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Best practices for compliance programs: Results of an international survey

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Competition law compliance programs and government support or indifference

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Abstract

All companies should employ competition law compliance progams in an attempt to ensure their their employees will follow these complicated laws. Yet , enforcers' support for competition law compliance programs is wildly inconsistent. A few provide guidance about compliance, and will consider a sincerely implemented compliance program to be a mitigating factor. But many will not give credit to a "failed" compliance program. We survey the enforcement policies of 16 countries and the European Union with regard to competition law compliance programs.

Les entreprises devraient toutes mettre en place des programmes de conformité au droit de la concurrence pour assurer le respect de ces règles complexes par leurs salariés. Ceci étant, il n'y a guère de cohérence dans la manière dont ces efforts de conformité sont percus par les autorités. Quelques unes fournissent des guides en la matière et considèrent qu'un programme sincère constitue une circonstance atténuante mais beaucoup ne font aucun cas de programmes de conformité "qui n'ont pas fonctionné". La présente étude porte sur la prise en compte de ces programmes de conformité dans 16 pays et dans l'Union européenne.

1. Companies employ compliance programs for a simple reason: to prevent the company from violating the law. However, it immediately gets more complicated, since a company exists only on paper. The people in a company are the ones that actually take the actions that violate the law, and in the course of so doing may get themselves and the company into legal trouble.

2. The competition laws exist because we have learned that society benefits from competition. But achieving competition is not easy. We have known for a long time that collusion is perhaps a more natural state for the competitors than competition:

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[1].

3. Faced with this inexorable tendency, laws have been enacted that seek to punish conspirators. The theory is that if you make the cost of conspiracy high enough, that will counteract the natural tendency for people to seek collusion as the easier way to profit than competition. Yet, as we all know, for a variety of reasons, these laws have not succeeded in stopping collusion.

I. The drivers of competition compliance

4. So what does it take to stop violations of competition law in a company? Assuming that the violations are not officially approved by a government, then we need to look inside the company at their commitment to competition. This commitment is reflected through a number of elements that comprise what we refer to today as the compliance program. The compliance program makes it clear that the company is committed to competition, and communicates that commitment to all employees. There are a number of additional elements that are necessary to ensure that a compliance program actually works, and these are set out in various compliance program standards that are discussed herein. But, in short, a compliance program should have the following attributes:

→ An assessment of the legal risks faced by a company, and development of a compliance program to address those risks as part of an overall culture that supports legal and ethical conduct as a key business strategy.

1 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

→ As part of that program, a clear policy regarding competition.

→ Internal procedures designed to implement the policy.

→ Support for competition at the board and senior officer level, and a commitment by directors and officers to enforce that policy.

→ A compliance program with sufficient resources and senior officer leadership, with direct connection to the board.

→ Communication and training to employees, along with appropriate incentives to follow the program, and punishment for failing to follow the program.

→ Auditing, monitoring and other steps to detect violations.

→ Periodic evaluation of the effectiveness of the compliance program, and correction of any deficiencies.

→ A method for employees to have questions answered, or report possible wrongdoing, with appropriate protection of the privacy rights of all involved.

5. If a company follows these steps and enacts, in good faith, an effective compliance program, there are two desired outcomes: 1) violations will be curtailed, and 2) if a violation occurs, a government enforcer will make a distinction between the unauthorized activities of a rogue employee and the good intentions of the company. In other words, a company would naturally hope that a compliance program would serve as a defense or a mitigating factor when faced with prosecution for a compliance law violation.

6. On this last point, there is a fairly wide divergence of approach by competition law enforcement agencies. Some agencies have recognized that no compliance program can be perfect, given the imperfections of human nature, and will consider a good faith implementation of a compliance program as indicative of a lack of intent to violate the law, thereby deserving of credit[2]. Other agencies take the approach that a compliance program that does not stop a violation is a "failed program" and is thereby not deserving of credit[3], or is only deserving of minimal credit[4].

7. The review of national laws that follows provides an interesting overview of the approach in many countries. It first might be instructive to take a look at the role of organized compliance programs in competition law/antitrust, which has an interesting history in the United States and in the European Union.

2 This is the approach adopted by the Organizational Sentencing Guidelines of the United States Sentencing Commission and the rest of the US Department of Justice for areas of law other than antitrust, as discussed herein.

3 The current position of the Antitrust Division of the United States Department of Justice.

4 The current position of the U.K., allowing a 10% credit.

II. Compliance programs and the Antitrust Division

8. We go back to one of the early cartel cases, the Electrical Equipment Conspiracy, which involved price fixing by the major manufacturers of electrical generating equipment in the 1950s. One of the participants, General Electric, had adopted a very specific antitrust policy in 1954:

No employee shall enter into any understanding, agreement, plan, or scheme, expressed or implied, formal or informal, with any competitor, in regard to prices, terms, or conditions of sale, production, distribution, territories, or customers, nor exchange or discuss with a competitor prices, terms, or conditions of sale, or any other competitive information, nor engage in any other conduct which, in the opinion of company's counsel, violates any of the antitrust laws[5].

9. However, General Electric and other companies were engaging in a price-fixing conspiracy, famously coordinated according to the phases of the moon. In trying to prevent corporate liability, the defense counsel argued that the conspirators would not have been involved if they had obeyed the policy. But the judge was not persuaded, and noted that the antitrust policy "was observed in its breach rather than in its enforcement... I am not naïve enough to believe that [the defendant] didn't know about it and it didn't meet with their hearty approbation"[6]. In Congressional hearings after the cartel participants were convicted, F. F. Loock, President of the Allen-Bradley Company (one of the conspirators), said "No one attending the [price-fixing meetings] was so stupid that he didn't know the meetings were in violation of the law. But it is the only way a business can be run. It is free enterprise"[7].

10. Clearly, a policy alone was not sufficient to stop this conduct[8]. In fact, there was evidence that the policy was entirely a sham, and the company's intent was to continue to fix prices, but maintain an appearance of compliance[9]. Part of the reason for this attitude may have been the relatively low criminal fines that could be imposed prior to 1955 ($5000 per count), so antitrust fines were viewed as a minor cost of doing business[10]. Companies could plead *nolo contendere* (no contest), and avoid a guilty plea that could be used as evidence in a subsequent civil suit. But statutory penalties were steadily increased, and in 1974 a violation of the Sherman Act was declared to be a felony, with longer prison time for individuals and larger fines for corporations.

5 General Electric Policy 20.5.

6 "Corporations: The Great Conspiracy", *Time* (Feb. 17, 1961); United States v. Westinghouse Electric Corp., General Electric Co., I-T-E Circuit Breaker Co., Ohio Brass Co., McGraw-Edison Co., A.B. Chance Co., and Lapp Insulator Co., Inc.,, Crim. Nos. 20234, 20235, 20236, 20238, 20239, 20240, 20241 (E.D. Pa. 1960).

7 J. Fuller, *The Gentlemen Conspirators* (1962); J. Herling, *The Great Price Conspiracy* (1962).

8 We do know now that a policy is only a part of a complete compliance program, with the elements as outlined above.

9 W.S. Ginn, a convicted officer of General Electric stated at his sentencing hearing that he was directed to fix prices by the top three officers of General Electric, who were not indicted. The intent was to insulate senior management from direct participation through the use of winks and nods. Id.

10 Although only a misdemeanor at the time, the concept of going to jail for a "mere" antitrust violation was a shocking prospect for corporate executives.

11. In view of the increasing penalties, and, without being cynical, perhaps due to a genuine commitment to the benefits of competition, some companies tried to install sincere compliance programs. The U.S. Supreme Court recognized in *United States v. U.S. Gypsum Co*[11]. that intent to achieve an anticompetitive effect is a necessary element of a criminal violation[12]. Shortly thereafter, in *United States v. International Paper Co*.[13], the court instructed the jury that "the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary intent. If, however, you find that a corporation acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining whether or not the corporation had the required intent."

12. The prosecutors hated this instruction, of course. They asserted that the mere existence of a compliance program was irrelevant, and that corporate liability was vicarious, and was based on the intent of the employee[14]. And this has been the position of the Antitrust Division of the Department of Justice ever since. Their position has been part of the their "amnesty" program where they give complete immunity to the first cartel member to confess, regardless of whether a compliance program was in place, or one was put in place later. The amnesty approach to antitrust enforcement has been enthusiastically adopted in at least fifty countries in recent years. The official position on compliance programs (i.e., they do not count for anything) also seems to be very influential.

13. Is this the proper approach to support compliance with the antitrust laws? We think not. The role of government is to encourage compliance, not merely to punish. Our learning about compliance programs has advanced in the last 35 years. We know more about why employees do the things they do, and how one can distinguish a legitimate compliance program from one that exists only on paper. There should be credit given for cooperation with government investigations and self-disclosure, but good faith attempts to comply need to be given more recognition. Enforcement agencies can take a role in helping companies improve their programs, but if they want companies to listen to their advice, there needs to be some recognition that following the advice will have some benefit when it comes to enforcement.

14. Prior to the *Electrical Equipment* cases in the United States, companies could take a cynical attitude toward antitrust compliance. If they were caught violating the law, minor fines would be paid, and the business would continue. There was nothing to encourage companies to comply, since greater profits were to be had by conspiring. It took a change of the law and aggressive enforcement to change that perception. Today, one might say that we are in an analogous situation. You could argue that there is no reason to invest in a compliance program since they are all imperfect and a government enforcer would give no credit for a program that was not perfect. Instead, a company might be better served by achieving greater profits through conspiracy, and investing efforts in making certain that it knew when the cartel was breaking down so that it could be the first in the door to confess – and get complete amnesty[15].

15. Of course we do not suggest this seriously. It behooves every company to understand the competition laws in every jurisdiction where it does business, and understand the government position with regard to compliance programs – and the amnesty programs. Antitrust compliance programs are an important part of an overall ethical corporate culture which yields tangible (e.g., higher returns on investment) and intangible (e.g., increased employee pride and motivation) benefits. In an era where companies in every country will depend on innovation for growth and survival, this can only come from aggressive competition.

III. Compliance programs and the EU Commission

16. It is also important to examine the history of the approach of the EU Commission over the years with regard to compliance efforts by companies, and this history is not far from the US history.

17. In 1980 and 1983, the European Commission received complaints from UK sugar merchants alleging that British Sugar was abusing its dominant position in the UK retail sugar market. After investigating these complaints, the European Commission was considering ordering interim measures until a final decision could be adopted and sent a Statement of objections to British Sugar. The latter then offered undertakings, which were accepted by the Commission on 7 August 1986. Interim measures were abandoned, while the Commission decided to continue the investigation on the case.

18. In October 1986, British Sugar informed the European Commission that it intended to implement a comprehensive compliance programme in order to ensure that the company fulfilled all its obligations under EU competition rules, covering the rules on abuses of dominance, but also the prohibition of restrictive agreements.

19. This undertaking stressed that "*in line with its policy of complying with all applicable laws the company is therefore committed to compliance with the EEC competition rules and will take every step to ensure observance of that policy. It is also the company's policy not only to observe the law but to go*

11 438 U.S. 422 (1978).

12 For a more detailed discussion of this history, see J. Cross, *Corporate Antitrust Liability and Compliance Programs in Corporate Legal Compliance Handbook* (Wolters-Kluwer 2d ed. 2011).

13 Crim. Nos. 78-H-11, 78-H-12 (S.D. Tex. 1978).

14 J. Shenefield & R. Favretto, "Compliance Programs as Viewed from the Antitrust Division", 48 *Antitrust L.J.* 73, 79 (1979).

15 See Murphy, "Introducing the FAST RAT Program" http://lawprofessors.typepad.com/antitrustprof_blog/2011/10/introducing-the-fast-rat-program.html.

beyond mere compliance with the strict letter of the law and seek to avoid any conduct which may give rise to bout as to whether or not it has acted lawfully"[16].

20. The European Commission adopted an infringement decision on 18 July 1988, expressly referring to the compliance programme showing *"the exemplary manner in which British Sugar has conducted itself following its receipt of the interim measures Statement of Objections"*. As a result, a mitigating factor was applied[17] and the final fine was set at ECU 3 million[18].

21. Subsequently, the European Commission discovered that British Sugar participated in collusive arrangements with competitors and some merchants in the same markets between 20 June 1986 and 2 July 1990. At the time British Sugar submitted its compliance programme, several meetings with its main competitor Tate & Lyle had already taken place, and British Sugar continued these contacts for 4 years afterwards.

22. The response came loud and clear: "*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 was set out in detail, 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 behavior, and to pass the message on to every level of the company's hierarchy. The infringement found in this Decision shows that this promise has not been fulfilled*"[19].

23. Considering such an aggravating circumstance, the fine imposed on British Sugar was increased by 75%, resulting in a fine of ECU 39.6 million instead of ECU 22.6 million. The Court of First Instance and the Court of Justice rejected the appeals introduced by British Sugar stating that an increase of 75% is not to be regarded as disproportionate taking into account the circumstances referred to by the Commission[20].

24. This case definitely sheds light on statements made since then on compliance programs by EU Commissioners, and notably by Commissioner Joaquin Almunia: "*When I talk about these things, I am often asked whether companies should be rewarded for operating compliance programmes when they are found to be involved in illegal commercial practices. The answer is no. There should be no reduction of fines or other preferential treatment for these companies. As already mentioned, we 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. To those who ask us to lower our fines where companies have a compliance programme, I say this: if we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed? 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*"[21].

25. But examples of more proactive policies towards genuine compliance efforts by some National Competition Authorities (notably the UK and French regimes detailed below) as well as by Competition Authorities outside the EU (Canada, Australia, Israel and others detailed below) now invite the European Commission to adopt a more positive approach towards compliance efforts.

26. The European Parliament itself voiced the concern that the EU competition policy is not sufficiently considering compliance programs as an instrument in the fight against anti-competitive behavior.

27. In its Resolution of 9 March of the Report on Competition Policy 2008, the Parliament called "*for the development of a wider range of more sophisticated instruments, covering such issues as* (...) *corporate compliance programs* (…) *favour*[ing] *a 'carrot-and-stick' approach with penalties that serve as an effective deterrent, in particular for repeat offenders, while encouraging compliance*" [22]. In its Resolution dated 2 February 2012, the Parliament expressed again that it "*favours an approach that serves as an effective deterrent while encouraging compliance*" and encouraged the European Commission to review its fining guidelines "*taking into account that the implementation of robust compliance programmes should not have negative implications for the infringer beyond what is a proportionate remedy to the infringement" and "introducing a distinction on the level of fines for undertakings who have acted intentionally or negligently*"[23].

28. The information brochure "*Compliance Matters*" released by the Commission on 23 November 2011[24] is a first step to recognize that compliance effort matter and that the existence of a compliance program will not be considered as an aggravating factor.

29. However, this information brochure is not sufficient to provide the level of guidance which can be expected from the European Commission on the components of a genuine compliance program and it does not address all the recommendations of the European Parliament. It is

16 Reproduced in the 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, case IV/F-3/33.710 Napier Brown & Company, case IV/F-3/33.711 James Budgett Sugar Ltd, para 27.

17 The exact mitigating factor applied does not appear in the decision.

18 Commission Decision of 18 July 1988 relating to a proceeding under article 86 of the EEC Treaty, case IV/30.178 Napier Brown – British Sugar.

19 Decision dated 1998 mentioned above, para 208.

20 CFI, 12 July 2001, Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v. Commission, Joined cases T-202/98, T204/98 and T-207/98; ECJ, 29 April 2004, British Sugar plc v. Commission, Case C-359/01 P.

21 Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Compliance and Competition policy Businesseurope & US Chamber of Commerce. Competition conference Brussels, 25 October 2010.

22 2009/2173(INI).

23 P7_TA(2012)0031.

24 http://ec.europa.eu/competition/antitrust/compliance/index_en.html.

notably to be stressed that even if the Commission states in this brochure that "*the existence of a compliance programme will not be considered an aggravating circumstance if an infringement is found by the enforcement authorities*", not a word is said of other negative consequences and notably of the decisional practice on parental liability implications of compliance programs. Indeed, as detailed below, the adoption of a compliance program at the group level is used as evidence that the group exercises decisive influence over its subsidiaries and therefore may contribute to hold the group jointly and severally liable with such subsidiaries, absent any participation of the mother company or group holding to the practices.

30. The brochure also fails to propose any positive incentive for companies to enter into compliance programs whereas a number of grounds are available:

→ In any system based on quasi-criminal penalties, such penalties shall be adapted to the personal situation of the offender: the situation of an offender who has taken appropriate steps to avoid such an infringement is necessarily very different.

→ Regulation 1/2003 provides that fines can be imposed only where infringements are committed intentionally or negligently and mitigating circumstances are available when a company only participated negligently: one may question whether a company having adopted a genuine compliance program has intentionally or negligently participated to an infringement entered into by employees or executives not complying with its procedures.

→ The Guidelines on the method of the setting fines stress that the level of fines shall be determined taking into account gravity and duration, but also with a view to ensure a deterrence effect both towards the companies concerned (specific deterrence) and other companies (general deterrence): the company having entered into a robust compliance program is perfectly aware of the need to ensure compliance and therefore does not need to be deterred.

