se puede derivar sobre la fama de la empresa, son razones importantes por las que las empresas deben de cumplir la normativa de defensa de la competencia. Una estrategia orientada activamente en este sentido puede mejorar la reputación de una empresa, así como las ventas de sus bienes o servicios, o bien puede coadyuvar a que la empresa en cuestión adquiera más fácilmente nuevos trabajadores. En última instancia, lo que importa es que la normativa realmente se cumpla. Este trabajo hace referencia a las consecuencias jurídicas que se derivan del incumplimiento de las normas de defensa de la competencia, así como a las posibles vías para implementar un programa de cumplimiento exitoso en el seno de una empresa.

PALABRAS CLAVE: Derecho de la Competencia, programas de cumplimiento, multas, aplicación privada, programas de clemencia, prevención de ilícitos anticompetitivos.

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1. INTRODUCTION

The benefits of competition are well known. Free competition seems to be the best incentive for the achievement of an efficient economic system, encouraging innovation by companies and guaranteeing consumers the best choice at the lowest price². In sum, competition within the economy is so good for businesses and for consumers. Strong competition regimes encourage open and dynamic markets, driving also productivity, innovation and value for consumers. In connection with them, they ensure the mentioned lower prices and a greater variety of goods and services.

Closely related to the guarantee of legal certainty which must ensure a state based on the rule of law is the basic characteristic that citizens (and therefore also the members of a business) need to know easily and to a low cost if they are complying with or breaking the law. This is even more important if the penalty or administrative punishment contemplated as legal consequence could significantly affect the liberty or patrimonial area of (potential) offenders. Certainly, the knowledge of unlawful conducts is more complicated in the field of competition law due to the fact that prohibitions are not covered in a concrete way as for example it is the case in criminal law. Instead, general clauses are very common ("any abuse by one or more undertakings of a dominant position within the internal market shall be prohibited in so far as it may affect trade between Member States"). Hence the importance of compliance codes or *programmes*³ in this specific area of competition law within a company, so that executives, as well as employees, are aware of the specific unlawful conducts and risks of not complying with competition law and thus contribute to comply with the rules of competition, especially keeping in mind that they are all required to it, regardless of their size and the number of employees. The aim of this paper is to discuss and outline the costs of non-compliance with competition law and the possible ways of implementing a successful compliance programme within companies, taking always into account the complexity of the issue of ensuring that staff members of the companies and the employers know with certainty the scope of competition rules.

² See, for a general overview of these objectives, DREXL, J., "On the (a)political character of the economic approach to competition law", *Competition Policy and the Economic Approach. Foundations and Limitations* (Edit. DREXL, J., KERBER, W., PODSUN, R.), Cheltenham/ Northampton, 2011, pp. 312-337.

³ The origin of these codes is in the U. S. banking law (Securities Exchange Act of 1934), which is Available at <http://www.sec.gov/about/laws/sea34.pdf>, accessed 1 October 2013.

2. IMPORTANCE OF COMPLIANCE WITH COMPETITION LAW

Compliance programmes have become an increasingly important subject for American businesses after the notorious *Enron-case*⁴. Competition law has not been of special relevance to the financial scandals that have given rise to the current emphasis on compliance with the rules, but it certainly has become one of its beneficiaries. This is completely justified, since antitrust litigation is so prevalent and so expensive that robust compliance programmes in this field are financial investments if they are really carried out. The achievement and maintenance of competition law is essential because of the mentioned benefits of free competition. Compliance and enforcement of these rules is crucial in order to create and maintain a competitive economy and to maximise consumer welfare⁵. Therefore compliance programmes in this area are particularly important, as not only managers, who usually have choices to make in the interest of their companies, but also employees or workers require specific guidance on how to implement antitrust rules. The significance of this compliance is highlighted: companies whose market behaviour fails to comply with the competition rules run the risk of incurring high fines and facing other negative consequences⁶. The high costs of non-compliance, apart from being seen as doing business ethically, are important reasons why a company should comply with competition rules. Compliance with competition

⁴ See REZNICK, R. P., "Identifying and Solving the Problems of the Modern Antitrust Practice", *Antitrust Law Client Strategies. Leading Lawyers on Best Practices for Compliance, M & A Transactions, and Litigation Proceedings*, (BUSH, John K. and others), Aspatores Books, Boston, 2007, pp. 25-41, p. 37. The Enron case was revealed in October 2001, and led to the bankruptcy of the Enron Corporation, which was an American energy company based in Houston, Texas, and the dissolution of Arthur Andersen, one of the five largest audit and accountancy partnerships in the world. At that time, Enron was considered to being the largest bankruptcy reorganization in American history, as well as the biggest audit failure. For more information concerning this case see BRATTON, W. W., "Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: Enron and the Dark Side of Shareholder Value", *Tulane Law Review*, n. 76, 2002, pp. 1-79. Available at <http://goo.gl/Zi1bmF> accessed 12 December 2013.

⁵ In this sense the former European Commissioner for competition policy affirmed in a speech given in London in September 2005 that "Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources". The speech is available at <http://goo.gl/sPrGQy>, accessed 12 December 2013.

⁶ Among these negative consequences is the bad press for law-breakers when the Competition Authority has made a finding of anti-competitive conduct and has fined the companies involved, with a detrimental impact on the reputation of those companies. They could also have to face hostility from clients or consumers who feel cheated and investigations could be costly for companies.

law should also be seen as a positive factor since it can enhance a company's reputation and attractiveness for promotional and recruitment purposes. Compliance can also raise job satisfaction of the companies' staff and contribute to a constructive sense of belonging within the company. Staff members who are aware of what constitutes illegal behaviour will also be more alert to wrongdoing by competitors or other commercial partners and could thus use the appropriate means to help to achieve a punishment of illegal behaviours.