→ Reductions in fine are available under the leniency and settlement procedures: the benefit for general interest of the adoption of compliance programs is not least that bringing elements allowing to uncover a cartel or enabling the Commission to handle cases faster and more efficiently.

31. The purpose of the present survey is to provide an overview of various examples of regimes[25] providing (i) detailed guidance (ii) real incentives to enter into compliance programs, whatever the precise institutional framework under which those Authorities or Courts operate. Other Competition Authorities have recently announced or are presently considering the adoption of guidance. The Swiss Federal Council has just announced a major competition reform which will include a reduction in fine for companies showing they have implemented a genuine compliance program[26]. These new examples will certainly usefully add up to the existing initiatives to obtain a better recognition of genuine compliance efforts. ■

25 See also J. Murphy, "Promoting Compliance with Competition law: Do compliance and ethics programs have a role to play", OECD Roundtable on Promoting Compliance with Competition Law, 7 October 2011, DAF/COMP(2011)5.

26 http://www.admin.ch/aktuell/00089/index.html?lang=fr&msg-id=43503.

Tab.: Synthesis: Guidance and incentives in the jurisdictions covered by the survey

	Guidance available on the design and implementation of compliance programs	Reductions in fine for companies that have taken appropriate steps to ensure compliance	Incentive to adopt or upgrade the program in the frame of leniency or settlement procedures
Australia	Yes	The existence of a competition culture is taken into account in determining the amount of penalties	In settlement discussion, the ACCC frequently requires an undertaking to adopt or improve a compliance program
Brazil			A compliance program can be imposed in settlement proceedings
Canada	Yes	A compliance program can have a positive impact on the Commissioner's sentencing recommendations	Plea agreements may include a compliance program
Czech Republic	Yes	Mitigation factor available (no precedent)	
Egypt	Yes	Courts could take it into consideration when deciding the fine	
European Union	Yes		
France	Yes		Reduction up to 10 % in settlement proceedings available to companies offering a commitment to implement a compliance program
India	Yes	A compliance program may influence the quantum of the penalty (no precedent)	
Israel	Yes	Effective compliance programs allow senior management to defend themselves against indictment	A compliance program can be imposed in settlement discussions although it has been less frequent recently
Japan		Criminal fines may be slightly reduced	
Netherlands		Reduction possible in exceptional circumstances (no precedent)	A compliance program can be imposed in settlement proceedings
Pakistan	Yes	Reduction possible	
Singapore	Yes	Mitigation factor available	
South Korea	Yes	Reduction up to 20 % for companies with A level compliance programs	
Turkey	Yes	No formal recognition of a fine reduction but likely to be taken into account	
United Kingdom	Yes	Reduction possible up to 10%	
United States	Yes (but not for antitrust)	No for matters handled by Department of Justice Antitrust Division; Yes for matters handled by Federal Trade Commission	No for matters handled by Department of Justice Antitrust Division; Yes for matters handled by Federal Trade Commission

I. Introduction

Please briefly describe how antitrust enforcement is organized in your jurisdiction:

- → *What are the various types of penalties which can be imposed on companies and/or individuals for antitrust breaches (fines, prison, disqualification orders, damage claims etc.) etc.?*
- → *Are such penalties imposed by the competition authority/agency or by the courts (in such a case, please indicate the role of the competition authority/agency as to the principle and amount of the penalties)?*
- → *Please provide any relevant statistics on the level of enforcement in your jurisdiction (i.e. number of cartel cases handled, total fines/prison sentences in 2011, etc.).*

Australia

1. Australia's antitrust laws are set out in the *Competition and Consumer Act 2010* (Cth) ("CCA"), which is administered and enforced by the Australian Competition and Consumer Commission ("ACCC"), an independent federal authority.

2. The ACCC has extensive powers to investigate where it is concerned that a contravention of the CCA has occurred. Where it discovers evidence of conduct it believes to be unlawful, the ACCC can launch legal proceeding in the Federal Court of Australia ("Federal Court"). **3.**
The ACCC can seek a range of sanctions from the Federal Court, including pecuniary penalties of up to $10 million (per contravention) for corporations or $500,000 for individuals. It can also seek injunctions, bring representative actions for third-party damages, or seek other remedies such as community service orders, probation orders, adverse publicity orders or orders disqualifying persons from managing corporations (directors' disqualification orders).

4. In addition, third parties may also institute proceedings for breaches of the CCA where they believe they have suffered loss or damage as a result of unlawful anticompetitive conduct.

5. The Federal Court has exclusive jurisdiction over civil proceedings brought under the CCA.

6. In the case of the cartel provisions of the CCA, a civil or criminal action may be brought against corporations and/or individuals. Civil cartel proceedings are brought by the ACCC before the Federal Court, while criminal cartel cases are prosecuted by the Commonwealth Director of Public Prosecutions in either the Federal Court or a State Supreme Court.Sanctions for criminal cartels include fines of up to $10 million for companies and fines of up to $220,000 and/or up to 10 years' imprisonment for individuals.

7. The ACCC is vigorous in its enforcement of the CCA and in recent years the Federal Court has imposed record fines for cartel infringements. In 2010 – 2011 the ACCC instituted civil proceedings in 28 cases before the Federal Court and accepted administrative undertakings in a further 43 instances[27].

27 ACCC Annual Report 2010-2011 at page 28.

Brazil

8. The Brazilian antitrust legal framework is currently under restructure. The new Brazilian antitrust law No. 12,529/2011 ("New Antitrust Law") was enacted after several years of discussion in the Congress and will revoke as of May 2012 the previous framework designed by Law No. 8,884/1994 ("Antitrust Law").

9. The Antitrust Law structured the Brazilian antitrust system with three administrative entities that are jointly responsible for the antitrust enforcement: (i) Secretariat for Economic Law of the Ministry of Justice ("SDE"); (ii) Secretariat for Economic Monitoring of the Ministry of Finance ("SEAE"); and (iii) Administrative Council for Economic Defense ("CADE").

10. SDE, a department under the Ministry of Justice, is the chief investigative body in matters related to anticompetitive practices and can be identified as the prosecutor of the Brazilian system. SDE conducts investigation of competition practices and, before the end of an investigation, may issue non binding preliminary reports and, at the end of an investigation, issues a non-binding opinion to be reviewed by CADE. SEAE performs the role of economic advisor of the Brazilian antitrust system. It issues non-binding economic opinions in merger review cases and may also analyze anticompetitive practices from an economic viewpoint, being a department under the Ministry of Finance.

11. CADE is the administrative tribunal, composed of seven members (one Chairman and six Commissioners), which issues the final administrative decision in connection with anticompetitive practices and merger reviews. It is an autonomous federal agency related to the Ministry of Justice.

12. According to the new law, the system will now be composed only by CADE and SEAE. SDE will be merged into the new CADE and SEAE will only handle competition advocacy issues. For the purposes of this publication, we will consider the framework set forth by the Antitrust Law (and refer to the New Antitrust Law provisions, if possible) , since (i) it is still effective; (ii) the new regulation from CADE was not released yet; and (iii) the rules regarding compliance guidance shall not be significantly amended.

13. Article 36 of the New Antitrust Law (equivalent to article 20 of the Antitrust Law) establishes a strict liability rule under which any act that, by any means, intended or otherwise, produced the following effects is deemed a violation of the economic order: (i) limiting, restraining or otherwise injuring competition; (ii) controlling a relevant market[28]; (iii) arbitrarily increasing profits; or (iv) abusing a dominant position[29].

28 The achievement of market control through superior efficiency is not considered a violation under the Antitrust Law.

29 The dominant position is presumed when a company or group of companies controls at least twenty percent (20%) of a relevant market. However, this reference can be changed for specific sectors of the economy.

14. There is also an indicative list of practices (article 36, Third Paragraph, of the New Antitrust Law, equivalent to article 21 of the Antitrust Law) that may be considered antitrust violations in case one of the four situations described above takes place. CADE can assess penalties to the companies involved in a violation and their officers and directors.

15. In recent years, the Brazilian antitrust authorities have been increasing their enforcement activities against anticompetitive practices. The number of investigations carried out by SDE and the amount of fines imposed by CADE are systematically increasing. In 2010, CADE imposed the largest fine in its history – nearly R$1.7 billion (approximately US$1 billion) – on a single company condemned for cartel formation.

16. The New Antitrust Law (articles 37 and 38) sets forth the list of various types of penalties which can be imposed on companies and/or individuals for antitrust breaches:

→ *Fines*: The following fines may be imposed by CADE on companies that infringe Brazilian competition rules: (i) for companies, 0.1% to 20% of the economic group gross revenue in the last financial year, registered in the market sector where the anticompetitive act occurred; (ii) for other legal entities, associations and unions, R$50,000.00 to R$2 billion; and (iii) for individuals, 1% to 20% of the fine imposed to the respective company, legal entity, association or union.

→ *Reputation damage*: CADE can order the company to publish in popular newspaper, for several days, an abstract of the decision.

→ *Disqualification*: CADE can decide to ban the company from any business with public banks and from entering any public bid for at least five (5) years.

→ *Corporate restructure*: The shareholders of company may be forced to spin-off, have its corporate control transferred to third parties, sell its assets or partially stop its commercial activities.

→ *Recommendations to other governmental agencies*: CADE can also recommend (a) compulsory license of an intellectual property right hold by the company to the Brazilian Patent and Trademark Office; and (b) the restriction of tax benefit to the Brazilian federal tax authority.

17. These penalties shall be imposed by CADE, according to the Antitrust Law and the New Antitrust Law. Please note that the Brazilian Constitution grants the right to any company or individual to appeal to the judicial courts against any decision issued by an administrative authority (e.g., CADE) and this is frequently the case. Recently, CADE has faced several challenges against its decisions condemning parties for antitrust violation before the Brazilian courts.

18. The Brazilian criminal law also sets forth that individuals from the companies directly involved in a cartel are subject to criminal penalties (to be decided by criminal courts), including two (2) to five (5) years of jail time.

19. In addition, if an infringement of the Antitrust Law causes or has caused harm to a third party, the victim may bring a claim for damages before court against the undertaking.

20. The antitrust penalties in connection with a violation shall be imposed by CADE. In case of cartel enforcement, the individuals directly involved in the collusion may be also subject to custodial sanctions to be decided by criminal courts.

21. The increased prosecution of anticompetitive practices imposed higher costs on the Brazilian antitrust authorities. From 2009 to 2011, the time spent by CADE in the analysis of preliminary inquiries increased from 267 to 360 days, and the analysis period for administrative proceedings increased from 267 to 474 days. From 2009 to 2011, CADE has judged 148 preliminary inquiries and 53 administrative proceedings.

22. The New Antitrust Law shall allow a better and more efficient enforcement against cartel and other violations, since the efforts will be concentrated in CADE, which is the decision-making body.

Canada

23. The Competition Act ("Act") contains both criminal offences, which are prosecuted before the courts, and non-criminal provisions dealing with conduct which can be reviewed by the Competition Tribunal ("Tribunal"), a specialized tribunal that combines expertise in economics and business with expertise in law.

24. Prosecution under the criminal provisions of the Act can result in fines and prison terms. For conspiracies relating to price-fixing, market allocation or output restriction, the Act provides for a maximum fine of C$25 million, and imprisonment for a maximum of fourteen years[30]. All other criminal offences under the Act are punishable by a fine in the discretion of the Court and by a term of imprisonment of up to fourteen years.

25. The Act also allows the courts to issue prohibition orders. Such orders may be issued either in the absence of prosecution, or after a conviction is entered. The court can issue an order prohibiting any act or thing directed towards the continuation or repetition of an offence. In addition, the court may also require an individual or a company to take any steps which it considers necessary in order to prevent the commission, continuation or repetition of an offence, and to take any steps agreed to with the prosecution. For example, this provision has been used to order the implementation of a compliance program and, in another case, the removal or demotion of key employees from their management position. The order is effective for a period of ten years, unless the court specifies a shorter period.

30 There is, however, no statutory limit to the number of counts which can be included in the charge, and multiple counts under the conspiracy provision can result in fines against a corporation which exceed the statutory maximum.

26. The Act also allows private plaintiffs to sue for damages suffered as a result of conduct that is contrary to the criminal provisions of the Act.

27. Breaches of the non-criminal provisions involving conduct such as abuse of dominance, refusal to deal, exclusive dealing, tied selling, market restrictions and price maintenance, are sanctioned by prohibition orders or, in certain cases[31], by orders compelling other actions such as the divestiture of assets or shares. For abuse of dominance, the Tribunal may also impose an administrative monetary penalty for any amount up to C$10 million for a first order, and up to C$15 million for subsequent order.

28. All mergers or proposed mergers may be subject to review by the Commissioner of Competition (the "Commissioner"). In addition, all mergers that exceed certain financial thresholds must be notified prior to completion. Failure to notify is a criminal offence and can also lead to the imposition of an administrative penalty or other remedy by the court. From a substantive point of view, when the Commissioner believes that a merger or proposed merger is likely to prevent or lessen competition substantially in one or more relevant markets, the Commissioner can either apply to the Tribunal to challenge the merger under the applicable provisions of the Act, or negotiate remedies with the merging parties in order to resolve the competition concerns by way of a consent agreement.

29. The Act is enforced by the Commissioner, who is the head of the Competition Bureau ("Bureau"). The Commissioner is responsible for investigating any suspected anti-competitive activity which may be captured under the provisions of the Act.

30. If the Commissioner is of the view that a criminal offence has been committed, the matter is referred to the Director of Public Prosecutions ("DPP") with a recommendation on the charges to be laid and the appropriate sentence to be imposed. The DPP is responsible for instituting and conducting all criminal prosecutions under the Act which are heard by the courts. Although the DPP can make recommendations as to appropriate sentences, the decision ultimately rests with the courts.

31. With respect to the non-criminal provisions of the Act, the Commissioner investigates alleged violations and decides whether to apply to the Tribunal for review. When all parties agree on a resolution, the Commissioner can enter into a consent agreement with the parties. Such consent agreement is filed with the Tribunal and, upon registration, has the same effect as an order of the Tribunal.

32. Where voluntary compliance cannot be achieved, the Commissioner may file an application seeking remedial orders and, in certain circumstances, monetary penalties. The Commissioner can make representations to the Tribunal in relation to the amount of the penalty in a given case, but the Tribunal can impose any penalty which it considers appropriate, taking into account the aggravating and mitigating factors set out in the Act.

31 Where an order prohibiting the practice would not be sufficient to restore competition, the Tribunal has wide discretion to issue an order compelling other actions.

33. Private parties can also seek leave to apply directly to the Tribunal with respect to non-criminal matters involving refusal to deal, exclusive dealing, tied selling, market restrictions and resale price maintenance. If a party is granted leave to bring an application to the Tribunal, the Tribunal can either make a variety of orders or register a consent agreement made by the parties.

34. The Bureau conducts its investigations in private, which means that information relating to the number of cartel cases handled for the year 2011 is not publicly available. However, for the year 2011, charges were laid in four cartel cases, and eight corporations and nine individuals entered into guilty pleas. Total fines imposed amounted to $45,000 for individuals and to $750,000 for corporations.

Czech Republic

35. The authority responsible for applying antitrust rules in the Czech Republic is the Office for the Protection of Competition (Úrad pro ochranu hospodárské souteže) (the "Office"; www.compet.cz). The Office, for a breach of antitrust rules, can impose a fine on undertakings up to 10% of the total turnover. In addition, individuals actively participating in concluding or maintaining horizontal or vertical cartel agreements may face imprisonment up to eight years, disqualification and financial penalties. So far no individual has ever faced criminal sanction for participation in a cartel agreement in the Czech Republic.

36. In 2010 the Office initiated one cartel proceeding and imposed total fines of CZK 88 million (approximately EUR 3.5 million).

Egypt

37. The Egyptian competition law was adopted in February 2005 (Law no. 3 of 2005).

38. The law provides in article 22 (as amended in June 2008) that any person in breach of an anticompetitive practice will be subject to a fine that ranges between 100.000 (one hundred thousand) EGP (USD 18000) and 300.000.000 (three hundred Million) EGP (USD 50.000.000).

39. Any person can claim damages either in competition cases before criminal courts or bring a separate case before the civil court.

40. According to the law, all anti competitive breaches are criminal in nature. Therefore, the Competition Authority cannot impose fines directly. The case is referred to the prosecution office and then to the court which has the jurisdiction to impose fines through a criminal court judgment.

41. The role of the competition authority is like an expert witness to the court.

42. The only court judgment was rendered in the Cement Cartel Case in 2010 with a fine of 200.000.000 (Two Hundred Million) EGP (USD 35.000.000).

43. An abuse of dominance case was settled with the person in breach in 2009. He paid 60.000 (sixty thousand) EGP (USD 10.000) and amended all his contracts with distributors to comply with the Competition Law and the Competition Authority decisions.

European Union

44. The European Commission can impose fines on companies infringing EU competition rules, either intentionally or negligently, up to 10% of their annual global turnover[32]. Such fines have to be fixed with regard to the gravity and the duration of the infringement and fines are also set by the European Commission so as to ensure that they have a sufficiently deterrent effect.

45. EU competition rules apply to "undertakings", i.e. economic entities, not to individuals. Individuals personally involved in EU competition rules violations may be subject to personal criminal prosecution at Member State level, based on national rules, but not at the EU level.

46. The European Commission, acts as an integrated public authority which investigates possible infringements and has the power to order infringements to be brought to an end and to impose sanctions. Decisions imposing fines are more precisely adopted by the College of Commissioners, after consultation of the Advisory Committee, composed of representatives of the competition authorities of the Member States.

47. These decisions are subject to legal review by the General Court and the Court of Justice. The General Court undertakes an exhaustive review of both the Commission's substantive findings of facts and its legal appraisal of these facts. Appeals on points of law only may be brought before the Court of Justice against judgments of the General Court.

48. The European Commission frequently publishes statistics concerning antitrust enforcement. The latest available statistics[33] show that, in 2011, the Commission imposed fines for a total amount of € 614 million in cartel cases, to be compared to € 2,869 million in 2010. Indeed, in 2011, the Commission only took decisions in 4 cartel cases, involving 14 companies (7 in 2010, involving 69 companies).

49. Since the entry into force of the 2006 Guidelines on fines[34], 151 undertakings were fined by the Commission, among which 76 were fined less than 1% of their annual global turnover and 22 were fined between 9 and 10% of it.

France

50. The French Competition Authority can impose fines on companies infringing French competition rules up to 10% of their annual global turnover[35]. Entities which are not companies can be fined up to € 3 million. Such fines have to be proportionate to the seriousness of the infringement, to the importance of the damage to the economy and to the situation of the company or group of companies concerned.

51. The French Authority is an independent administrative authority. Decisions are adopted by the College of Members of the Authority and they are subject to the legal review of the Paris Court of Appeals and of the French Supreme Court.

52. Individuals participating to anticompetitive practices also incur personal criminal liability when they have fraudulently taken a personal and decisive part in the conception, organization or implementation of an infringement to competition rules. Criminal courts may impose fines up to € 75,000 and up to 4 years of prison[36]. Such criminal actions can be initiated either independently or after the action against companies initiated by the Competition Authority.

53. The French Competition Authority counts among the European Competition Authorities which are particularly active enforcing EU and French rules. The Authority's official statistics for 2011 have not been published yet[37] but, in 2011, total fines amounted to € 420 million, a level of fines consistent with 2010 (€ 442 million[38]).

India

54. The Indian competition regime is regulated by the Competition Act, 2002 (*Act*) and the regulations and notifications framed thereunder. The Act deals with three substantive areas of law:

→ anti-competitive agreements;

→ abuse of dominance; and

→ merger control.

55. The substantive provisions of the Act dealing with anti-competitive agreements and abuse of dominance came into effect in May 2009, and the provisions governing merger control were made effective only in June 2011.

56. The enforcement authority under the Act is the Competition Commission of India (*CCI*). The CCI is assisted by an investigative arm, led by the Director General (*DG*).

32 Article 23 of Council Regulation N° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

33 Which were published on 7 December 2011 and are available at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

34 European Commission's Guidelines of 1 September 2006 on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No 1/2003.

35 Article L 464-2 I of the Code de commerce.

36 Article L 420-6 of the Code de commerce.

37 The French competition authority's annual report is generally published in June of the following year.

38 Autorité de la concurrence's annual report for 2010, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=406.

57. The CCI has wide discretion in the passing of orders, including *ex parte* interim orders, and is also empowered to impose significant penalties by way of fines.

58. Orders of the CCI may be appealed against before the Competition Appellate Tribunal (*CompAT*) within a period of 60 days from the receipt of the order.

59. Any person aggrieved by any direction, decision or order of the CompAT may file an appeal to the Supreme Court within a period of 60 days from the date of receipt of an order of the CompAT.

60. With respect to anti-competitive agreements, the CCI may pass such orders as it deems fit, including:

– directing the enterprises to terminate the agreement and to refrain from re-entering such an agreement; or

– directing modification of the agreement.

61. The CCI may also impose penalties not exceeding 10% of the average turnover of the preceding 3 financial years of a contravening enterprise. Further, in case of a cartel, the CCI may impose upon each member of the cartel a penalty of up to 3 times the profits for each year of the continuance of the agreement, or 10% of turnover for each year of continuance of the agreement, whichever is higher.

62. In cases of abuse of dominance by an enterprise, the CCI may pass any or all of the following orders:

→ direct the enterprises involved to discontinue abusive activities;

→ direct the division of a dominant enterprise, and issue appropriate directions with regard to:

- the transfer of property, rights, liabilities or obligations;
- the modification of contracts and charter documents;
- the creation, allotment, surrender or cancellation of securities;
- the formation or winding up of the enterprise;

→ impose penalties not exceeding 10% of the average turnover of the preceding 3 financial years of the offender;

53. Under the provisions governing relating to merger control (or "combinations" as referred to under the Act), the CCI is empowered to:

→ approve a combination;

→ direct that a combination shall not take effect;

→ propose a modification of a combination.

→ impose the penalties in the following circumstances:

- upon the failure to notify, a penalty of up to 1% of the turnover or assets of the combination, whichever is higher;
- if any party to the combination makes a statement which is false in any material particular, or knowing it to be false; or omits to state any material particular knowing it to be material, such person shall be liable to a penalty between INR 50 lakhs (approximately EUR 76,923[39]) to INR 1 crore (approximately EUR 153,846).

64. Additionally, failure to comply with the orders of the CCI is punishable with a fine which may extend to INR 1 lakh (approximately EUR 1,538) for each day during which such non-compliance occurs, subject to a maximum of INR 10 crores (approximately EUR 1.5 million).

65. No criminal liability arises from the violation of the substantive provisions of the Act.

66. However, non-compliance with the orders issued by the CCI (directing a person to comply with its earlier orders) could result in criminal liability by way of a fine up to INR 25 crores (approximately EUR 3.8 million) and / or a prison sentence (up to a maximum of 3 years). Also, non-compliance with the orders issued by the CompAT could result in criminal liability by way of a fine of up to INR 1 crore (approximately EUR 153,846) and / or a prison sentence (up to a maximum of 3 years).

67. The CCI or the CompAT do not have the power to impose such penalty or criminal sentence. The punishment is to be imposed by the Chief Metropolitan Magistrate, Delhi, pursuant to a complaint filed by the CCI or the CompAT, as the case may be.

68. The DG is vested with the powers to:

→ summon and examine persons on oath;

→ require production of documents and receive evidence; and

→ obtain warrants/authorisation for search and seizure at offices and residences.

69. Anti-competitive behaviour could also separately, potentially attract provisions of the Indian Penal Code (*IPC*) and could lead to charges being made under the provisions of the IPC.

70. With respect to damages claimed by private parties affected by anti-competitive actions, the award of damages by way of compensation can be granted by the CompAT. The CompAT is empowered to hear compensation claims for damages or losses arising out of findings of the CCI or the CompAT regarding anti-competitive practices.

39 For the purpose of this article, the rate of conversion has been calculated at 1 Euro = 65 INR.

71. There have been approximately 160 cases brought before the CCI since its inception, dealing with allegations of anti-competitive agreements and abuse of dominance. An overwhelming majority of the cases were dismissed for lack of *prima facie* evidence. A number of other complaints were dismissed on account of the claims relating to deficiency in services and other consumer complaints, and not complaints relating to anti-competitive activities.

72. However, the CCI has imposed stiff penalties in a few cases. The highest penalty levied so far has been where the CCI arrived at a finding of abuse of dominance by a major real estate developer and imposed a penalty of INR 650 crores (approximately EUR 100 million). This order of the CCI is currently under appeal before the CompAT and has been conditionally stayed.

73. Prior to this decision, the highest fine imposed by the CCI was in a case where the accused party was found to have indulged in cross subsidizing of one of its businesses (the relevant market) by leveraging its dominant position in other businesses, with a view to enter and protect its position in the relevant market. In addition to passing an order of cease and desist from unfair pricing, the penalty levied was INR 55.5 crores (approximately EUR 8.5 million) which amounted to 5% of the party's average annual turnover.

Israel

74. Any violation of the Israeli Restrictive Trade Practices Law 1988 (the "Antitrust Law") is a basis for criminal, administrative and civil liability.

75. Criminal liability in Israel applies not only to the corporation. A violation of the Antitrust Law might also impose direct personal liability upon corporate officers involved in the antitrust wrongdoing (section 47 of the Antitrust Law). Moreover, section 48 of the Antitrust Law imposes indirect criminal liability on senior officers of a corporation, even if they were unaware of the offence committed, unless they can prove that they had taken all reasonable measures to prevent antitrust violations. In practice, this defense may be best served by a compliance program that meets the IAA guidelines.

76. Criminal penalties include a possible imprisonment of up to 3 years (5 years in aggravating circumstances) and a fine of up to 2,260,000 NIS (about US$600,000) plus an additional amount of 14,000 NIS (about US$3,800) for each day the infringement continues (section 47 of the Antitrust Law).

77. The IAA is the prosecutorial body responsible for criminal enforcement of the Antitrust Law. While the IAA is authorized to indict corporations and individuals for any violation of the Antitrust Law, it had normally reserved criminal enforcement for hard core cartel offences, bid rigging and other blunt violations of the Antitrust Law. For such violations, the IAA's practice was to normally seek imprisonment of any person directly involved in the violations as well as senior officers indirectly liable for such violations under Section 48 of the Antitrust Law. All criminal proceedings are adjudicated in the Jerusalem District Court, which ultimately decides the verdict and the penalties to be imposed. The District Court's verdict is subject to appeal to the Israeli Supreme Court.

For other violations of the Antitrust Law the IAA normally applies one or more of the following administrative tools:

→ A Declaration of breach – under section 43(a) of the Antitrust Law, the Antitrust Commissioner can declare that a certain agreement, merger or practice is in breach of the Antitrust Law (e.g., that a person was part to an illegal restrictive arrangement/illegally merged with another corporation/abused its dominant position). Such Declaration serves as prima facia evidence in any court proceeding, thereby facilitating private lawsuits against the parties to such agreements or practices. The Declaration may also facilitate subsequent civil proceedings initiated by private plaintiffs or criminal proceedings brought by the IAA. The declaration is subject to appeal process at the Antitrust Tribunal.

→ A consent decree – under section 50(b) of the Antitrust Law, the IAA may enter into a consent decree with an alleged antitrust offender. Such decree is an alternative to a criminal or administrative action and it may include fines and undertakings by the alleged offender. The decree is subject to approval by the Antitrust Court.

→ Injunctive relief – the IAA can apply to the Antitrust Tribunal under section 50(a) of the Antitrust Law seeking a restraining order aimed at preventing or terminating violations of the Antitrust Law.

78. The IAA can also issue directives to monopolies and to members of an oligopoly under certain conditions, as well as seek a divestiture of a merger that was illegally consummated, if such merger reasonably demonstrates a significant harm to competition. These proceeding are subject to judicial review by the Antitrust Court.

79. Monetary Payments – in recent years the IAA has been advocating for an amendment to the Antitrust Law, which will enable it to impose significant monetary payments on antitrust violators. As part of wide reforms to increase competition that are currently underway in Israel, it is expected that such an amendment will be approved by the Israeli parliament during 2012.

80. Civil proceedings – The Law states that any breach of the Law is a civil tort under the Israeli Torts Ordinance. Accordingly, private parties may file a lawsuit against antitrust offenders seeking compensation for damages incurred as a result of an antitrust violation or apply for an injunction order to prevent such damages. Consumers may also file class actions under the Class Actions Law, 2006 for harm incurred as a result of an antitrust violation. Civil tort proceedings may be issued by any person in any court

84. *Criminal Enforcement:* In 2011, the IAA launched 5 new criminal investigations, including with respect to an alleged failure by Tnuva, Israel's leading dairy firm, to comply with an IAA data request. The IAA completed several other investigations resulting in a possible prosecution in three

cases, one of which was a high profile investigation into possible cartel between major Israeli bakeries. The IAA brought one case before the Jerusalem District Court this year, relating to alleged bid-rigging in the water counters market. The Jerusalem District Court issued one verdict this year regarding a cartel between amplifier companies. Accepting a plea bargain, the Court sentenced one defendant for a two months imprisonment and a fine of about U.S.$12,000, while two other defendants were sentenced for a few months community service and various fines.

85. *Administrative Enforcement:* The IAA entered into one consent decree in 2011, regarding an alleged breach of the pre-merger notification regime. The consent decree included a monetary payment of about U.S.$100,000 by the merging parties. The IAA announced its intention to publish several declarations of breach, pending a hearing process.

Japan

86. The Japanese Anti-Monopoly Act sets forth imprisonment and fines as criminal penalties, payment order and cease-and-desist order as administrative penalties, and damage claims and injunction as civil liabilities.

87. Imprisonment may be imposed only on individuals, but fines may be imposed on both companies and individuals. Administrative penalties are imposed on companies in principle. Liabilities for damages are likely to be assumed by not only companies but also individuals such as their directors, but injunction is claimed only against companies in principle.

88. Imprisonment, fines, damage claim and injunction are imposed by the courts, while a payment order and a cease-and-desist order are imposed by the Fair Trade Commission ("FTC") which is the competition authority.

89. If an entrepreneur violates the Anti-Monopoly Act, criminal penalties are not usually imposed. However, if the violation is malicious, criminal penalties are imposed by courts in addition to the administrative penalties and civil liabilities. The proceedings in court to impose certain criminal penalties are commenced after FTC files an accusation with the prosecutor general.

90. FTC took legal measures against 12 cases violating the Anti-Monopoly Act (including 10 cartel cases) in 2010, while FTC deals with 142 cases in 2010. The total amount of payment order which FTC imposed in 2010 is around JPY72 billion. No accusation was filed with the prosecutor general by FTC in 2010.

Netherlands

91. The Dutch Competition Act entered into force on 1 January 1998 and is modelled closely on European Union competition law. The cartel prohibition contained in the Act (article 6) is almost an exact copy of article 101 of the Treaty of the Functioning of the European Union, excluding the effect on interstate trade criterion. The Act also contains a prohibition on the abuse of a dominant position (article 24). The Dutch Competition Authority (NMa) has the task of applying and enforcing the Act.

92. In 2013, the NMa is scheduled to merge with the Independent Post and Telecommunications Authority (OPTA) and the Consumer Authority (CA) to create a single regulator. The three authorities currently cooperate on the basis of "cooperation protocols".

93. Pursuant to the Competition Act, NMa can impose fines for breach of the cartel prohibition which may not exceed EUR 450,000 or 10 per cent of the company's turnover, whichever is higher. Principals and de facto managers can be made subject to fines of up to EUR 450,000 for involvement in a cartel. Under amendments already in effect from 1 August 2004, maximum fines of EUR 450,000 can be imposed on individuals for non-cooperation with NMa investigations. Similarly, maximum fines of EUR 450,000 or 1 per cent of turnover can be imposed on companies for non-cooperation.

94. There are no criminal sanctions under the Act. The ministers for economic affairs and justice are currently preparing a bill to introduce the possibility of imposing prison sentences on individuals infringing the cartel rules, as well as disqualification possibilities. However, rumour has it that these plans have been shelved.

95. Penalties are imposed by the NMa. In December 2001 the NMa published Guidelines for the Setting of Fines. These Guidelines were replaced in 2009 by the policy guidelines on the setting of fines. The policy guidelines state that the fine is based on the relevant turnover of the undertaking. This is understood to be the value of all the transactions realised by the undertaking for the duration of the infringement from the sale of goods or the provision of services to which the infringement relates. The fine for offenders other than individuals is set according to the following formula (as stated in the guidelines): Starting point × seriousness factor (× duration factor) + increase/decrease for additional circumstances.

96. The NMa will set a starting point equal to 10 per cent of the offender's relevant turnover. The seriousness factor has a maximum of five and is determined by the gravity of the infringement, considered in combination with the economic context in which the infringement occurred. The NMa distinguishes between three types of infringements: very grave, grave and less grave infringements. The basic amount of the fine consists of 10 per cent of the relevant turnover multiplied by the seriousness factor. In the case of very grave infringements, the NMa may increase the basic amount up to 25 per cent. In addition, in the case of a repeat infringement, the basic amount will be increased to 100 per cent.

97. The starting point for individuals is determined within the range of EUR 10,000 to EUR 200,000 for giving instructions or exercising de facto leadership with regard to inter alia "procedural" infringements such as breaking of seals affixed by the NMa during dawn raids. A range of EUR 50,000 to EUR 400,000 applies in regard of infringement of the cartel prohibition.

98. In 2012, the NMa imposed fines in six cases for a total amount of EUR 39.7 million. In two cases, fines were imposed on individuals.