Efforts made by companies to ensure compliance with competition law are very important but what finally matters is that the rules are really complied with. Besides, the risks associated with violating antitrust compliance policies are grave due to the now global enforcement of antitrust laws⁷.

But the most important reason for having an affirmative compliance programme in the competition law area is that competition poses perhaps the major criminal and administrative exposure faced by most businesspersons in the daily conduct of their business affairs⁸. An undertaking could be also a victim of others' anti-competitive behaviour and if the undertaking does not know the rules it will not be able to protect itself⁹.

Moreover, the progressive internationalization of the economy and the growing importance of international markets should also be kept in mind, since therefore many firms find themselves subject to foreign competition laws¹⁰. This is the main reason why compliance with those concerned competition rules has become an imperative for companies which operate in foreign markets.

3. ANTICOMPETITIVE CONDUCTS AND LEGAL CONSEQUENCES

⁷ AMERICAN BAR ASSOCIATION, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors*, 2nd edition, Chicago, 2010, p. 47, especially LIPSTEIN, R. A., "Starting from Scratch: How and When to Create an Antitrust Compliance Program", pp. 5-9.

⁸ See in this sense GARRETT, J. J., *Antitrust Compliance. A Legal and Business Guide*, Practising Law Institute, New York, 1978, p. 9.

⁹ SINGLETON, S., *Competition law Compliance 2008*, Thorogood Publishing, London, 2008, p. 2.

¹⁰ HANNAY, W. S., "Designing an Effective Antitrust Compliance Programme", (Advisors MURPHY, J. E. and DAWES, P. E.), *Corporate Compliance Series*, Vol. 11, Thomson West, Chicago, 1996, p. 82.

3.1. Procedural reforms taken by Regulation 1/2003

The need to include a competition compliance programme within companies is especially evident taking into account the reform produced with regard to the procedural rules of competition law at a Community level in Regulation 1/2003¹¹. In this sense, unlike the former Regulation 17 of 1962¹², Council Regulation (EC) No 1/2003 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* (now articles 101 and 102 of the Treaty on the Functioning of the European Union, TFEU) provides in its article 1 for a principle of legal exemption.

Regulation 1/2003 applies from 1 May 2004, and from this moment on, companies operating in the EU market were no longer required to report their behaviour to the Commission, since it was replaced by a legal regime in which businesses, regardless of their size, have to self-assess their behaviour and therefore they have to necessarily know when they can conflict with competition law¹³. The agreements referred to by article 101.1 TFEU¹⁴ and that do not meet the requirements of article 101.3 TFEU shall be prohibited, without requiring a prior decision of the Commission to that effect. The same prohibition applies to the abuse of a dominant position under article 102 TFEU¹⁵.

As a result of the change of policy of the Commission (whose origin is clearly the workload the Commission had to face and with what it could hardly cope without delays) the risk for companies to be discovered and punished after an anticompetitive conduct increased. They no longer had to ask the Commission for a prior authorization, and this mentioned risk accentuates the importance of self-assessments made by companies. Therefore competition compliance programmes are extremely important.

It is worth mentioning again that companies which do business in the field of the EU have to take into account the European legislation. However, the laws are usually

¹¹ The importance of European law in the area of competition law is outstanding, taking into account its applicability to all companies operating in the EU level.

¹² Regulation 17 of 1962 provided for the principle of prior authorization by the EU Commission of conducts that could affect the free competition in the market in question.

¹³ See KARBAUM, C., *Kartellrechtliche Compliance- Rechtsgrundlagen und Umsetzung*, Peter Lang Verlag, Frankfurt am Main, 2010, p. 20.

¹⁴ Equivalent to the so-called "Chapter I prohibition" of the English Competition Act, 1998.

¹⁵ Equivalent to the "Chapter II prohibition" of the Competition Act, 1998. See SINGLETON, S., *Competition law Compliance 2008*, Thorogood Publishing, London, 2008, p. 45.

very similar indeed so there should be no difficulty for example for British businesses in complying with both, EU and UK competition law¹⁶. In addition, under article 2 of Regulation 1/2003, in all national and European procedures under articles 101 and 102 TFEU, the burden of proving an infringement of paragraph 1 of article 101 TFEU or article 102 TFEU rests on the party or authority alleging the infringement. The undertaking or association of undertakings claiming under the provisions of paragraph 3 of article 101 TFEU ("Block Exemption Regulations") shall provide pieces of evidence of compliance with the preconditions in that paragraph.

3.2. Brief reference to anticompetitive conducts

Competition law systems (worldwide about more than 120 systems of competition law¹⁷) are concerned with practices that could be harmful to the free competition and to the competitive process. A brief mention of these anti-competitive practices should be done to know their importance and impact on market economy.

The first pillar of competition law lies in the anti-competitive agreements or cartels, whose object or effect is the restriction of free competition. These agreements are unlawful both under European (article 101.1 TFEU) and the different State laws¹⁸, unless they have certain redeeming virtues as for example the enhancement of economic efficiency. The horizontal agreements (between competitors, i.e. two companies at the same level of the distribution chain), also called "*hardcore cartels*", such as fixing prices, sharing markets or restricting output or bid-rigging, are severely punished and in some jurisdictions they can even lead to the imprisonment of the individuals responsible for them, as it will be mentioned later.

Competition law can also condemn abusive behaviour by a monopolist or by a dominant firm with substantial market power which enables it to behave as if it were a monopolist. For example when a dominant firm reduces its prices to less than cost in order to drive a competitor out of the market or to deter other competitors from entering

¹⁶ TAYLOR, P. M., *E.C. & U. K. Competition Law & Compliance: A Practical Guide*, Sweet & Maxwell, London, 1999.