Pakistan

99. The Commission may:

- → issue orders pursuant to section 31 of the Competition Act 2010 (Act) specifying remedial measures:
- → impose fines and penalties under section 38 of the Act
- → initiate proceedings for imprisonment

100. Orders under Section 31

101. Section 31 of the Act provides that the Commission may issue orders in the case of:

102. (a) an abuse of dominant position: require the undertaking concerned to take such actions specified in the order as may be necessary to restore competition and not to repeat the prohibitions specified in Chapter II or to engage in any other practice with similar effect; and

(b) prohibited agreements, annul the agreement or require the undertaking concerned to amend the agreement or related practice and not to repeat the prohibitions specified in section 4 or to enter into any other agreement or engage in any other practice with a similar object or effect; or

(c) a deceptive marketing practice, require:

(i) the undertaking concerned to take such actions specified in the order as may be necessary to restore the previous market conditions and not to repeat the prohibitions specified in section 10; or

(ii) confiscation, forfeiture or destruction of any goods having hazardous or harmful effect.

(d) a merger, in addition to the provisions contained in section 11

(i) authorize the merger, possibly setting forth the conditions to which the acquisition is subject, as prescribed in regulations;

(ii) decide that it has doubts as to the compatibility of the merger with Chapter II, thereby opening a second phase review; or

(iii) undo or prohibit the merger, but only as a conclusion of the second phase review.

103. Penalties under Section 38

104. The Competition Commission (Commission) may impose the penalties listed below, after giving the undertaking concerned an opportunity to be heard, if an undertaking, or any director, officer or employee is found to have contravened the provisions of the Act.

105. Contravention of any provision of Chapter II of the Act which pertains to abuse of dominant position, prohibited agreements, deceptive marketing practices and mergers, results in a penalty of an amount not exceeding 75 million Pakistani Rupees (PKR) or an amount not exceeding 10% of the annual turnover of the undertaking, as may be decided in the circumstances of the case by the Commission.

106. For non compliance of orders, notices, requisitions of the Commission, a penalty of an amount not exceeding 1 million PKR.

107. Where an undertaking knowingly abuses, interferes with, impedes, imperils or obstructs the process in any manner an amount not exceeding one million rupees

108. Section 38(3) of the Act provides that if the violation of the order of the Commission is a continuing one, the Commission may also direct the undertaking guilty of such violation shall pay by way of penalty a further sum which may extend to one million rupees for every day after the first such violation.

109. Section 38(5) of the Act states that notwithstanding anything contained in this Act or any other law for the time being in force, failure to comply with an order of the Commission shall constitute a criminal offence punishable with imprisonment for a term which may extend to one year or with fine which may extend to 25 million PKR and the commission in addition or in lieu of the penalties prescribed in the Act, initiate proceedings in a Court of competent jurisdiction.

110. The Commission has to power to impose penalties.

111. The following statistics are available in the Annual Report 2010, available on the Commission's website (www.cc.gov.pk):

Proceedings Resolved 09-10	
Abuse of dominance cases	5
Prohibited Agreement cases	4
Deceptive marketing cases	3

Total Cases Resolved	12
Total Appeals Heard	2
Total Penalties levied in 09-10 - =6 – 8 billion PKR	

Singapore

112. The various penalties which can be imposed on companies are:

- → Fines of up to 10% turnover of the business of the undertaking in Singapore for each year of infringement for a maximum of 3 years. This is provided for in section 69(4) of the Singapore Competition Act Cap. 50B ("Act"); and
- → Directions given to the undertaking by the Competition Commission of Singapore ("CCS"), which it considers appropriate to bring the infringement to an end, or to remedy mitigate or eliminate any adverse effects. This is provided for in section 69(1) of the Act.

113. Officers of the affected company may also face a fine of up to S$10,000 and/or imprisonment for a term not exceeding 12 months, not for the violation of cartel behavior or an abuse of dominance, but for example, for misleading, failing to provide information or documents to the CCS. This is provided for in section 83 of the Act.

114. Section 86 of the Act also provides for parties who have suffered loss or damage directly as a result of an infringement to have a right of private action against any undertaking who was at the material time a party to such infringement. No action may be brought until a final decision has been reached as per section 86(2) of the Act. There is a two year limitation period for such actions to be brought.

115. Such penalties are imposed by the competition authority, which amount can then be revised on appeal to the Competition Appeal Board or the courts on certain grounds being proven.

116. The High Court and Court of Appeal of Singapore has the power to confirm, modify or reverse the decision of the Competition Appeal Board, including the amount of financial penalty. This is provided for in section 74(3)(a) of the Act.

117. While this suggests that the High Court and Court of Appeal can only review the amount of penalty issued, section 74(3)(b) states that the High Court and Court of Appeal can make such further or other order, whether as to costs or otherwise, suggesting that the High Court and Court of Appeal has the power to make any order. There has been no case precedent regarding this position.

118. The enforcement of penalties and/or directions of the CCS are enforced by the district court of Singapore, as per section 85(1).

119. There have been a total of 12 cartel cases reported in Singapore. 7 were notifications, and 5 were investigations. For notifications, there were 2 in 2011, 2 in 2010 and 3 in 2007. For investigations, there were 2 in 2011, and 1 each in 2010, 2009 and 2008. 4 were handled in 2011, 3 in 2010, 1 in 2009, 1 in 2008 and 3 in 2007. Fines were handed in 5 of these cases. No prison sentences were issued.

120. There has only been one case relating to abuses of dominance, and this was the result of an investigation. The infringement decision was issued in 2010, along with a fine issued. No prison sentences were issued, as violations of the Competition Act are not subjected to criminal penalties. The case is currently under appeal.

121. A total of 29 merger cases have been notified. 2 cases have been notified thus far in 2012. 5 cases were notified in 2011, 7 in 2010, 4 in 2009, 7 in 2008 and lastly 4 in 2007. No fines or prison sentences have been issued.

South Korea

122. The primary law governing competition and antitrust matters in Korea is the Monopoly Regulation and Fair Trade Law ("FTL"). The Korea Fair Trade Commission (the "KFTC") is a ministerial-level central administrative agency charged with enforcing the FTL.

123. If the KFTC's committee consisting of nine Commissioners (the "Committee") finds the companies subject to its investigation to be in violation of the FTL, the Committee usually issues a corrective order wherein the offending parties are ordered not to do the prohibited activity. The Committee may also order the offending parties to publish a public announcement concerning the violation of the FTL. In addition, they may impose the sanctions described below on the relevant entities[40].

124. If the KFTC finds an entity to be in violation of the FTL, it may impose the sanctions set out below; the degree and range of sanctions imposed will depend upon the type and severity of the FTL violation. Moreover, the KFTC may file a criminal complaint against those individuals who actually conducted the acts in violation of the FTL.

A. Cease and Desist Order

125. The KFTC usually issues a corrective order ordering the offending parties to cease the illegal activity.

B. Public Announcement of the Violation

126. The KFTC may also order the offending parties to publish an announcement with details of the violation of the FTL. The KFTC will designate the number of daily newspapers in which the announcement must be carried and the size of the announcement, and will usually dictate its contents as well.

C. Surcharges

127. The KFTC generally has the authority to impose surcharges on enterprises in violation of the FTL. For instance, an abuse of a market dominant position will be subject to a surcharge of up to 3% of the relevant sales of the enterprise[41]. In the case of an unfair business practice, the KFTC may impose a surcharge of up to 2% of the relevant sales amount. The actual rate of the surcharge imposed will be decided by the KFTC on the basis of various factors (the primary factor is generally the severity of the anticompetitive effect of the violation, but the KFTC will also consider, for example, the duration or number of occurrences of the violation and/or the amount of unjust gain accrued as a result of the violation) up to the maximum applicable.

40 In addition, those individuals who actually conducted the acts in violation of law may also be subject to criminal sanctions.

41 Under the FTL, its Enforcement Decree and the KFTC Guidelines, "relevant sales" includes the revenues from sales of the "products related to the violation" during the period of the violation. The "products related to the violation" will generally correspond to the definition of the relevant product and geographic markets.

D. Complaint for Criminal Sanctions

128. Criminal sanctions are the most severe penalties available under the FTL. If the KFTC decides to pursue a criminal sanction, it will file a criminal complaint with the Prosecutor's Office for an indictment under the FTL against the company and/or any responsible individual. If convicted, the offender may be subject to criminal liability including fines or imprisonment, although imprisonment is reserved for only the most exceptional cases. For acts constituting abuse of market dominant position, for example, the FTL sets forth criminal sanctions of up to three years' imprisonment and/or criminal fines of up to 200 million Korean Won.

Turkey

129. In the case of a proven cartel activity, the companies concerned shall be separately subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees and/or managers of the undertakings/association of undertakings that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking/association of undertaking. After the amendments, the new version of the Law on Protection of Competition No. 4054, dated 13 December 1994 ("Competition Law") makes reference to article 17 of the Law on Minor Offenses to require the Competition Board to take into consideration factors such as the level of fault and the amount of possible damage in the relevant market, the market power of the undertaking(s) within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the undertaking(s) in the infringement, financial power of the undertaking(s), compliance with the commitments etc., in determining the magnitude of the monetary fine.

130. In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ("Regulation on Fines") was also enacted by the Turkish Competition Authority. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines. According to the Regulation on Fines, fines are calculated first by determining the basic level, which in the case of cartels is between 2 and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines also applies to managers or employees that had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

131. In addition to the monetary sanction, the Competition Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all de facto and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed as legally invalid and unenforceable with all its legal consequences. Similarly, the Competition Law authorises the Competition Board to take interim measures until the final resolution on the matter, in case there is a possibility for serious and irreparable damages.

132. The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability) but no criminal sanctions. That said there have been cases where the matter had to be referred to a public prosecutor after the competition law investigation was completed. On that note, bid-rigging activity may be criminally prosecutable under sections 235 et seq. of the Turkish Criminal Code. Illegal price manipulation (i.e. manipulation through disinformation or other fraudulent means) may also be condemned by up to two years of imprisonment and a civil monetary fine under section 237 of the Turkish Criminal Code.

133. Similar to US antitrust enforcement, the most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages. That way, administrative enforcement is supplemented with private lawsuits. Articles 57 et seq. of the Competition Law entitles any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is actually a condemnable agreement or concerted practice, but wait for the Competition Board to render its opinion on the matter, therefore treating the issue as a prejudicial question. Since courts usually wait for the Competition Board to render its decision, the court decision can be obtained in a shorter period in follow-on actions.

134. The sanctions specified above may apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as the employees and/or board members/executive committee members of the infringing entities in case such individuals had a determining effect on the creation of the violation. Other than these, there is no sanction specific to individuals. The Competition Law does not provide any specific rules regarding the liability of implicated employees for the legal costs and/or financial penalties imposed on the employer. On the other hand, much would depend on the internal contractual relationship between the employer and the implicated employee, as there is no roadblock against the employer claiming compensation from the implicated employee under the general principles of Turkish contracts or labour laws. In fact, the Competition Law Compliance Program which was recently released by the

Turkish Competition Authority explicitly states that one of the ways to ensure the success of a compliance program is to provide clear intercompany disciplinary measures to hold the implicated employees personally liable.

135. Moreover, the Competition Board may request all the information it deems necessary from public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is TL 13,591 (approx. EUR 5,852 according to the applicable Turkish Central Bank average rate for 2011). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Similarly, refusing to grant the staff of the Turkish Competition Authority access to business premises may lead to the imposition of a daily-based periodic fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Again, the minimum fine is TL 13,591 (approx. EUR 5,852 according to the applicable Turkish Central Bank average rate for 2011).

136. The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Turkish Competition Authority. The Turkish Competition Authority has administrative and financial autonomy. It consists of the Competition Board, Presidency and Service Departments. As the competent body of the Competition Authority, the Competition Board is responsible for, inter alia, investigating and condemning cartel activity. The Competition Board consists of seven independent members. The Presidency handles the administrative works of the Turkish Competition Authority.

137. A cartel matter is primarily adjudicated by the Competition Board. As mentioned above, administrative enforcement is supplemented with private lawsuits as well. In private suits, cartel members are adjudicated before regular courts. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Board, and build their own judgements judgments on that decision.

138. In 2011, the Competition Board has issued a total of 617 decisions. Amongst these, 283 decisions (approx. 46%) were related to cartel/dominance cases whereas 239 decisions (approx. 39%) were related to mergers/acquisitions/joint venture cases, 14 decisions (approx. 2%) were related to privatization cases and 54 decisions (approx. 9%) were related to exemption/negative clearance cases.

139. Within 283 cartel/dominance decisions, 238 of the claims (approx. 84%) were dismissed by the Competition Board in 2011 whilst fines were imposed on 9 cases (approx. 3%). The Competition Board has 18 ongoing investigations regarding cartels and abuse of dominance.

140. In 2011, the Competition Board has imposed a total amount of TL 462,862,794 (approx. EUR 199,303,648 according to the applicable Turkish Central Bank average rate for 2011) in fines. A great majority of these fines (99.8% or TL 461,989,251, approx. EUR 198,927,510 according to the applicable Turkish Central Bank average rate for 2011) were imposed on the undertakings regarding cartels, abuse of dominance and illegal concentrations.

141. As for the highest monetary fines imposed by the Competition Board as a result of a cartel investigation, two decisions stand out:

→ The highest monetary fine imposed by the Competition Board on a single company as a result of a cartel investigation was 68,844,704.73 TL (approx. EUR 29,643,775 according to the applicable Turkish Central Bank average rate for 2011). This monetary fine was imposed by the Competition Board on Ford Otomotiv San. A.Ş ("Ford") in its decision dated 18.04.2011 and numbered 11-24/464-139. This amount represented 9‰ of Ford's annual gross revenue for the year 2010.

→ The highest monetary fine imposed by the Competition Board for an entire case (i.e. total fine on all companies covered by the cartel conduct) as a result of a cartel investigation was TL 277.4 million (approx. EUR 119,445,401 according to the applicable Turkish Central Bank average rate for 2011) for various companies in automotive sector. The total fine was imposed on 15 undertakings (active in the new private cars and vans market) by the Competition Board in its decision dated 18.04.2011 and numbered 11-24/464-139.

United Kingdom

1. Antitrust penalties

142. Companies: The UK antitrust enforcement agencies may impose penalties for breach of the EU and UK rules prohibiting anti-competitive agreements and abuse of market dominance of up to 10% of global group turnover in the previous financial year[42]. They may order termination of the infringing conduct and, particularly in the context of a finding of abuse of market dominance, may require the infringing company to alter its business structure and/or terms. Third parties that have suffered loss as a result of the infringement may bring proceedings for damages and/or an injunction against the infringers in the English courts. They may rely on the factual findings of the UK competition regulators and the European Commission where the deadline for final appeal has expired. There has been some case law involving non-British claimants with UK subsidiaries "forum shopping" in the English courts to take advantage

42 S. 36(8) Competition Act 1998.

of the more onerous rules on discovery to force disclosure of potentially problematic material[43].

143. Individuals: There are two consequences. Firstly, the UK competition regime is one of the few European systems that allows for prosecution of individuals who breach competition law. The Enterprise Act 2002 introduced the cartel offence from 20 June 2003[44]. Individuals who dishonestly participate in specified cartel conduct can be prosecuted and fined unlimited sums and / or sent to prison for up to five years[45]. The existence of a criminal offence in the UK means that UK citizens may be extradited to the US under the UK/US extradition treaty[46]. UK citizens convicted of cartel offences in the US have also returned to serve their sentences in UK prisons[47]. Secondly, where companies have infringed competition law, the directors of those companies may be disqualified from being a director for up to 15 years, if the director:

- → "ought" to have known of the breach; or
- → had reasonable grounds to suspect a breach but took no steps to prevent this and his conduct contributed to that breach[48].

144. Penalties on companies and individuals are generally imposed by the Office of Fair Trading ("OFT") as the primary UK investigatory competition agency[49]. The sectoral regulators in the UK have concurrent powers with the OFT in their sectors (electricity, gas, water, rail) and can also impose penalties. The OFT and sectoral regulators use their discretion under the relevant legislation to determine the appropriate amount of a penalty, taking into account a number of factors. In cartel cases they also take account of the leniency process, which allows companies and individuals to seek immunity from prosecution / fines or leniency (i.e. immunity or reductions in penalties for co-operation and information provision)[50].

43 See for instance *Provimi Ltd v Aventis Nutrition and others* [2003] EWHC 961 (Comm).

44 S. 188 Enterprise Act 2002, in force from 20 June 2003.

45 S. 190 (1) (a) Enterprise Act 2002. On 15 March 2012, the British Government announced its proposals for the reform of the UK competition regime. The centrepiece is the merger of the OFT and CC into a new, unified Competition & Markets Authority, by April 2012. The most striking proposed reform is re-writing the cartel offence in the Enterprise Act 2002 by deleting the 'dishonesty' element. To undermine the most damaging secret arrangements between conspirators, the offence will no longer include those cartels which the parties have agreed to publish in a suitable format (e.g. in the London Gazette) before they are implemented, so that customers and others are aware of them. The official explanation is that 'dishonesty' offences are particularly difficult to prosecute in a white collar criminal environment and the reform will increase the number of prosecutions. However, publishing restrictive arrangements may take the law back to the era of the Restrictive Trade Practices Act 1976, before the modernisation of UK law with the Competition Act 1998. In addition, the European Commission ended the notification of restrictive agreements in 2004, encouraging parties to self-assess with their legal advisors. The question is therefore whether this will unduly overburden the CMA's resources.