¹⁷ See WHISH, R. and BAILEY, D., *Competition law*, 7th edition, Oxford University Press, Oxford, 2012, p. 1. See also the website of the International Bar Association's Global Competition Forum at www.globalcompetitionnetwork.org, as well as www.oecd.org and www.unctad.org.

¹⁸ E. g. Section 1 of Competition Act of 1998, article 1 of the Spanish Competition Act 15/2007.

the market and subsequently charge higher prices¹⁹. Abusive behaviour is a central concern of competition policy, as a firm or several firms with market power indeed could be able to harm consumer welfare. This could be the case for example by reducing output, raising prices, degrading the quality of products on the market, suppressing innovation and even depriving consumers of choice.

Competition rules enable in most cases the competition authorities to investigate mergers between firms that could harm free competition. If for example one competitor achieves to acquire its main competitor, consumers could be deprived of choice and may have to pay higher prices as a result.

Finally, the State (or a public authority) could also be responsible for restrictions and distortions of competition, as a result of special provisions of subsidies or public financial aids, but also in cases of legislative measures, regulations or licensing rules. In this sense it is worth mentioning that according to EC Competition law (articles 107 to 109 of the TFEU), any aid granted by the State or through the State in any form whatsoever which distorts or threatens to distort competition law by favouring certain undertakings or the production of certain goods is incompatible with the internal market, insofar it affects trade between Member States. The European Union law also includes a list of aids in the Treaty of Functioning which shall be compatible with the internal market (e.g., aids to make good the damages caused by natural disasters) or others which may be considered to be compatible with the internal market (e.g., aids to promote the economic development of areas where the standard of living is abnormally low or where there is serious unemployment or in order to promote culture and heritage conservation).

3.3. Public enforcement and administrative fines

The importance of compliance in competition law stands out as sanctions or penalties are quite relevant: financial penalties imposed by the Office of Fair Trading (hereafter OFT) in the United Kingdom under section 36 of the Competition Act of 1998 may reach ten per cent of the annual sales of the undertaking. The EU Commission may also impose penalties of up to ten per cent of the annual sales in the

¹⁹ This behaviour is called "*predatory pricing*". See BRUCKMANN, B. O., *Predatory Pricing Law*, Section of Antitrust Law, ABA, Chicago, 1995.

sector in which the anticompetitive practice took place (article 23 Regulation 1/2003), multiplying this amount by the number of years the cartel or anti-competitive agreement lasted. These fines are enforced by competition authorities²⁰, even if the illegal purpose of the anti-competitive conduct has not been achieved by the company (i.e., if a price cartel has been discovered, its members will have to face the important economic fines, whether or not they managed to raise the prices of the product or service). The EU Commission published in 2006 an important document which contains the guidelines on the method of setting fines imposed pursuant to article 23 of Regulation No 1/2003²¹. Thus, in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area. Also, in setting the fine, the EU Commission may take into account circumstances that result in an increase or decrease in the basic amount. The guidelines set down some aggravating (e.g., if the undertaking continues or repeats the same or a similar infringement after the Commission or a National Competition Authority has made a finding that the company infringed article 101 or 102 TFEU or when the company refuses to cooperate with or obstructs the Commission in carrying out its investigations or if the undertaking was the instigator of the infringement), as well as some mitigating circumstances (e.g., when the undertaking provides evidence that the infringement has been committed as a result of negligence or where the undertaking has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so).

The OFT also published in 2004 a guidance in relation to the appropriate amount of a penalty. This document states that this amount should take the seriousness of the infringement and the relevant turnover of the undertaking into account, as well as the duration of the infringement and other aggravating (e.g., the role of the undertaking as a leader or instigator of the infringement, the involvement of directors or senior management or the repetition of infringements by the same undertaking or other

²⁰ E.g., the EU Commission, the OFT or the *Comisión Nacional de los Mercados y de la Competencia* (CNMC) in Spain. To get an overview of the fines imposed in 2012 by the EU Commission see BARBIER DE LA SERRE, É. and LAGATHU, E., "The Law on Fines Imposed in EU Competition Proceedings: Faster, Higher, Harsher", *Journal of European Competition Law & Practice*, n. 8, 2013, Oxford, pp. 1-20.

²¹ The *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* (2006/C 210/02) are available at <http://goo.gl/n4EGb4> (accessed: 12 December 2013).

undertakings in the same group) or mitigating factors (e.g., if the undertaking has acted under severe duress or pressure or if there takes place a termination of the infringement as soon as the OFT intervenes).

In the United States, infringing companies may be fined up to \$ 100 million or twice the gain that has been obtained as a result of the anti-competitive conduct or twice the loss suffered by the victims (in internationally important cases the competition authority usually applies the last criterion). Managers of the involved companies can be fined up to \$ 1 million and they could be imprisoned up to 10 years. In practice, these penalties are really imposed²².

The magnitude of administrative fines at European level stands out. For example, since 2007 the EU Commission has fined undertakings involved in a cartel or anti-competitive agreement an amount of more than € 10 billion²³. In 2005, the EU Commission fined thread producers from Germany, Belgium, the Netherlands, France, Switzerland and United Kingdom over € 43 million for their participation in different anti-competitive agreements. The Commission took into account that this type of thread is used in different industries to sew or embroider various products such as clothes, textiles, home furnishings, seats and seat belts for cars, mattresses, footwear or leather products. These companies had attended from 1990 until 2001 regular meetings and they also had bilateral contacts to agree on price increases and/or target prices, to exchange sensitive information on price lists or prices charged to various consumers and also to arrange customer allocation. More recently, the EU Commission has imposed a fine of € 315.2 million to the U. S. Company Procter & Gamble and the Anglo-Dutch Unilever on 13 April 2011 for participating in a cartel together with Henkel in the market for powdered detergent affecting eight European countries. In the UK for example, the OFT imposed in its Decision of 10 August 2011, case *Dairy products*, fines of £ 49.51 million due to an infringement of Chapter I prohibition. This

²² See the statistics published by the US Department of Justice, which are available at <http://www.justice.gov/atr/public/division-update/2012/criminal-program.html>, accessed 13 December 2013.