46 See the UK Supreme Court case *Norris (Appellant) v Government of the United States of America (Respondent) [2010] UKSC 9*. http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_PressSummary.pdf.

47 S. 191 Enterprise Act 2002. See for instance the *Marine Hose* case: http://oft.gov.uk/about-the-oft/legal-powers/enforcement_regulation/prosecutions/marine-hose.

48 S. 204 Enterprise Act 2002.

49 S. 36 Competition Act 1998 and S.190(2) Enterprise Act. See OFT 423 Guidance as to the appropriate amount of a penalty, December 2004: http://oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf.

50 See OFT803 Leniency and no-action: OFT's guidance note on the handling of applications, December 2008. http://oft.gov.uk/shared_oft/reports/comp_policy/oft803.pdf.

145. The only OFT infringement decision in 2011 involved the dairy sector and carried fines of nearly £50m.

2. Decisions of the UK regulators

146. The OFT had a mixed year in 2011. In August 2011, it imposed fines of nearly £50m in its Dairy investigation on a number of supermarkets and dairy manufacturers for coordinating increases in the prices consumers paid for certain dairy products in 2002 and/or 2003[51]. Initially the OFT had attempted to impose fines of over £120m in December 2007 and February 2008[52].

147. In November 2011 the OFT issued a Statement of Objections in the *British Airways / Virgin civil* price fixing case. This is a necessary step towards issuing a final penalty decision, and was taken because the OFT alleged that British Airways breached a settlement agreement with the OFT which had been previously agreed in August 2007, involving an agreed fine of £121.5m[53]. However, the criminal prosecution brought by the OFT against a number of BA executives collapsed in May 2010 after the OFT discovered that it had not shared crucial material with the defence. It has now been reported that the OFT and BA are in talks to agree a fine much reduced from £121.5m[54].

148. In March 2011 the Competition Appeal Tribunal ("CAT") reduced the fines imposed by the OFT on a number of construction companies by over 90% in some cases. This followed a very high profile OFT investigation into the UK construction industry, lasting some five years, fining 103 companies a total of £129m for engaging in "cover pricing", a form of bid-rigging. The OFT had issued a record-breaking 2000 page infringement decision but the CAT criticised the methodology used by the OFT to calculate the fines, calling the sums involved "excessive and disproportionate"[55].

149. In April 2011 the CAT similarly reduced on appeal the fines which had been imposed on a number of specialist construction recruitment companies by the OFT in September 2009. The Construction Recruitment Forum case had involved total OFT fines of £39.27m on six recruitment agencies for price-fixing and organising a collective boycott of another company. The CAT dramatically reduced the amounts payable by the companies in question, in one case from £30.3m to £5.8m[56].

51 See http://oft.gov.uk/news-and-updates/press/2011/89-11 Press release 89/11, 10 August 2011, *OFT fines certain supermarkets and processors almost £50 million in dairy decision*.

52 See http://oft.gov.uk/news-and-updates/press/2008/22-08.

53 See http://oft.gov.uk/news-and-updates/press/2011/120-11.

54 See http://www.telegraph.co.uk/finance/newsbysector/transport/9090804/British-Airways-in-talks-over-OFT-price-fixing-fine.html.

55 Case Numbers: 1114/1/1/091119/1/1/091127/1/1/091129/1/1/091132/1/1/091133/1/1/09 Kier Group Plc; Kier Regional Limited; Ballast Nedam N.V.; Bowmer And Kirkland Limited; B&K Property Services Limited; Corringway Conclusions Plc; Thomas Vale Holdings Limited; Thomas Vale Construction Limited; John Sisk & Son Limited; Sicon Limited -v- Office Of Fair Trading [2011] CAT 3.

56 Cases 1140/1/1/09, 1141/1/1/09 (1), 1142/1/1/09 (1) Eden Brown Limited; CDI Anders Elite Limited (2) CDI Corp; Hays PLC and others v Office of Fair Trading [2011] CAT 8.

150. In both of the above cases, the CAT discussed the presence of compliance programmes introduced after the infringements. The CAT agreed that the OFT should take this into account when calculating the fines applicable to the companies in question.

151. In December 2011 the CAT quashed an OFT infringement decision in the Tobacco cases[57], in which a number of retailers and tobacco manufacturers had been fined a total of £225m in April 2010[58]. The OFT has expressed its "disappointment" at this verdict[59].

152. As at the time of writing in March 2012, there are no current criminal cartel cases in the public domain[60].

3. Ongoing cases

153. There is an ongoing civil investigation alleging an infringement of the Competition Act 1998 and article 101 in relation to passenger services on the London to Hong Kong route. In April 2010 the OFT issued a statement of objections alleging that Cathay Pacific Airways and Virgin Atlantic had infringed competition law in relation to passenger services on the London to Hong Kong route between September 2002 and July 2006. The matter was brought to the OFT's attention by Cathay Pacific under the OFT's leniency policy. Provided it continues to cooperate, Cathay will be immune from any penalty imposed in this case[61].

154. Another ongoing civil investigation involves suspected cartel activity in the UK involving commercial vehicle manufacturers. The investigation is being carried out under the Competition Act 1998 but has not reached any decision[62].

United States

155. In the United States, antitrust/competition law violations are enforced at both the state and federal level, by both public prosecution and private litigation.

156. Violation of the Sherman Act[63], the main federal antitrust law, can be enforced as a criminal violation by the Antitrust Division of the United States Department of Justice. This enforcement is usually limited to cartel participants, and includes large fines for enterprises and individuals, and prison terms (up to 10 years) for individuals. An individual may be subject to a fine of up to $1 million, and an organization may be subject to a fine of up to $100,000,000, or twice the gain or loss attributable to the violation. The largest fine so far is the $500 million imposed on Hoffman-LaRoche as part of the vitamin cartel case. Companies convicted of violating the antitrust laws may also be debarred from serving as federal contractors.

157. Private parties and the government may seek to recover losses attributable to antitrust violations through treble damages actions[64]. Equitable (injunctive) relief is available to the government to prevent or cause actions to be taken (e.g., to stop a merger or undo a merger that has been consummated), and to private litigants (e.g., to prevent termination of a business relationship). Attorneys General of the states may bring an action on behalf of the citizens of that state ("parens patriae") to recover treble damages.

158. The Federal Trade Commission also has jurisdiction to civilly enforce the antitrust laws, including the Federal Trade Commission Act[65], which provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful".

159. The individual states of the United States also have antitrust laws governing violations that occur within the borders of their states. In general, these laws very closely parallel the federal laws, and may be enforced by a state attorney general or a private party.

160. Damages and criminal fines are imposed by courts. The FTC has certain administrative authority to impose fines for violation of its orders or rules, but these may be challenged in court.

161. Statistics relating to the activities of the Antitrust Division of the Department of Justice and the Federal Trade Commission are available on their web sites.

II. Compliance advocacy and guidance

Please provide an overview of the compliance guidance, if any, released by your competition authority/agency or court in your program:

→ *Have authorities/agencies in your jurisdiction released detailed guidance on compliance programs? In the affirmative, please provide a link to view the documents (if available, in English) and full publication references; please briefly explain the guidance provided and the tools proposed.*

→ *Are any other form of public statement on antitrust compliance programs available (i.e. press releases, speeches, FAQ, case law etc.)?*

57 Case No. 1160/1/1/10 (1) Imperial Tobacco Group plc (2) Imperial Tobacco Limited and others v Office of Fair Trading [2011] CAT 41.

58 See http://oft.gov.uk/news-and-updates/press/2010/39-10.

59 See http://oft.gov.uk/news-and-updates/press/2011/134-11.

60 In December 2011 the OFT closed its criminal investigation into commercial vehicle manufacturers, stating that: "Following a thorough investigation it has been determined that there is insufficient evidence for any individual to be charged with the cartel offence". See http://oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/commercial-vehicle-criminal.

61 See http://oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/virgin-cathay.

62 See http://oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/commercial-vehicle-civil.

63 15 U.S.C. § 1. Violation of § 2 of the Sherman Act, which deals with monopolies, is also a criminal violation, but is rarely enforced as such.

64 15 U.S.C. § 15.

65 15 U.S.C. § 45.

→ *Are competition authorities/agencies in your jurisdiction likely to review draft compliance programs for approval/ advice?*

Australia

162. The ACCC's guidance on compliance programs is available on its website[66] and in its publication, *Corporate trade practices compliance programs*[67], which set out the ACCC's position in detail.

163. In summary, the ACCC considers that substantial and properly implemented competition compliance programs are important preventative tools. They should help to facilitate a culture of compliance within corporations, as well as enabling them to identify and reduce the risk of a breach of the CCA before it occurs.

164. The ACCC considers a culture of compliance exists where a positive attitude towards legal compliance is promoted at all levels within the organisation, and where this is demonstrated by people proactively seeking to understand and act in compliance with legal obligations affecting their work[68].

165. With respect to compliance programs, notably, the ACCC does not prescribe a generic regime. Rather, it recognises that each organisation's requirements will be different depending on factors such as the size and complexity of the organisation, and its risk profile. Consequently, an effective compliance regime may range from the relatively simple, such as employee training, to something far more extensive in the case of a large organisation.

166. However, in its guidance the ACCC identifies a number of elements which it considers should be present in all compliance programs. They should be well-managed, adequately resourced, properly documented and actively supported by the board and senior management.

167. Moreover, the ACCC considers that an effective compliance program will have strategic vision, there will be risk assessment processes in place, control points will exist within the organisation, the program will be adequately documented, appropriate personnel will be accountable for its management and it will be subject to continuous improvement[69].

168. While it provides high-level guidance as to what should be included, the ACCC is not itself actively involved in the design or implementation of compliance programs. Generally, this is the responsibility of individual corporations and currently there is no process in place whereby the ACCC offers specific advice to corporations in this regard.

66 See ACCC website: http://www.accc.gov.au/content/index.phtml/itemId/54418.

67 See ACCC website: http://www.accc.gov.au/content/index.phtml/itemId/717078.

68 See ACCC website: http://www.accc.gov.au/content/index.phtml/itemId/54418.

69 See ACCC website: http://www.accc.gov.au/content/index.phtml/itemId/54418?pageDefinitionItemId=86167.

Brazil

169. Although the Brazilian antitrust authorities do not have any formal compliance guidance in order to clarify how companies can drive antitrust compliance, SDE has issued Ordinance No. 14 of March 9, 2004 ("SDE Ordinance") in order to establish the Program for Prevention of Infractions to the Economic Order ("SDE Compliance Program")[70]. The SDE Compliance Program is endorsed by SDE, after analysis of the company's proposal, according to the Ordinance provisions. Alternatively, the undertakings can prepare and implement compliance programs in Brazil without any consent or review by the authorities.

170. The procedures and structure of the SDE Compliance Program is determined by items IV, V, VI, VII and VIII of article 4,[71] however the content and enforcement are applicant's obligation, as set forth by article 3 of SDE Ordinance.Therefore, the applicant must provide in its proposal: (i) standards and procedures in connection with the compliance of the Antitrust Law by the employees; (ii) appointment of a person with authority to coordinate and monitor the enforcement of the SDE Compliance Program ("SDE Compliance Program Officer"); (iii) indication of the limits for the SDE Compliance Program Officer to grant its powers to other employees; (iv) the degree of supervision over the activities of those to whom the SDE Compliance Program Officer granted his powers, as well as those who have contact with competitors; (v) mechanisms to identify and punish the employees that were responsible for anticompetitive practices; (vi) description of the resources to be used, such as presentations, manuals, lectures, software, rules, reports, document destruction policy and system of supervision of infractions; (vii) agreement with independent audit for competition purposes, which must be performed at least every 2 (two) years; (viii) statement from the officers, directors, managers, heads of the sales teams and any employees that participate in associations or unions meetings with competitors, declaring that they acknowledge the SDE Compliance Program; and (ix) statement from associations, unions, or similar, that its members do not adopt anticompetitive practices.

171. The content of the SDE Compliance Program must be guided by the characteristics of the market in which the applicant has activities (i.e., tailor-made). For example, CADE usually presents concerns on the degree of vertical integration in the concreting services market[72]. Therefore, a proposal of SDE Compliance Program submitted by a company from this market must address these concerns. If a producer of concrete produces cement in excess and supplies the surplus to some of its competitors, it may determine in its SDE Compliance Program that its sales team will provide the input at reasonable price and conditions and will not incur in any practice to foreclose part of the market or create barriers to entry.

70 The SDE Ordinance No. 14/2004 is available at www.mj.gov.br/sde

71 Please note that the company can add other procedures if it finds necessary.

72 See, for example, concentration act No. 08012.002467/2008-22.

172. The Brazilian antitrust authorities frequently emphasize the importance of the SDE Compliance Program for the competition policy. For example, CADE highlighted the importance of the SDE Compliance Program in its presentation in the II Lusophone Meeting of Competition Policy[73]. SDE has also made presentations regarding the SDE Compliance Program and its effectiveness[74].

173. CADE has also imposed to companies the adoption of compliance programs as a result of an investigation or as a restriction for merger clearance.

174. The proposed SDE Compliance Program is subject to SDE analysis. If it complies with the requirements set forth by SDE Ordinance, SDE will issue the Certificate of Compliance ("Certificate"), which will be valid for 2 (two) years.

175. Compliance programs can also be reviewed by CADE if it is a condition for settlement with defendants. In Brazil, defendants of administrative proceedings or preliminary investigations can execute Cease and Desist Commitment ("Settlement") with CADE. Also, in case of antitrust clearance, CADE and the parties can negotiate behavioral and structural restrictions in order to approve a transaction by the execution of a Performance Commitment. In both agreements, CADE may impose the obligation of implementing a compliance program[75] [76]. In these cases, the authority determines the mechanisms that the program shall provide in order to ensure its effectiveness. The results and enforcement of the compliance program are later analyzed by CADE, which will either declare that the companies fulfilled their obligation or breached the Settlement or Performance Commitment.

176. Aside from these hypothesis, the Brazilian antitrust authorities do not usually review compliance programs formulated by companies. Notwithstanding, considering that the New Antitrust Law will merge SDE into CADE, the procedure of registration of the SDE Compliance Program and issuance of the Certificate by SDE will no longer be in force. However, given the importance of compliance programs, it is reasonable to expect that CADE will issue new regulation regarding this matter.

Canada

177. The Bureau has published a detailed bulletin, the Corporate Compliance Programs Bulletin ("Bulletin"), which includes protocols to be followed for the implementation of competition law compliance programs[77].

73 Available at http://www.cade.gov.br/internacional/PAA-Lusofono-29-05-06.pps.

74 For example, see SDE's presentation to Febracan (Brazilian Federation of Anesthesiology Cooperatives), available at: www.mj.gov.br/sde.

75 See Settlements executed in the administrative proceeding No. 08012.005328/2009-31 and administrative proceeding No. 08012.011142/2006-79 and Performance Commitment executed in the concentration act No. 08012.002148/2008-17.

76 Please refer that these compliance programs proposed by CADE are not certificated by SDE (i.e., are not SDE Compliance Programs). As previously mentioned, the SDE Compliance Program are not mandatory and are rarely adopted by undertakings, which prefer to prepare and implement their own compliance programs without the review of any antitrust authority.

77 Competition Bureau, Corporate Compliance Programs Bulletin (2008). Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02732.html.

178. The Bulletin describes measures that businesses should consider in order to prevent or minimize their risk of contravening the Act, and detect possible contraventions. The Bulletin also provides a framework of the essential components of a compliance program to help businesses develop their own program.

179. Relevant sources:

→ [Media Centre > Announcements] Competition Bureau Revises Two Bulletins to Reflect Amendments to the Competition Act, September 27, 2010 (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03292.html).

→ [Media Centre > Announcements] Competition Bureau Publishes Updated Bulletin on Corporate Compliance Programs, October 24, 2008 (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02731.html).

→ [Media Centre > Speeches] Competition Law and Trade Associations, 2008 Property & Casualty Industry Insurance Forum, Northwind Professional Institute, Langdon Hall, Cambridge, Ontario, May 23, 2008, John Pecman, Acting Senior Deputy Commissioner of Competition, Criminal Matters Branch, Competition Bureau (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02718.html).

→ [Media Centre > Speeches] Speaking Notes for Sheridan Scott Commissioner of Competition, Competition bureau, Address to the Federation of the Industries of São Paulo State, May 12, 2008 (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02678.html).

180. In 2007, the Tribunal registered a consent agreement[78] between the Commissioner and Premier Fitness Clubs with respect to allegations of misleading advertising. The consent agreement includes detailed information about the compliance program which Premier Fitness Clubs had to implement in order to comply with the negotiated agreement.

181. Although the Bureau will not sanction or approve compliance programs, in certain circumstances, the Bureau may provide advice and guidance with respect to the development of an acceptable program.