²³ Cartel statistics of the period 2007-2013 are available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>, accessed 1 October 2013. They include the highest fines imposed by the EU Commission, the ten highest cartel fines per case (since 1969), the ten highest cartel fines per undertaking (since 1969) and the number of cartel cases decided by the EU Commission (period 2008-2012). E. g., in the cartel related to TV and computer monitor tubes the fine reached more than € 1.47 billion, in the car glass cartel in 2008 the amount of the fine imposed reached € 1.383.896.000 and in the elevators and escalators cartel, in 2007, the fine reached € 832.422.250.

case is on appeal to the Competition Appeal Tribunal (hereafter CAT) by *Tesco Stores Ltd. British Airways*, which was also imposed a fine of £ 121.5 million by the OFT in its Decision of 1 August 2007 because of its participation in a cartel.

However, the mere fact of having a compliance programme in competition law within the company is not considered a mitigating factor in relation to the fines that may be imposed by the competition authorities. At first the EU Commission seemed to take into account these compliance programmes as a relevant factor in determining the fines because of anti-competitive conducts (e.g., Decision of 18 December 1987, case *Fisher Prices vs. Quaker Oats*, Decision of 22 December 1987, case *Eurofix-Bauco vs. Hilti*, Decision of 15 July 1992, case *Viho vs. Parker Pen*). In the Decision of 5 June 1991, case *Viho vs. Toshiba*, the Commission declared in the disciplinary proceedings that Toshiba had made "a major programme of adaptation to EU Competition law (...) to ensure that competition rules are respected in the future".

Despite this, the Commission affirmed in its guide, published on 23 November 2011²⁴, that when determining the amount of the fines, the specific situation of each company is taken into account. All compliance efforts with competition law are welcomed but "the mere existence of a compliance programme is not enough to counter the finding of an infringement of competition rules". Thus, the existence of a compliance programme will not be considered a valid argument to justify a reduction of the fine following an investigation of an anti-competitive conduct. Before this guidance was published, the Court of First Instance (now General Court) had affirmed in this same direction in its Judgment of 8 October 2008, T-74/04, case *Carbone Lorraine vs. Commission*, that "regarding to the implementation of a compliance programme in competition law it has already been stated that, while it is certainly important that an undertaking takes steps to prevent future infringements of Community competition law, the adoption of such measures do not alter the reality of the offense proved. The Commission is not therefore required to characterize this element as a mitigating circumstance, especially when the offense is, as in this case, a clear violation of Article 81" (now Article 101 TFEU). More recently, in its Judgment of 13 July 2011, T-38/07, case *Shell Petroleum and others vs. Commission*, the General Court strongly reaffirmed that "the measures taken by Shell to comply with competition law cannot alter the

²⁴The guide is available at <http://goo.gl/rhBBx>, accessed 1 October 2013.

importance of the anti-competitive conduct and the recidivism proven in this case. Therefore, the adoption of a compliance programme by the undertaking does not require the Commission to grant a reduction of the fine due to this fact" (see also Judgment of the Court of First Instance of 15 March 2006, T-15/02, case *BASF vs. Commission*).

This same court has also underlined that frequently it is impossible to determine the effectiveness of measures within companies to avoid anti-competitive conducts (see Judgment of the Court of First Instance of 8 October 2008, T-73/04, case *Carbone-Lorraine vs. Commission*). In the before-mentioned case of 13 July 2011 the General Court emphasizes that the measures taken by Shell did not take the undertaking to report the cartel, since Shell only agreed to collaborate with the Commission once Shell was informed of the charges. The recidivism of Shell related to the participation in the cartel is also an aggravating circumstance in this case and so the General Court decided that Shell's arguments, based on the existence of a compliance programme in competition law, were "irrelevant".

In conclusion, the purpose of a compliance programme should be to avoid an infringement of competition law. They should not be implemented as an abstract or formalistic tool for reducing the fine that has to be imposed to the undertaking if it is discovered infringing these rules²⁵.

Contrary to the EU Competition law, the English competition law system expressly takes into account the existence of a compliance programme when imposing fines, which could be reduced up to ten per cent. In the report of the OFT of May 2010, entitled "Drivers of Compliance and Non-Compliance with Competition Law" it says that "where, in an individual case, we consider that the existence or adoption of a compliance programme should be regarded as a mitigating factor, we will generally reduce the penalty by up to ten per cent" (in this same sense see also the Decision of the OFT of 20 January 2002 in case CP/1163-0, *Arriva First Group*). However, according to the mentioned report, exceptionally, the existence of a competition compliance programme could be considered as an aggravating factor justifying an increase in the financial penalty, e.g., when the compliance programme has been used to hide or facilitate an infringement of competition law and/ or to mislead the OFT. In October

²⁵ See also Joined Cases T-101/05 and T-111/05, cases *BASF* and *UCB*, paragraph 52, and Case T-138/07, case *Schindler Holding*, paragraph 282.

2010 the English Competition Authority published a report entitled "How Your Business Can Achieve Compliance", following a public consultation on this matter and including tips on how to identify, assess and mitigate risks within companies so that they do not infringe competition law, and also a periodic review and updating of the measures so that they continue being useful for undertakings. Finally, in December 2011, the OFT published the extensive report "The Impact of Competition Interventions on Compliance and Deterrence", which summarizes the studies taken until this moment, the deterrent effect of English competition law and the most advisable measures for companies to implement a compliance programme in this area.

In France, paragraph III of Article L. 464-2 of the Commercial Code provides also for a reduction regarding to the financial penalty when the undertaking agrees to modify its future behaviour. In this sense, the *Autorité de la Concurrence* could consider a company's commitment to change its future behaviour through compliance programmes, but this interpretation has not been established in the law. On 14 October 2011 the French Competition Authority published a public consultation on compliance programmes and in its draft guidelines on compliance programmes the Authority grants a reduction up to ten per cent of the financial penalty as long as the company is committed to incorporate a compliance programme or to improve its existing compliance programme. The French Competition Authority also mentions some requirements that compliance programmes should have to be able to be considered as a mitigation of the fine (e.g., managers of the company have to firmly support compliance programmes, a special training related to the compliance programme and effective control mechanisms related to the compliance programme). Despite of having implemented such a programme, if an undertaking violates the competition rules and does not apply for leniency, the compliance programme could not be taken into account as a mitigating factor.

3.4. Penal sanctions in Competition law

The direct application of competition law could take place in both civil and administrative or penal processes. Enforcement of EU competition law is dominated by administrative penalties, as well as the Competition laws of the majority of the Member States.

On the contrary, in the American *Sherman Act* of 1890 antitrust violations were classified as misdemeanours, and a maximum jail time of one year and a maximum fine of US \$ 5000 were contemplated. Those same sanctions remained in place until 1974 and jail sentences were still uncommon. Today everything is quite different. Sherman Act violations by cartels are considered felonies (especially the violation by fixing prices, rigging bids, and allocating market shares, markets or territories) for which an individual can be subjected to a fine of US \$ 1 million and ten years in jail (according to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004). The maximum corporate fine was increased in 2004 to US \$ 100 million. In addition, an antitrust felon may also be disqualified from holding various licenses, voting, or even serving in various offices²⁶. Worldwide, more than twenty jurisdictions with Competition laws denominate some or all offences as crimes (e.g., Canada, Brazil, Australia or Japan).

In Europe, certain Member States like Ireland or the United Kingdom also provide criminal penalties for cartel cases. Ireland was one of the first countries outside the US to introduce a comprehensive set of criminal sanctions into its civil antitrust regime. Since 1996, Ireland's competition law prohibitions have attracted both criminal penalties and civil remedies. In its Competition Act of 2002 Ireland added criminal offences based on infringements of articles 101 and 102 TFEU (sections 4 and 6 of the Irish Act), and the penalties, consisting of fines and imprisonment terms, are laid down in section 8 of the Act. Currently, undertakings can be fined of up to € 4 million or ten per cent of its turnover and individuals could be convicted to a similar level of fines and/or a term of imprisonment of up to five years²⁷.

Section 188 of the English *Enterprise Act* of 2002 provides also that price fixing cartels, limitations on supply or production, market or customers sharing and bid-rigging arrangement are offences, if they are carried out in a dishonest way. A person declared guilty of an offence under Section 188 could be convicted to imprisonment up to five years or to an unlimited fine, or both. The financial penalty for undertakings may

²⁶ BAKER, D. I., "Punishment for Cartel Participants in the US: A Special Model?", *Criminalising Cartels. Critical Studies of an International Regulatory Movement* (Edits. EZRACHI, A. and BEATON-WELLS, C.), Hart Publishing, Oxford and Portland, Oregon, 2011, pp. 27-45, p. 29.

²⁷ For more details see MASSEY, P. and COOKE, J. D., "Competition Offences in Ireland: The Regime and its Results", *Criminalising Cartels. Critical Studies of an International Regulatory Movement*, (Edits. BEATON-WELLS, C. and EZRACHI, A.), Hart Publishing, Oxford and Portland, Oregon, 2011, pp. 105-128.

not in any event exceed ten per cent of the relevant turnover of the concerned undertaking (section 36 of the Competition Act of 1998)²⁸. No other jurisdiction has followed the UK example of making dishonesty the key determinant of criminality.

In contrast to the UK criminalization of all horizontal hard core cartels, Germany introduced a criminal offence in article 298 of its Penal Code (§ 298 *Strafgesetzbuch*), confining its scope to bid-rigging. Other hard core restraints such as price fixing, output restrictions, market and customer allocation remain just administrative offences, being punishable by corporate or individual fines, or even both. Individuals found guilty of bid-rigging could be fined with imprisonment up to five years or to a fine. Although English competition law criminalizes more anti-competitive conducts, there are more convictions in Germany than in the UK. Between 1998 and 2008 more than 260 persons were indicted in Germany for bid-rigging, and more than 180 of them were actually convicted (e.g., in the *Pipes Cartel Case*, which was a Judgment of the *Landgericht München II* of 3 May 2006, the main defendant was sentenced to a final prison of two years and ten months and an additional fine of € 100 000 or in the *Paper Wholesale Cartel*, Judgment of the *Bundesgerichtshof* of 19 June 2007, the guilty individual was fined € 250 000)²⁹.