Czech Republic

182. In its Information Bulletin 4/2004 the Office outlined guidelines for a compliance programme. The guidelines are not binding. The Office underlined the importance of the compliance programme and stated that in order to be efficient the compliance programme has to be tailor-made and must rely on four main principles: (i) it must be supported by company management; (ii) it must include effective methods and action plan; (iii) it must involve regular training sessions and workshops; and (iv) it must be regularly evaluated and monitored. The Office denoted that the implementation of the compliance programme could be considered as a mitigating circumstance for imposition of the fine. The Czech version of

78 (2007), CT-009.

the outlined guidelines is available at http://www.compet.cz/fileadmin/user_upload/Informacni_listy/2004/Infolist2004-04compliance.pdf.

183. The Office has not reviewed the guidelines since 2004 and there is a lack of public statements by the Office regarding compliance programmes.

Egypt

184. The Egyptian Competition Authority (ECA) has released in 2010 a compliance program. The compliance program is published on the ECA website: www.eca.org.eg

185. We are not aware of any form of public statement on antitrust compliance programs available.

186. The ECA is likely to review compliance programs for guidance, though this has not happened since the establishment of the ECA. In addition, it would NOT be considered as a legal advice from the ECA to the company.

European Union

187. In November 2011, the European Commission published a non-binding brochure on compliance – "Compliance Matters"[79] – which aims at helping companies develop a proactive compliance strategy. It summarizes EU competition rules and provides guidance to help companies ensure compliance. It is rather an information brochure than detailed guidance, compared to the materials which have been released by some National Competition Authorities (such as the UK and French Authorities).

188. The brochure outlines that an effective programme should notably include the following[80]:

→ a clear, explicit and tailor-made compliance strategy, involving the identification of the overall risk and individual exposure, function of the sector of activity, the frequency and level of the company's interaction with competitors and the characteristics of the market, and having it detailed in a written internal document, for the drafting of which the Commission provides practical guidance;

→ visible and lasting commitment to this strategy by senior management and sufficient resource to ensure the programme's credibility;

→ formal acts of acknowledgment by staff and consideration of compliance efforts in staff evaluation, by implementing positive incentives and taking measures raising awareness and responsibility (including by imposing penalties) and by setting up proper internal reporting mechanisms (e.g. designating of a compliance officer reporting directly to the company management, concrete guidance to the staff as to how to report a possible misconduct);

→ constant update of the compliance tools, contact points for advice and frequent training of staff and management;

→ adequate monitoring and auditing to prevent and detect anticompetitive behavior.

189. The Competition Commissioner, Joaquin Almunia, has given several speeches dealing with compliance programs, which are available on the Commission's website[81]. A few cases also dealt with compliance programs. They will be mentioned below, where relevant.

190. Although the European Commission may be consulted for informal advice on a wide range of competition issues, there is no indication that the Commission would be prepared to review draft compliance programs for guidance.

France

191. The French competition authority released on 10 February 2012 its Framework-Document on Antitrust Compliance Programmes (hereafter "the Framework-Document")[82] detailing the requirements the Authority considers such programmes should meet in order to be effective, as well as the conditions to obtain a fine reduction in that respect (see 4.3 below). Numerous decisions have addressed compliance programs proposed in that framework[83].

192. According to the Authority, an effective programme should notably include the following features[84]:

→ a clear, firm and public position adopted by the company's management bodies and, more broadly, by all managers and corporate officers;

→ the designation of one or more persons empowered to develop or monitor all aspects of the programme within the company;

79 European Commission, "Compliance Matters: what companies can do better to respect EU competition rules" of 23 November 2011.

80 "Compliance Matters" Brochure, pages 15 to 18.

81 See notably speeches by Joaquín Almunia: *Compliance and Competition policy* of 25 October 2010 at the Businesseurope & US Chamber of Commerce competition conference in Brussels and *Cartels: the priority in competition enforcement* of 14 April 2011 at the 15th International Conference on Competition: A Spotlight on Cartel Prosecution, held in Berlin.

82 The Framework-Document on Antitrust Compliance Programmes of 10 February 2012 is available in English at: http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf.

83 E.g., decisions 09-D-05, du 2 février 2009, relative à des pratiques mises en œuvre dans le secteur du travail temporaire ; 07-d-26, du 26 juillet 2007, relative à des pratiques mises en œuvre dans le cadre de marchés de fourniture de câbles à haute-tension ; 07-D-21, du 26 juin 2007, relative à des pratiques mises en œuvre dans le secteur de la location-entretien du linge ; 08-D-13, du 11 juin 2008, relative à des pratiques relevées dans le secteur de l'entretien courant des locaux ; 11-D-02, du 26 janvier 2011, relative à des pratiques mises en œuvre dans le secteur de la restauration des monuments historiques ; 10-D-39, du 22 décembre 2010, relative à des pratiques mises en œuvre dans le secteur de la signalisation routière verticale ; 07-D-40, du 23 novembre 2007, relative à des pratiques ayant affecté l'attribution de marchés publics de collecte des déchets ménagers dans le département des Vosges ; 07-D-02, du 23 janvier 2007, relative à des pratiques ayant affecté l'attribution de marchés publics et privés dans le secteur de l'élimination des déchets en Seine-Maritime ; 11-D-07, du 24 février 2007, relative à des pratiques mises en œuvre dans le secteur des travaux de peinture d'infrastructures métalliques.

84 Framework-Document, para. 22.

→ the implementation of information and training measures;

→ the implementation of effective control, audit and whistle-blowing mechanisms;

→ the setting of an effective oversight system.

193. In 2008, the French Competition Authority also asked Europe Economics to prepare an independent report on effective compliance programmes and the various options to consider by the Authority in that respect[85].

194. The President of the Authority has given speeches discussing / mentioning compliance programmes on many occasions[86] and the Authority has released different publications related thereto[87].

195. The Framework-Document was submitted to a public consultation. Sixteen contributions were received[88].

India

196. Guidance in the form of a "suggested framework for compliance of the Act by enterprises" has been published by the CCI (*Guidelines*). It is available on the CCI website and can be accessed at the following address: http://www.cci.gov.in/images/media/Advocacy/CCP2012.pdf.

197. However, the Guidelines are a guide, forming part of the CCI's advocacy programme. The contents of the Guidelines cannot be regarded as the official views of the CCI.

198. While recognizing that each organization must customize its compliance programmes to suit its purpose, some broad elements have been put forward by the CCI in the Guidelines. The Guidelines recognize the need for enterprises, particularly those that are dominant in a relevant market, to adopt such compliance programmes to regulate their behavior. The recognition of the concept of "group dominance" also makes it important for corporate groups to adopt compliance programmes.

199. The essential features of the competition compliance programme proposed in the Guidelines are:

a) an explicit statement of the commitment of senior management to the compliance programme;

b) availability of an enterprise's compliance policy (compliance manual) in an easily understandable manner;

c) a compliance programme that is dynamic and regularly updated to reflect changes in the law;

d) active training and education of employees;

e) inclusion of provisions in the compliance policy that mandate seeking a written undertaking from employees to conduct their business dealings within the compliance framework;

f) inclusion of competition law compliance into the appraisal, human resources and disciplinary policies of the enterprise;

g) identification of employees and divisions of an enterprise that are more likely to be exposed to the competition law risks;

h) appointment of a compliance officer to ensure the effectiveness of the compliance programme, by overseeing the design and implementation of the programme;

i) relevant internal procedures enabling employees to seek advice on whether a particular transaction complies with competition law and report activities that they suspect infringe the law. These practices should be included in the "best practices" norms of every enterprise;

j) internal review mechanism for business agreements (particularly those entered into with competitors) for compliance with the act and developing guidelines;

k) guidelines for external discussions (especially relating to prices) and exchange of business information;

l) guidelines relating to price fixing (both direct and indirect);

m) guidance for dealing with complaints from customers as well as suppliers, particularly if the enterprise is dominant;

n) familiarizing employees with "dawn raids" that could potentially be conducted by the CCI;

o) behavioural guidelines for enterprises and their employees who participate in and are members of trade associations and industry association meetings;

p) development of a system of audit to evaluate the efficacy of the programme.

200. The CCI has framed a whistleblower policy under the Act, the same is contained under the Competition Commission of India (Lesser Penalty) Regulations, 2009 (*Lesser Penalty Regulations*).

201. Apart from the abovementioned framework provided by the CCI, there is no available guidance in the form of public statements, press releases, speeches, FAQs or case law with respect to competition compliance programmes.

85 Europe Economics, "Etat des lieux et perspectives des programmes de conformité", October 2008, available at: http://www.autoritedelaconcurrence.fr/doc/etudecompliance_oct08.pdf.

86 E.g.: Conference of Bruno Lasserre of 21 June 2011 at the MEDEF, where he invited companies to take an active part in the discussions on the future Framework-Document; Bruno Lasserre, *La non-contestation des griefs en droit français de la concurrence: bilan et perspectives d'un outil pionner*, at the General Assembly of the Association française d'étude de la concurrence ("AFEC") on 10 April 2008.

87 E.g.: "Entrée libre" letter of April 2009, official newsletter of the *Autorité de la concurrence.*

88 Both the draft document and the contributions can be found at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=427.

202. At present, there is no development in the law or any precedent of the CCI reviewing and providing guidance on draft compliance programmes developed by enterprises.

Israel

203. The IAA has published general format and guidelines for an Antitrust Compliance Plan – 1998 Model Internal Compliance Program ("Model Compliance Program" or "MCP"). An English version of the document is available at: http://eng-archive.antitrust.gov.il/ANTItem.aspx?ID=169&FromSubject=100232&FromYear=2012&FromPage=0

204. According to the MCP, a compliance program is an internal mechanism set up by the corporation for its own purposes, with a view to identifying and preventing violations of the provisions of the Antitrust Law in advance, and with a view of minimizing the damage caused by violations of the Antitrust Law that were already committed. Pursuant to the general format published by the Antitrust Authority, each corporation is instructed to create a "customized" compliance program, which accommodates its own needs and business activity patterns. At the same time, the internal compliance program should meet certain minimum requirements which are included in the MCP, including the following elements:

1. Appointment of a person in charge of compliance (compliance officer) – a senior executive employee, who reports directly to the CEO, that will be in charge of the application and implementation of the plan. Senior management must be actively involved in the compliance process, sending a clear signal to the corporation's employees of the importance attributed to antitrust compliance by the management.

2. Conducting an initial audit – a full blown internal review of the corporation's past and present conduct in light of the Antitrust Law. The purpose of such in-depth review is to identify the "weak spots" of the corporation in terms of possible exposure to violation of the Antitrust Law, and to serve as a foundation for the construction of an effective internal compliance program in line with the corporation's needs. The IAA defined the initial review as an essential and crucial stage in the compliance plan.

3. Establishing an internal compliance procedure – this requires making the relevant adaptation to the model format proposed by the IAA, to address the particular characteristics of the corporation and its needs.

4. Training program for employees and directors, adapt to their level of antitrust exposure. The training program has a minimum timeframe of 3 hours per half a year.

5. Establishing supervision, reporting and audit systems to be applied on an ongoing basis.

6. Determining procedures for disciplinary sanctions against employees or directors who have acted in contrast to the provisions of the Antitrust Law.

7. Adopting a document retention policy.

8. Submission of notices to the IAA to report significant milestones in the implementation of the compliance program. Additionally, a corporation shall submit annual notice to the IAA regarding the implementation of a compliance program.

205. The IAA has published two presentations regarding the Internal Compliance Program. Most of the materials, including those detailed below, are not available in English:

1. "Basic principles of an internal compliance program" (2008 IAA Website 5001244).

2. "An internal compliance program – Comparative law" (2008 IAA Website 5001211).

206. Also, the IAA has issued a press release regarding a seminar on internal compliance programs (2008 IAA Website 5001209).

207. Prior approval or submission of the compliance programs is not a prerequisite condition for future acknowledgement of the IAA in such program (though, as mentioned above, the IAA does require submission of specific notices concerning the implementation of the program). Moreover, the IAA does not approve in advance nor does it normally review draft compliance programs. The IAA will normally review compliance programs only ex-post, e.g. in the course of a criminal investigation to determine whether the plan was effective and genuine.

208. However, in the framework of its limited resources, the IAA offers to companies that adopt a compliance program an "open line" to seek the IAA's guidance in relevant issues concerning the compliance program. According to the 1998 Model Compliance Program, the IAA will also regularly update the compliance officers with the latest developments in the area of antitrust law.

Japan

209. The FTC has not released detailed guidance on compliance programs.

210. The report on the result of investigation regarding companies' compliance programs was released by FTC. However, the latest version of the report was released in 2010 only in Japanese (http://www.jftc.go.jp/pressrelease/10.june/10063002honbun.pdf).

211. The English version of the old edition was released in 2006: (http://www.jftc.go.jp/en/pressreleases/uploads/2006-May-24.pdf).

212. The FTC does not review draft compliance programs of companies if they ask it to do so.

Netherlands

213. The NMa has not published any detailed guidance on compliance programmes. It has, however, underlined the importance for undertakings to have a compliance programme in place on several occasions and generally encourages undertakings to introduce compliance programmes[89].

214. In a speech of 16 March 2007, the (former) chairman of the NMa Board indicated the NMa's willingness to consider settlement of competition infringements by alternative means (to refrain from imposing substantial fines to competition law infringements). However, in order for the NMa to employ alternative enforcement instruments, five strict criteria should be met:

- → there is an immediate termination of the infringement;
- → alternative enforcement yields a consumer profit;
- → alternative enforcement does not harm third-party interests;
- → a structural solution is preferable to a change of behaviour; and
- → the infringement does not concern a hard-core cartel.

215. According to the NMa, compliance programmes are particularly relevant to sectors in which NMa enforcement policy has been successful (for example, the construction industry and insurance sector). Following NMa intervention, companies are willing to impose self-regulation. In doing so, they hope to ensure an enduring compliance with the Competition Act. It is up to the NMa to convince the companies involved that a system of checks and balances is most conducive to maintaining compliance.

216. The NMa may further decide to refrain from sanctions if an undertaking offers commitments – similar to article 9 of Regulation 1/2003. If the undertaking fails to comply with the commitment, the NMa can – without further investigation – impose a fine amounting to the higher of 10 per cent of turnover or EUR 450,000.

217. The NMa in most cases insists on receiving the compliance programme once it has been drafted in the context of commitment proceedings. The NMa was more closely involved in the setting up of an industry-wide compliance programme in two cases. In 2004 it drew up a compliance programme in cooperation with the insurance sector and in 2010 it aimed to set up a collective compliance programme together with the home care sector. This, however, failed because the compliance programme was rejected by the majority of the industry.

89 It has produced a very nice video about leniency in cartel cases, which can serve as a helpful compliance tool by itself. http://www.youtube.com/watch?v=6ksOVTCkmSg (Dutch version); http://www.youtube.com/watch?v=5diFAaJdwel (English version).

Pakistan

218. The Commission on its website has released guidance related to a Voluntary Competition Compliance Code (VCCC). The link to the document is as follows: www.cc.gov.pk/images/Downloads/vccc.pdf.

219. Overview of the guidelines:

A VCCC is a self correcting mechanism for undertakings. The Undertakings should ensure that the provisions of the Act along with the associated rules and regulations are not violated and if there is any violation committed, then an undertaking should detect it at an early stage and take appropriate corrective action. The elements of a compliance code are:

1. *Assessment of risk*

The undertaking should consider the risks it faces of violating competition laws. It should see its position in the market, scope of entering into arrangements in violation of the Act, the extent of contact of employees with competitor undertakings, number of competitors and the market as a whole.

2. *Establishment and Implementation of Compliance Policy*

The following of a code would require establishment of a competition policy and its implementation which would include the commitment of the undertaking, duty of the employees related to conduct of business in accordance with the competition laws, procedure of obtaining advice on compliance with the Act, consequences of non compliance etc.

3. *Commitment from Senior Management*

The commission has listed this as the most important factor in ensuring an effective compliance code. Senior management of an undertaking should take responsibility and keep guiding the rest of the employees. They should put commitment to follow compliance code in the mission statement of the company, let other employees know of its importance, make adherence to the code as one of the overall objectives of the undertaking, actively participate themselves in the implementation of the compliance code.

4. *Appointment of a Compliance Officer*

5. Training and education of employees regarding the adherence to and the importance of a compliance code and the need to always abide by competition laws during the course of any business of the undertaking. Training should be more rigorous for employees who work in business areas such as sales, purchasing, marketing, pricing decision etc.

6. The Compliance policy should always be made readily available for all the employees of an undertaking

7. *Consequences of non compliance for employees*: The employees should be made aware of the consequences of non compliance with the code; compliance should be made one of the objectives of the undertaking. Employees should be motivated with bonuses and other benefits if they adhere to compliance with the code.

8. Regular evaluation should be made of the effectiveness of the compliance code by testing employees on their understanding of the compliance code put up by the undertaking.

9. For successful adoption and implementation of the compliance code the undertaking should ensure effective monitoring, auditing, and reporting.

Undertakings should establish their clear policies when dealing with trade associations and should ensure involvement of their legal counsel in any meetings with them. Furthermore Undertakings should avoid discussions with trade associations on pricing, profit levels, costs etc.