3.5. Private enforcement of Competition law, especially actions for damages

Anti-competitive agreements which are incompatible with EU competition rules are automatically void (article 101.2 TFEU) and therefore these agreements cannot be enforced in court by the parties involved. That means that nobody could be obliged due to an agreement which is illegal. Moreover, if a violation of these EU competition rules causes or has caused harm to a third party, the victim could bring a claim for

²⁸ For more details see the OFT's guidance as to the appropriate amount of a penalty, available at: http://oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf, accessed 1 October 2013, and JOSHUA, J., "DOA: Can the UK Cartel Offence be Resuscitated?", *Criminalising Cartels. Critical Studies of an International Regulatory Movement*, (Edits. BEATON-WELLS, C. and EZRACHI, A.), Hart Publishing, Oxford and Portland, Oregon, 2011, pp. 129-155. See also Guy, D., "The UK's experience with criminal law sanctions", *Criminalization of Competition law Enforcement. Economic and Legal Implications for the EU Member States*, (Edits. CSERES, K. J., SCHINKEL, M. P. and VOGELAAR, F. O. W.), Cheltenham, Edward Elgar, 2006, pp. 248-257.

²⁹ See generally WAGNER-VON PAPP, F., "Kartellstrafrecht in den USA, dem Vereinigten Königreich und Deutschland", *Wirtschaft und Wettbewerb*, n° 12, 2009, pp. 1236-1249.

damages before a national or an European Court against the infringer. Within the EU, public enforcement of competition law has been much more important than private enforcement, but it is a fact that competition authorities have only limited resources. Thus they may be unable to investigate every alleged infringement of the competition rules. Therefore, private enforcement constitutes an important complement to their activities and different EU Commissioners have affirmed the Commission's desire to strengthen private enforcement of competition law³⁰, also with the further objective to safeguard in a better way the rights of the affected individuals³¹. In this sense, one of the main driving forces behind the Council Regulation (EC) No 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now articles 101 and 102 TFEU) was the Commission's desire that National courts of the Member States should share with the EU Commission the task of enforcing the competition rules, thereby enabling the Commission to concentrate its resources on pursuing the most serious infringements of the competition rules (recitals 3 and 7). Article 6 therefore empowers national courts to apply directly articles 101 and 102 TFEU and the Judgments of the EU Court of Justice in *Crehan* (2001) and *Manfredi* (2006) establish that there is a right to damages for victims of harm caused by an infringement of the competition rules³². The UK courts already established in 1984 that damages could be available for harm caused by infringements of Articles 101 and 102 TFEU (Case *Garden Cottage Foods vs. Milk Marketing Board*). Although the Competition Act of 1998 does not explicitly confer a right to damages in Chapter I and Chapter II, there is no doubt that damages are available for victims, taking into account the mentioned jurisprudence of the EU Courts and Section 60 (2) of the Competition Act (requiring consistency with EU decisions).

³⁰ See for example Speech of Mario MONTI in Florence on 1 June 2001 (available at <http://goo.gl/BSkQLv>, accessed 12 December 2013) or Speeches of Neelie KROES in Brussels on 9 March 2006, entitled "More private antitrust enforcement through better access to damages: an invitation to an open debate" (available at <http://goo.gl/vTeRKN>, accessed 12 December 2013) and of Joaquín ALMUNIA in Madrid on 12 May 2010, entitled "Competition and consumers: the future of EU Competition policy" (available at <http://goo.gl/VDrTLR>, accessed 12 December 2013).

³¹ See MARCOS, F., "The Spanish Property Insurance Cartel", *Connecticut Insurance Law Journal*, Vol. 18, n. 2, 2012, pp. 79-101.

³² See Judgment of the European Court of Justice of 20 September 2001, C-453/99, case *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* and Judgment of the European Court of Justice of 13 July 2006, C-295/04 to C-298/04, cases *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo v Assitalia SpA* (C-298/04).

4. PREVENTION OF ANTICOMPETITIVE AGREEMENTS AND ABUSE OF DOMINANT POSITION: COMPLIANCE PROGRAMMES AS ESSENTIAL PREVIOUS FACTOR

Assuming the company's commitment to compliance with the rules of competition and having identified the risks of each company ahead of a violation of competition law, the most appropriate way to prevent unlawful conducts of the companies is by implementing measures within the company in order to assure or maximize compliance with the law. Taking this fact into account, the most important thing to ensure the effectiveness of compliance with competition law is that companies should think ahead and develop a suitable approach for their situation and foresee problems, rather than react to them only after they have occurred. In fact, the aim of a compliance programme is to raise awareness of potential conflicts with competition law, as well as to inform employees and managers about the illegal and anti-competitive conducts and about the risks and legal consequences of infringing these rules. It would be appropriate to implement a specialized legal department to advise on compliance with these regulations. A trustworthy compliance programme about competition law only can bring benefits to the company, provided that it is actually enforced as stipulated.

A proper compliance programme has to contain an accurate statement of the law. To be successful, compliance programmes should be based on an analysis of the areas in which it is more likely for the company concerned to infringe the competition rules. These areas will depend on factors such as the sector of activity (if there have been previous infringements in the same sector it should be a warning which indicates the need for particular attention), the frequency and level of the interaction with other competitors (if they meet frequently infringements could most likely occur as if they do not meet during industry meetings or within associations or daily commercial dealings) or the characteristics of the special market (if the company holds a dominant position or market power, how many competitors the company has or the barriers to entry in a specific market). The preventive measures will depend on the situation of the company in the market, because they will be different if the company holds a dominant position

or if the company could be easily induced to participate in a cartel. The tendency for competitors to agree on prices or other commercial conditions of the offered service, or even to share markets in which they operate is a behaviour that was observed since the late eighteenth century by Adam Smith³³. The aim of the competitors is to ensure or increase certain benefits as a result of participation in a cartel: by fixing prices or trading conditions past losses could be compensated and/ or competitive situations be avoided. Moreover, the existence of a monopoly or oligopoly can easily encourage an abuse of dominant position, although the concept of what actually is considered "abuse" has been and is widely discussed (e.g., which cases can be included under the "imposition, directly or indirectly, of prices or other unfair trading conditions or services"), to such an extent that the pronouncements of the competition authorities and of the courts that review their decisions acquire a great relevance. In connection with these cases of abuses of dominant position, the example of Microsoft is of great relevance³⁴. In March 2004, the European Commission fined Microsoft with € 497 million, in July 2006 the second fine reached € 280.5 million for not providing enough information in relation to interoperability. Finally, in March 2008, the Commission fined Microsoft a third time with € 899 million, the highest fine in the history of the European Union to a single company, reaching the total amount of fines imposed to Microsoft almost € 1,700 million. More recently the EU General Court has confirmed in its Judgment of 29 March 2012 the fine of more than € 151 million imposed by the European Commission on Telefónica for having abused its dominant position in the Spanish wholesale market for regional and national access to broadband Internet during the period between September 2001 and December 2006, thus confirming the Commission's decision taken in 2008³⁵.