The guidelines in the end talk about the incentives of adopting a compliance code and why it is really helpful for an undertaking.

220. The Commission has a separate Advocacy and IT department which holds seminars, conferences etc over different aspects of competition law to increase awareness regarding compliance amongst undertakings and consumers. Public statements on antitrust compliance programs can be found there. The commission's website includes:

- news briefings for the years 2010 and 2012 at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=166&Itemid=62.
- Interviews of the chairperson of the Commission and also of other notable persons at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=29&Itemid=87.
- Press releases from the years 2008-2012 by the Commission informing about show cause notices being dispatched to various undertakings and other competition policies related statements from the commission including reviews, briefs of international conferences of the Commission at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=97&Itemid=86.
- Conference/Seminar: includes detailed information on different conferences held in Pakistan related to Competition compliance with links to speeches made by officials of government departments and other related persons. Also includes public statements on antitrust compliance programs at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=25&Itemid=49.
- The Research and Publications section includes reports by the Commission on assessment of various sectors of the economy and the state of competition in Pakistan at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=92&Itemid=138.

221. The information received from an official at the Commission reveals that the Commission is ready to help undertakings implement compliance codes and drafts of such compliance programs will be reviewed by the Commission for guidance. An undertaking can inform the commission that they have a compliance code and then can submit it to the Commission for suggestions. The Advocacy and Legal departments of the Commission should be contacted in this regards. However the official stressed that the adoption of a compliance program is voluntary only.

Singapore

222. The CCS has issued detailed guidance on compliance programmes.

223. This is seen in the following link: http://www.ccs.gov.sg/content/ccs/en/Education-and-Compliance/Conducting-a-Compliance-Programme.html

224. In terms of guidance provided, the CCS website goes through the important provisions within the Act, as well as the procedures for filing a notification or guidance. The CCS also provided guidelines regarding the key provisions or the Act.

225. The CCS website provides answers to frequently asked questions. There is also a public register which lists the decisions the CCS has made, as well as the text of its actual decisions.

226. The CCS also conducts regular talks and issues speeches, which typically touch on several issues within competition law, including compliance matters and the importance of ensuring compliance. A comic strip relating to Competition Law has also been issued. Last, the CCS has organized a "CCS digital film animation competition" in order to improve antitrust awareness and correspondingly, compliance.

227. The CCS has expressed on its website that it does not endorse individual compliance programmes, but may refer to individual examples of best practice from time to time in its general communications. The CCS also encourages parties to obtain legal advice, or seek guidance/approval regarding conduct. In short, the CCS do not review draft programs for guidance.

228. However, the CCS is open to requests to give presentations to industries or associations to help them better understand the guidelines.

South Korea

229. In recognition of the essential need for and to further foster free and fair competition in the Korean market, in 2008, the KFTC promulgated a notification ("Notification") to test and qualify a company's compliance program and

to provide incentives for those companies that adopted a qualified compliance program.

230. According to Korean Fair Trade Mediation Agency ("KOFAIR"), which is delegated from KFTC the authority to test and qualify a compliance program, 194 companies are operating a compliance program as of April 8, 2011.

231. In order to receive the aforementioned benefits under the FTL, a compliance program should first satisfy the following requirements:

(i) Proclamation of a compliance policy by the chief executive officer;

(ii) Appointment of an officer in charge of the compliance program by the board of directors ("*BOD*");

(iii) Development of a compliance manual and distribution to officers/employees;

(iv) Implementation of compliance education/training for employees (at least two hours per every 6 months);

(v) Establishment of an internal monitoring system and report to the BOD (at least once every 6 months);

(vi) Establishment of a company policy providing disciplinary measures for officers/employees who violate the FTL and competition related laws; and

(vii) Systematic management of documents related to compliance training and its implementation.

232. In addition to satisfying the above requirements, a company should apply for qualification of its compliance program to KOFAIR after operating its compliance program for one year. Upon a company's application, KOFAIR will test such company's compliance program and score it by one of eight levels from "AAA" to "D". The test normally includes inspection of documents, interviews with officers and employees and a site visit.

Turkey

233. Please see the link below for the Turkish Competition Authority's "Competition Law Compliance Program" which was announced on the Turkish Competition Authority's website on May 10, 2011: http://www.rekabet.gov.tr/dosyalar/images/file/UluslararsiIliskiler/Competition%20Compliance%20Program.pdf.

234. A brief summary of the Competition Compliance Program is as follows:

Given the difficulty of creating a standard compliance program for each undertaking, compliance programs are opted to be formed with respect to the structure and conditions of the sectors in which undertakings operate. However, the Turkish Competition Authority finds beneficial to adopt compliance programs that covers the four subjects below.

A) Preparation of internal guidelines

235. The Turkish Competition authority is of the opinion that compliance programs could be executed more effectively with written guidance. The guidelines should be written in plain language so that each employee may understand it. The guidelines should indicate the importance of compliance to the competition law for the undertaking and the high amount of fines and administrative measures that the Competition Board may impose on the undertakings that violate competition law. Additionally information on the main principles of competition law, the powers of the Turkish Competition Authority and Competition Board and information on the secondary legislation regarding the field of activity of the undertaking should be provided. The guidelines should also mention how and in what ways the internal auditing would be provided. Sanctions and disciplinary actions facing the employees that have caused competition law violations must be clarified along with a simple and clear "do and do not" list.

B) Regular training of the employees

236. Training should be for all employees. If this is seen to be unnecessary, training programs should be provided for directors and employees who are responsible with the strategic and commercial decisions. Trainings could be given either by in-house employees or by an external professional or institution.

C) The compliance programs should regularly be reviewed and evaluated

237. The examination and inspection of the employees without prior notice with respect to the compliance program are seen to be useful. The employees should know where to turn for questions or problems. Moreover, if the company has enough scale, it would be useful to have an in-house department or at least a consultant for this matter. The confidentiality of the employee who informs the relevant units about a competition law violation must be protected.

D) Discipline and incentive mechanisms.

238. Activities and employees that are important from a competition law point of view should be monitored and reported. Directors and employees should be informed about the possible sanctions the company could face along side with the possibility of personal liability. Additionally, employees who contribute to the level of compliance should be appreciated and rewarded.

239. The associations of undertakings should take necessary measures to prevent the activities that take place within their body resulting in competition law violations and ensure that its members are well-informed about competition law and policy. The associations of undertakings may also publish guidelines, manuals or policy documents to that effect.

240. In cases where the management of an undertaking detects a competition violation, the violation should be immediately terminated and if necessary considering the leniency program the Competition Authority should be informed of the violation.

241. Large scaled holding companies should be especially careful with regards to the operation of compliance programs. Some sectors are more prone to competition law violations due to different factors such as; characteristics of the products, structure of the market, market entry conditions, existence of mechanisms facilitating communication between the competitors.

242. The difficulty of designating a comprehensive compliance programs for small and medium sized enterprises has been acknowledged by the Turkish Competition Authority. Therefore, it is advised that small and medium sized enterprises should regularly review and evaluate their decisions and practices in light of the information provided in the Turkish Competition Authority's website.

243. Furthermore, a control list that includes significant basic issues and may be useful for undertakings to review and assess their own positions is published as an annex of the compliance program. The list includes various questions under the below subject headings:

a) Information concerning the Competition Legislation and the Turkish Competition Authority.

b) Relationships with the competitors.

c) Relationships with customers and distributors.

d) Undertakings which has dominant position/ market power.

e) Association of undertakings.

f) Undertakings participating to public tenders.

244. Competition law compliance programs were first mentioned in the "2011 Competition Letter" written by the President of the Turkish Competition Authority. The Competition Letters published annually serve as an informal means to inform the public of various competition policies and principles and of the Turkish Competition Authority's focus areas for the coming year. In the 2011 Competition Letter (published on March 21, 2011) a significant emphasis was provided for the importance of competition compliance programs for the undertakings. It was mentioned that the Turkish Competition Authority would focus on this issue in the coming year. Later that year, the "Competition Law Compliance Program" was announced on May 10, 2011.

245. More recently, President of the Turkish Competition Authority in his annual message (i.e. "President's 2012 Message") made emphasis on the adoption of various competition compliance programs, pointing out the announcement of the Competition Law Compliance Program earlier in 2011.

246. The Turkish Competition Authority does not have such practice.

United Kingdom

247. In June 2011 the OFT published new guidance for businesses on competition law compliance, including specific advice for directors and general guidance for businesses. The OFT has recommended a risk-based four-step approach to achieving a competition law compliance culture. The guidance also makes it clear that the OFT will not, save in exceptional situations, regard a competition law compliance programme as a factor warranting an increase in the amount of the penalty[90].

248. The OFT's compliance guidance can be found on the compliance homepage on its website. This offers an extensive range of materials to guide businesses with effective competition compliance[91]. These materials include:

- → a film;
- → short form guidance;
- → a four-step compliance wheel; and
- → full detailed OFT written guidance manuals.

249. The OFT has also issued detailed guidance specifically addressed to directors, intended to help company directors understand their responsibilities under competition law. The OFT stated that directors play a key role in establishing and maintaining an effective competition law compliance culture within their company. Without the full commitment of individual directors to compliance with competition law, any compliance activities undertaken by the company are unlikely to be effective. The guidance explains the key competition law risks that directors should be aware of and the ways in which directors can minimise the risks of their company infringing competition law[92].

250. The OFT commissioned Synovate to undertake independent quantitative research to update the OFT's understanding of businesses and their experience of potential breaches of competition law. The OFT has published Synovate's Competition Law Compliance survey on its website[93].

251. In June 2011, to introduce the OFT's new compliance materials on its homepage, the OFT chairman Philip Collins gave a speech at King's College, London[94]. In that speech Mr Collins stressed that "it is essential that the compliance efforts are designed and suited to the particular business and is not just seen as a 'box ticking' or formulaic process".

90 See OFT1341: Guidance, June 2011: "*How your business can achieve compliance with competition law*", at http://oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1341.pdf.

91 See http://oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance.

92 OFT Guidance OFT1340, June 2011: *Company directors and competition law*. See http://oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1340.pdf.

93 See OFT1270: *Competition Law Compliance Survey, Prepared for the Office of Fair Trading by Synovate (UK) Ltd*, June 2011, at http://oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1270.pdf.

94 Speech By Philip Collins, Chairman, Office of Fair Trading: *Competition Law: Sanctions, Redress and Compliance*, King's College London, 27 June 2011. See http://oft.gov.uk/shared_oft/speeches/2011/1211.pdf.

Mr Collins had previously addressed the Trade Association Forum annual conference in 2010, encouraging compliance amongst members[95].

252. In December 2011, OFT Chief Executive John Fingleton gave a speech to Charles River Associates' conference on Economic Developments in European Competition Policy, looking at the economics of compliance with competition law in the light of recent research by the OFT in this area[96].

253. The OFT published extensive and "business friendly" compliance material as recently as June 2011, and these are readily available on its website. It is unlikely that the OFT will expend further resources reviewing draft compliance programmes being proposed by a company to mitigate its risks of competition infringement. There are no provisions in the guidelines which suggest that the OFT will do so.

United States

254. The United States Sentencing Commission issued the Organizational Sentencing Guidelines in 1991, with subsequent updates[97]. The Guidelines propose a basic framework for an "effective" compliance program that will prevent or detect violations of law. To help organizations understand what the Sentencing Commission considers an effective program, the Guidelines provide that:

To have an effective compliance and ethics program, an organization shall:

(1) exercise due diligence to prevent and detect criminal conduct; and

(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law[98].

255. The Guidelines outline the key elements of an effective compliance program:

→ The organization will have established standards and procedures[99] to prevent and detect criminal conduct[100].

→ The organization's governing authority (i.e., board) shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program[101].

→ High-level personnel of the organization[102] shall ensure that the organization has an effective compliance and ethics program, and specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program[103]. High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law[104].

→ Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority (e.g., Audit Committee), on the effectiveness of the compliance and ethics program[105]. If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program[106].

→ To carry out operational responsibility for compliance, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority[107].

→ The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization[108] any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program[109].

95 Philip Collins, Chairman, Office of Fair Trading, 4 March 2010: *Compliance: a key role for Trade Associations in helping business understand and meet their legal obligations*. A speech given to the Trade Association Forum annual conference. See http://oft.gov.uk/news-and-updates/speeches/2010/0210.

96 John Fingleton, *The Economics of Compliance, 7 December 2011*. See http://oft.gov.uk/news-and-updates/speeches/2011/1711.

97 http://www.ussc.gov/Guidelines/Organizational_Guidelines/index.cfm.

98 United States Sentencing Commission, Sentencing Guidelines Chapter 8, [USSG] §8B2.1.

99 "Standards and procedures" means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct. USSG § 8B2.1 Application Note 1.

100 USSG § 8B2.1(b)(1).

101 USSG § 8B2.1(b)(2)(A).

102 "High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest. USSG § 8A1.2 Application Note 3(B).

103 USSG § 8B2.1(b)(2)(B).

104 USSG § 8B2.1 Application Note 3.

105 USSG § 8B2.1(b)(2)(C).

106 USSG § 8B2.1 Application Note 3.

107 USSG § 8B2.1(b)(2)(C).

108 "Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis. USSG § 8A1.2 Application Note 3(C).

109 USSG § 8B2.1(b)(3).

→ The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents, by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities[110].

→ The organization shall take reasonable steps to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct[111].

→ The organization shall take reasonable steps to evaluate periodically the effectiveness of the organization's compliance and ethics program[112].

→ The organization shall take reasonable steps to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation[113].

→ The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through appropriate incentives to perform in accordance with the compliance and ethics program and appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct[114].

→ After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program[115].

→ The organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each element of the compliance program to reduce the risk of criminal conduct identified through this process[116].

→ In order to get credit for violations where a high-level person was involved, the compliance program needs to be organized so that the individual with operational responsibility for the program reports directly to board, promptly if a problem, and annually on the program effectiveness. The compliance program must have detected the offense first and promptly reported it to authorities, and no compliance person was part of the offense[117].

256. Unfortunately, the Antitrust Division of the Department of Justice does not believe that these provisions should apply to antitrust program. The U.S. Attorney's Manual provides that:

it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, e.g., voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business. With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program, and that amnesty is available only to the first corporation to make full disclosure to the government.

257. The claim that antitrust violations go to the "heart" of a business is not otherwise explained, particularly in comparison to other violations (e.g., securities fraud, bribery) that may well go to the "heart" of a corporation's activities, but since they are enforced by other agencies, the treatment of compliance programs is very different.

258. The Justice Department position is that a compliance program that fails to stop an antitrust violation is a failed program, and therefore is not deserving of credit. This is directly contrary to the position of the Sentencing Commission which accepts the fact that people are fallible, and that individual employees may ignore corporate policy and violate laws:

259. Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct[118].

260. Unfortunately, in addition to not giving credit for compliance efforts, the Antitrust Division has not released any guidance on antitrust compliance programs for many years. State and federal enforcement agencies do not review compliance programs or otherwise provide guidance.

261. In contrast, the FTC will generally take compliance efforts into consideration when reviewing the actions of a company that has violated the law, although there are no published guidelines. In some cases, the FTC will settle a case by including specific compliance requirements in a decree, which it will supervise for several years[119].

110 USSG § 8B2.1(b)(4)(A)-(B).

111 USSG § 8B2.1(b)(5)(A).

112 USSG § 8B2.1(b)(5)(B).

113 USSG § 8B2.1(b)(5)(C).

114 USSG § 8B2.1(b)(6)(A)-(B).

115 USSG § 8B2.1(b)(7).

116 USSG § 8B2.1(c).

117 USSG § 8C2.5(f)(3)(C).

118 USSG §8B2.1 (2011).

119 See, e.g., *In re* Transitions Optical, Inc., File No. 091-0062 (April 27, 2010).

III. Voluntary compliance programs

1. In your jurisdiction, are there benefits in entering into compliance programs before from any enforcement action by competition authorities/agencies or courts (aside reducing exposure to the risk of breaching the rules)?

Please notably explain:

→ *whether a fine reduction is available for companies with voluntary ex-ante compliance programs at the time an infringement is committed? Please detail what would be considered as a genuine compliance program (compliance officer, level of commitment from management, audits, hotlines, sanctions, publicity, document retention policy etc.) the conditions to receive such reductions and the range of such reductions.*

→ *whether a voluntary ex-ante compliance program initiated by a group is likely to change anything in terms of parental liability if an infringement is committed by a subsidiary (i.e. in Europe, both the company participating to the infringement and the head of its group may be considered as jointly and severally liable with a fine based on the total group turnover)?*

→ *whether a voluntary ex-ante compliance program is likely to limit criminal liability for the companies/individuals concerned if an infringement is committed afterwards?*

→ *whether a voluntary ex-ante compliance program is likely to have an impact on damages actions?*

Australia

262. Where a corporation contravenes the CCA and legal proceedings are instituted by the ACCC, the Federal Court will consider a number of factors in determining an appropriate pecuniary penalty. One of these factors is whether a culture of compliance exists within the corporation. If the corporation is able to demonstrate that it does, this is treated as a mitigating factor in the calculation of the penalty.