³³ See SMITH, A., *An Inquiry into the Nature and Causes of the Wealth of Nations*, first published 1776, 5th edition, London: Methuen & Co., 1904. "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary" (Book I, Chapter 10, Paragraph 82).

³⁴ See SURBLYTÉ, G., *The refusal to disclose trade secrets as an abuse of market dominance: Microsoft and beyond*, Berne, 2011.

³⁵ Before the full liberalization of telecommunications market in Spain in 1998, Telefónica was in a position of legal monopoly for the provision of retail telecommunications services through fixed line and at the time of liberalization Telefónica was the only telecommunications operator which had a landline in Spain and was fined for abusing its dominant position in delivering broadband services using

The mentioned examples show the usefulness of having implemented a competition law compliance programme within a company, taking always into account the characteristics of each company, e.g., the size of the firm, resources at its disposal, customers, market in which it operates, barriers to entry in it and whether the company has a dominant position in it, since in these cases prevention measures will be different from cases in which the company could become a participant in a cartel, the interaction between the company and its competitors, the frequency and intensity of interaction and if it takes place between different employers or if they are informal meetings.

In summary, a competition compliance programme consists of a set of essential procedures adopted as a means of ensuring compliance with this specific area of competition law. The purpose of this kind of programmes is to avoid infringements of competition law, as well as to make undertakings appreciate the need for compliance of competition law due to its importance, scope and significance. They should also manage to make them understand that the mentioned risks of non-compliance are very important, so they should not be acceptable for any company. Complying with competition rules will help to ensure that the companies are as competitive as possible, which is good for themselves, for other competitors and for consumers.

The purpose is also to disseminate the compliance strategy of the company throughout its organizational structure, for what it should preferably be laid down in writing, through manuals, brochures, codes of conduct or other printed medium, specifying the prohibited behaviours by Competition law as well as its purpose and also their legal consequences³⁶ in all the working languages of the company and written easy to understand, so that they can really be meaningful to employees and businesspeople. Employees and managers of the company will better understand the reason behind the compliance strategy and its importance, being able to give special attention in these cases. They should provide an overview of competition rules, as well as be tailored for the problems each particular business is likely to face. They should also achieve to address the care that must be taken in generating e-mails and other written communications. Solving specific issues to avoid problems for the company in question

ADSL. Besides, the General Court pointed out that a margin squeeze in a relevant market is capable itself of constituting an abuse of a dominant position.

³⁶ Including the graduation of the administrative fines or even criminal sanctions according to some jurisdictions, in short, the risks of non-compliance with these regulations.

is what makes competition compliance programmes be particularly valuable. Therefore lawyers should be familiar with their clients businesses and the issues which the company faces day-to-day before preparing the specific compliance programme.

It might be also helpful to obtain from the managers a list of problems related to competition law they would like to see addressed and explained. It is very important to make the managers of the company understand that there is no tension between adhering to competition rules and being successful in business. Both employees and managers must understand the personal and professional consequences of ignoring or evading compliance in competition law, because it is applicable to people and companies of all sizes and across industries, even for self-employed businessmen and women. Some disadvantages of written compliance manuals could arise when a company is geographically distributed in many locations, with employees who often vary. In these cases it is difficult to ensure that all company members have read the compliance manual and that all have received an adequate and uniform training. Moreover, if the company manufactures different products or offers different services (perhaps not all from the start), the manual has to be frequently reviewed and changed, in order to adapt it to new circumstances, which may not always be easy. Furthermore, this updating of manuals and its printing can generate significant costs for the company.

Another advisable measure to strengthen compliance programmes would be to hold seminars and training sessions related to anti-competitive conducts, as well as online programmes which the members of the company could follow and read or consult as much as they need to do it. It is also necessary to inform both employees and managers that competition authorities can use any type of communication between competitors or between competitors and other participants of the distribution chain to prove their suspicions, irrespective of whether they are letters, handwritten notes, text messages on mobile phones or e-mails.

The powers of investigation of competition authorities are very broad (see articles 17 to 22 of Council Regulation (EC) No. 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, now Articles 101 and 102 TFEU), including the power to enter any premises, land and means of transport of undertakings, even without prior notice, or the power to

take or obtain in any form copies of or extracts from books or records related to the business. Employees and managers should be prepared for unannounced investigations carried out by competition authorities, since in these exceptional situations they often do not know the regular content thereof and their rights³⁷ or obligations (the inspections shall be exercised upon production of a written authorization specifying the subject matter and purpose of the inspection).

In any case it is very important to provide for constant updates of the compliance programmes as well as a visible commitment to this strategy by the most important managers. Formal written acknowledgements signed by the members of the companies and penalties within the company for breaching competition rules can also be useful to ensure compliance with competition law. Employees and managers should certainly know with whom to contact in case of conflicts and problems related to the compliance programme.

In short, the key aspects a competition compliance programme should include the establishment and communication of clear standards and procedures in order to be effective, as well as the exercise of due diligences to prevent and detect administrative and/or criminal conducts, the promotion of an organizational culture that encourages ethical conducts and a clear commitment to comply with competition rules. High-level executives or managers within the company should have an oversight responsibility to ensure its effectiveness. It could be helpful to designate a person in charge within the company to monitor compliance with these programmes (i.e., often known as *compliance officer*). Those individuals should receive adequate resources, appropriate authorities and direct access to executive authority. It is strongly advisable to implement training sessions and disseminate as much information as possible about competition rules, establish consistent enforcement of disciplinary mechanisms and incentives³⁸ to follow compliance programmes and the reasonable steps that must be taken when a violation of competition law takes place, in order to respond to it and adequately prevent future violations.

³⁷ See PÉREZ FERNÁNDEZ, P., "The Difficult Relationship Between Restraints to the Attorney-Client Privilege and Compliance with the Law by Companies- Commentary on *Akzo Nobel Chemicals and others vs. Commission* (case C-550/07)", *European Criminal Law Review*, Vol. 1, n. 3, 2011, pp. 274-285.

³⁸ See SOKOL, D., "Detection and Compliance in Cartel Policy", *Competition Policy International Antitrust Chronicle*, n. 2, September 2011, pp. 1-5, p. 3.

5. WHAT TO DO IF THE COMPLIANCE PROGRAMME FAILS: LENIENCY

Competition compliance strategies and programmes may be insufficient in order to prevent any anti-competitive conducts from happening. In these cases, the previous existence of a compliance programme could help to stop infringements at the earliest possible stage and in any case it will enable the undertaking to take the necessary and appropriate measures without delay, so that potential infringements are swiftly stopped or ended. The role of compliance programmes is also to inform companies about how to get the best out of leniency programmes. By cooperating under a leniency programme (also through a settlement procedure) the damages the involved undertaking or undertakings have to face because of the anti-competitive behavior could be limited.

The European leniency programme³⁹ is aimed at enabling the detection of cartels between competitors. It offers companies that cooperate with the Commission the opportunity to receive full immunity (if it is the first company to denounce a cartel to the Commission) or a reduction of up to fifty per cent of the fine (if the company has presented the leniency application after another competitor) if it is the first company to provide significant information. To receive immunity from fines the first company has to fully and continuously collaborate with the Commission, providing all the corroborative evidences in its possession and immediately cease its infringement and the company may not have forced other companies to participate in the cartel. If a company is the second one that provides "significant added value", it will obtain a reduction of 20-30% and any subsequent undertakings a reduction of up to 20%. Being quickly is the key, because competition authorities are on constant lookout for signs of distorted competition and in these cases they may start their own investigations and then leniency programmes are useless for companies. If companies participate in a swifter conclusion of the leniency procedure by acknowledging their participation in a cartel, they will be rewarded with a ten per cent reduction of the fine in addition to any other

³⁹ In December 2006 the Commission adopted a revised Leniency Notice on immunity from fines and reduction of fines which amended its earlier 2002 notice on leniency. The Leniency Notice is available at <http://goo.gl/CPzV5N>, accessed 13 December 2013.

possible reductions. Worldwide, almost every system of competition law includes a leniency policy⁴⁰.

In the UK, the OFT's corporate leniency policy is contained in Section 3 of the mentioned OFT's guidance as to the appropriate amount of a penalty of December 2004, under which companies can report "cartel activities" in breach of the Chapter I prohibition under the Competition Act of 1998 and of Article 101 TFEU to the OFT. This programme provides immunity as well as reductions of fines, depending on the order of going to the authority. The OFT also operates an individual policy offering immunity from criminal prosecution to individuals who cooperate in cartel offences⁴¹.

6. BRIEF CONCLUSION

In practice, there are many benefits arising from the implementation of a competition compliance programme within companies, regardless of their size, since if managers and employees of the company are aware of competition rules and of the severity of the possible legal consequences of anti-competitive conducts it is more likely that they take care and avoid violating competition law. It is also the best way to remain competitive. A global study carried out in 2010 by *Ernst & Young* concluded that anti-competitive conducts are among the ten major risk factors which can cause illegal conducts of companies⁴². Finally, one should not forget that a successful compliance programme is an iterative process. As happens also with the law, the products or services offered, and the marketplace – among other factors - continuously change. Employees or managing directors and the company's risk assessment may also change. Therefore establishing such a culture of compliance is certainly an ongoing process and one-off preparation of compliance instructions in competition law, as well

⁴⁰ For more details see GLOBAL LEGAL GROUP, *The International Comparative Legal Guide to: Cartels & Leniency 2011. A practical cross-border insight to cartels and leniency*, Ashford Press, London, 2010, and *Global Leniency Manual 2010 Baker & McKenzie*, (Edits. MOBLEY, S. J. and DENTON, R.), Oxford University Press, New York, 2010. See also KLEIN, G. J., "Cartel Desestabilization and Leniency Programs- Empirical Evidence", *Discussion Paper Zentrum für Europäische Wirtschaftsforschung*, n. 10-107, 2010, pp. 1-27.

⁴¹ For more details see "Leniency and no-action- OFT's guidance note on the handling of applications", December 2008, available at: http://www.of.gov.uk/shared_of/consultations/of803con.pdf, accessed 1 October 2013.

⁴² The study called "The Top 10 Risks for business: a sector-wide view of the Risks Facing Businesses across the globe" is available at <http://goo.gl/IpDYIX>, accessed 1 October 2012.

as one training programme when implementing the competition code or manual, could lead to a compliance failure⁴³.

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⁴³ See in this same sense, AMERICAN BAR ASSOCIATION, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors...* cit., p. 1.

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