263. There are a number of decisions where the Federal Court has considered whether or not a company possesses such a compliance culture and, if so, to what extent this should be taken into account[120].

264. The Federal Court will consider whether:

→ the corporation has a substantial compliance program in place, which has been actively implemented; and

→ the implementation of the compliance program was successful.

265. A substantial compliance program, which has been actively and successfully implemented, is likely to have a greater mitigating effect on the penalty than a compliance program which is token or ineffective.

266. In Australia, there are currently no specific criteria mandating what elements of compliance need to be in place to have a mitigating effect, nor is there any fixed "discount" or specific methodology used to calculate the "discount" that applies.

267. While it is accepted that the existence of a substantial culture of compliance can be a mitigating factor on penalties for contravening the CCA, there is currently no regulation, case law or precedent in Australia concerning the impact of a compliance culture or compliance programs to potentially limit criminal liability or affect third party damages actions.

Brazil

268. Although voluntary ex-ante compliance programs were never addressed by CADE, it is reasonable to infer that it would be taken into account by the authority. In an administrative proceeding regarding a cartel by medical laboratories judged in 2005[121], in which CADE imposed fines varying from 1% to 2% of the companies' gross revenue, the Commissioners recommended the defendants to formulate an antitrust compliance program in order to avoid further infractions to the economic order. Considering this recommendation, it is possible to infer that, if the defendants had a strong compliance program, CADE would at least be more susceptible to execute a favorable Settlement with the companies[122].

269. SDE Ordinance, on the other hand, had a specific provision setting forth a recommendation of penalty reduction for companies holding a Certificate[123], without specification of the range of such recommended reduction. This provision, however, was later revoked by Ordinance No. 48 of March 4, 2009. Therefore, currently there is no rule granting fine reduction for companies with voluntary ex-ante compliance programs.

270. The mere existence of a compliance program will not be considered as an attenuating circumstance by CADE, but it might be helpful to provide evidence to the Brazilian antitrust authorities of the commitment of the undertaking to seek serious compliance.

271. Notwithstanding the lack of rules that grants fine reductions or benefits to companies with voluntary ex-ante compliance programs, it is still important to implement them.

120 Including, for example, *TPC v CSR* [1991] ATPR 52,135 (41-076); *ACCC v George Weston Foods Ltd* [1999] FCA 858; *ACCC v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238; *ACCC v Rural Press Ltd* [2001] FCA 1065.

121 Administrative Proceeding No. 08012.009088/1999-48.

122 See request No. 08700.004221/2007-56, in which CADE considered the strong worldwide compliance program of a global group of the cement industry in order to execute a Settlement without the obligation to plea guilt.

123 Article 9 of SDE Ordinance No. 14/2004.

In addition to enhance the good corporate governance and reputation, an effective antitrust compliance program may be a helpful argument in negotiations of settlement with CADE and can also prevent the anticompetitive practice to be adopted by an unwarned person. The rules set forth by SDE Ordinance and CADE's case law can serve as guidance for an effective and enforceable antitrust compliance program.

272. For example, a strong antitrust compliance program must contain: (i) indication of the practices that are considered anticompetitive by the Antitrust Law and CADE case law (with special emphasis on the practices that the employees, managers, officers and directors of the company are more susceptible to engage); (ii) appointment of an individual (if possible, a member of the senior management dedicated to antitrust compliance) to be in charge of the enforcement and supervision of the antitrust compliance program; (iii) mechanisms to verify the enforcement of the compliance program (e.g., external independent auditing, monitoring, periodic reports); (iv) punishment provisions for individuals engaged in anticompetitive practices; (v) mechanisms to ensure that the employees of the company that participate in associations do not engage in anticompetitive agreement with its members (e.g., prepare summary of the matters discussed in the meetings); (vi) compliance training for employees, managers, officers and directors; and (vii) a hotline to report anticompetitive practices. In addition, it is important to seek the effectiveness of the program, with the creation of proper incentives to comply (e.g., periodical training sessions, goals for the employees, compliance standards).

273. As per article 33 of the New Antitrust Law (equivalent to article 17 of the Antitrust Law), the companies of the same economic group are considered jointly and severally liable in case of condemnation by CADE and there is no provision setting forth any benefits in case of voluntary ex-ante compliance program.

274. Therefore, a voluntary ex-ante compliance program would not change anything in terms of parental liability. There is no provision in the New Antitrust Law regarding such benefit, nor a favorable case law in this sense. The base for the calculus of the penalty will still be the economic group turnover in the affected sector.

275. There are no provisions, neither in the Antitrust Law, nor the New Antitrust Law or related legislation, regarding the possibility of limitation to criminal prosecution for individuals responsible for involving companies with voluntary ex-ante compliance programs in anticompetitive practices.

276. There are also no provisions, neither in the Antitrust Law, nor the New Antitrust Law or related legislation, regarding the possibility of limitation to damages for companies with voluntary ex-ante compliance programs involved in anticompetitive practices.

Canada

277. The existence of a compliance program does not immunize businesses or individuals from enforcement action by the Commissioner or from prosecution by the DPP. In the Bulletin, the Bureau also notes that the mere pre-existence of a compliance program will not be considered grounds to recommend favourable treatment in sentencing to the DPP for either corporations or individuals with respect to criminal offences under the Act.

278. However, although the Bureau is not clear with respect to how it will evaluate the impact of the implementation of a compliance program when it comes to recommendations for sentencing or remedies, the Bureau notes that establishing a credible and effective program, or taking verifiable steps to strengthen an existing compliance program in response to a violation of the Act, can have a positive impact on the Commissioner's sentencing recommendations in criminal matters, or on the remedy sought by the Commissioner in civil reviewable matters.

279. In addition, section 718.21 of the Canadian *Criminal Code* provides that when sentencing an organization, the court shall take into consideration any measures that the organization has taken to reduce the likelihood of committing a subsequent offence. For example, such measures could include the implementation of a compliance program.

280. Furthermore, as indicated in the Bulletin, in certain circumstances, the Commissioner may be inclined to consider an alternative form of resolution to litigation where the business can demonstrate that:

- → it terminated the conduct in breach of the Acts as soon as it was detected;
- → it attempted to remedy the adverse effects of the conduct;
- → the conduct was contrary to corporate policy in existence at the time of the contravention; and
- → the contravention occurred at a lower level in the business and was not carried out or endorsed by senior management.

281. The Bureau considers that a proper compliance program should include five essential elements which are discussed in the Bulletin:

1. Senior Management Involvement and Support

282. Senior management should foster a culture of compliance within the business organization by playing an active and visible role in promoting its program.

2. Corporate Compliance Policies and Procedures

283. A corporate compliance program should include the development and documentation of compliance policies and procedures tailored to a business' operations, and updated when required to reflect material changes to the business, the law, the Bureau's enforcement policies, or to the industry

(for instance, deregulation). Reasonable measures should also be taken to promptly notify employees of such changes, and relevant documentation should be available to all employees.

3. Training and Education

284. A corporate compliance program should include an ongoing training component focusing on compliance issues for staff at all levels who are in a position to potentially engage in, or be exposed to, conduct in breach of the Act.

4. Monitoring, Auditing and Reporting Mechanisms

285. The Bureau considers that effective monitoring, auditing and reporting mechanisms help prevent and detect misconduct, educate staff, provide both employees and managers with the knowledge that they are subject to oversight and determine the program's overall efficacy.

5. Consistent Disciplinary Procedures and Incentives

286. The Bureau notes that businesses should develop a disciplinary procedure addressing those who initiate or participate in conduct in breach of the Act, or those who do not abide by a business' program. This procedure should clearly state potential disciplinary actions.

6. The concept of parental liability is not applied in Canadian competition law.

287. As mentioned above, the existence of a compliance program does not immunize businesses or individuals from enforcement action by the Commissioner or from prosecution by the DPP. In the Bulletin, the Bureau also notes that the mere pre-existence of a compliance program will not be considered grounds to recommend favourable treatment in sentencing to the DPP for either corporations or individuals with respect to criminal offences under the Act.

288. However, although the Bureau is not clear with respect to how it will evaluate the impact of the implementation of a compliance program when it comes to recommendations for sentencing or remedies, the Bureau notes that establishing a credible and effective program, or taking verifiable steps to strengthen an existing compliance program in response to a violation of the Act, can have a positive impact on the Commissioner's sentencing recommendations.

289. Further, in the Bulletin, the Bureau notes that if a program is a sham and used only to conceal or deflect liability, it may be considered an aggravating factor for sentencing purposes or administrative monetary penalties.

290. This issue has not yet been considered in Canadian private actions.

Czech Republic

291. Although the Office stated that the implementation of a compliance programme could be considered as a mitigating circumstance when imposing a fine, this has never been tested in practice. The implementation of a compliance programme is not likely to be seen as limiting liability for companies or individuals under the competition law or criminal perspective or having impact on damage actions. In its decisional practice the Office has never considered the existence of the compliance guidelines. The argument of fine reduction due to an implemented compliance programme also has not been raised before the Office.

292. In our opinion, however, it is only a matter of time before the Office commences pursuing the compliance programme within its competition advocacy framework.

Egypt

293. The law does not provide for a fine reduction for companies with voluntary ex-ante compliance programs. However, the judge, upon his sole discretion, may take this fact into consideration when deciding the fine.

294. A voluntary ex-ante compliance program initiated by group would not change anything in terms parental liability. According to Egyptian Competition Law, they may be considered as jointly and severally liable if they fall under the definition of "Related Parties" as stipulated in the Executive Regulations to the Law.

295. Furthermore, a voluntary ex-ante compliance program does not limit criminal liability for the companies/individuals concerned if an infringement is committed afterwards.

European Union

296. As stated above, the European Commission supports the adoption of compliance programs but considers that they bring their own reward in limiting the risk of infringement.

298. The European Commission indeed states in its brochure that "*the mere existence of a compliance programme will not be considered as an attenuating circumstance. Nor will the setting-up of a compliance programme be considered as a valid argument justifying a reduction of the fine in the wake of investigation of an infringement*"[124].

298. It may be noted that the European Commission has once granted a reduction in fine to a company committing to adopt a compliance program after infringing the provisions on abuses of dominance[125]. However, a few months later, the same company was involved in a cartel case. The European Commission has never since applied any mitigating factor to companies with compliance programs at the time the infringement was committed or adopting such compliance programs just after the investigations took place. The Court of Justice supports that policy[126].

124 "Compliance Matters" Brochure, page 20.

125 Case No IV / 30.178 Napier Brown - British Sugar – 18 July 1988 p.83

126 see, for example, joined Cases T-101/05 and T-111/05, BASF and UCB, paragraph 52, and Case T-138/07, Schindler Holding, paragraph 28.

299. There would however be scope in the EU provisions for applying a mitigating factor in cases where a company has taken all necessary steps to avoid infringements but an infringement is nonetheless committed by reason of negligence/willful conduct of employees. In such cases, it may be questioned whether the company – the sole addressee of EU competition rules, see 1. above – has really been involved in the infringement "intentionally or negligently" as required by Regulation N° 1/2003. More largely, there is no need to set high fines towards the company concerned in order to ensure deterrence, and the contribution to general interest brought by a sincere compliance program is not less important that the contribution to the general interest which are recognized in the leniency program and in the settlement procedure through significant reductions in fines.

300. In addition, it is important to note that the implementation by a parent company of a group-wide compliance programme is not in any way seen positively where enforcement actions are brought against subsidiaries. To the contrary, this may be considered as a sign that the parent company exercises decisive influence over its subsidiaries, therefore contributing to establish that the parent company shall be found jointly and severally liable for its subsidiary's infringement[127].

301. The Commission has not either given any support to the view that national courts should view positively the adoption of compliance programs in the frame of criminal or damages actions, being noted that these actions are in any event based on national law (see 1. above).

France

302. As stated above, the French Competition Authority supports the adoption of compliance programmes by companies but, in its Framework-Document, the Authority states that it is not appropriate to take compliance programmes into account when determining a company's fine either an aggravating or a mitigating circumstance.

303. Indeed, the Authority considers that the fact that the company has set up a compliance program has no bearing on the seriousness of the facts or on the importance of the economic harm they may have caused to the economy. Furthermore, although it is true that the existence of a compliance programme may be an element that differentiates the relevant company or organisation from other participants to the infringement, the Authority considers that this fact should not be taken into consideration in itself when making an individual decision on the amount of the financial penalty to be imposed, insofar as it did not prevent the occurrence of the infringement.

304. In case a company discovers a misconduct thanks to its compliance program, the Authority considers that it is the company's responsibility to cease the misconduct immediately and report this misconduct as soon as possible to the Authority under the leniency procedure. It is only when the leniency procedure is not available (non cartel cases including horizontal or vertical anticompetitive agreements, abuses of dominance) that the Authority would be prepared to consider a mitigating factor[128]. There is no precedent so far and the Framework-Document does not disclose the range of the reduction the Authority would consider.

305. Under EU case law[129], having a parent-company and its subsidiary share a common compliance programme may be regarded as an indication of the subsidiary's lack of commercial autonomy and may therefore contribute to having the parent-company found liable for its subsidiary's infringement. We are not aware of any similar French precedent.

306. We are not either aware of precedents referring to the adoption of compliance programmes as likely to have a positive impact on criminal or damages actions.

India

307. The provisions of the Act dealing with the imposition of penalties for anti-competitive activities are silent on whether the existence of compliance programme would serve as a mitigating factor and result in the reduction, if any, of the quantum of the penalty imposed on an enterprise.

308. However, the language of the Guidelines suggests that the existence of a competition compliance programme may influence the quantum of the penalty in the case of enforcement action. No range for such reduction or conditions on which such reduction of penalty may be granted has been indicated in the Guidelines.

309. Further, the law is silent on what would amount to a "genuine" compliance programme. It must be noted though that the Guidelines provide an indicative list of the essential features that are required in a competition compliance programme. Please refer to our response to Question 1 above.

310. The Act provides that in the case of the contravention of the provisions of the Act or rules, regulations or orders made or directions issued thereunder by companies, every officer in charge shall, along with the company itself, be deemed to be guilty of the contravention and subject to liability under the Act.

311. However, this presumption of liability is rebuttable if the person can establish that the contravention was committed without his knowledge or that he had exercised due diligence to prevent the commission of such contravention.

312. Keeping this in mind, a genuine competition compliance programme initiated or adopted by a group may assist the parent enterprise in mitigating or escaping its liability by establishing that due diligence had been exercised by it to

127 For a recent example, see the judgment of the EU General Court of 2 February 2012 in the T-76/08 case "EI du Pont de Nemours et Cie v. Commission".

128 Framework-Document para. 27 and 28.

129 For a recent example, see the judgment of the EU General Court of 2 February 2012 in the T-76/08 case "EI du Pont de Nemours et Cie v. Commission".

prevent the contravention of Indian competition law by its subsidiaries. However, there has been no precedent in this regard, and there is no express provision under the Act or the regulations framed thereunder to this effect. The existence of a group level ex ante competition compliance programme could potentially have a bearing on the liability of a parent company under Indian competition law, although the same remains to be tested and established in practice.

313. As a violation of the substantive provisions of the Act does not lead to attachment of criminal liability, the compliance programme would have no bearing on criminal liability. It is unlikely that the compliance programme can influence the imposition of criminal sanctions for failure to obey orders of the CCI.

314. However, with respect to criminal liability under the IPC, the existence of a genuine or bona fide competition compliance program could influence the imposition of criminal sanctions on the company and individual officers in charge of the enterprise, by serving as a mitigating factor.

315. It must be re-iterated that competition law in India, being relatively new, has not developed sufficiently in the area of compliance programmes and thus no clear jurisprudence has emerged reflecting the extent of influence the adoption of competition compliance programmes may have on private and public enforcement action.

316. Damages could be claimed before the CompAT, or potentially under tort law. The existence of a bona fide and genuine competition compliance programme could possibly indicate that due diligence or reasonable care had been exercised, and might reduce the quantum of the damages awarded. There is however no established precedent for private enforcement or damages claims for anti-competitive actions.

Israel

317. An effective voluntary compliance program may have a direct and significant bearing on the possible criminal liability of senior management, in cases where the indictment rests on indirect liability under section 48 of the Antitrust Law.

318. As explained in section 1 above, the Antitrust Law imposes direct criminal liability on individuals who participated in the antitrust offence. In addition, section 48 of the Antitrust Law states that in the event that an offense was committed by the company (namely, an offense committed by any of the company's employees) anyone who was an active director or senior executive employee at the time the offence was committed will also be prosecuted. In effect, the IAA's practice is that nearly every time a corporation commits an antitrust offense, the corporation's general manager (as of the date of committing the offense) and other senior management officers are also charged, regardless of their personal involvement in the offence committed.

319. According to section 48 of the Antitrust Law, officers can defend themselves from indirect liability if they can prove – and the onus of proof rests with them – that they were unaware of the circumstances giving rise to the offense and that they "adopted all reasonable measures to guarantee compliance" with the Antitrust Law. This defense was interpreted very narrowly by the courts, but the IAA clarified that an effective antitrust compliance program would enable senior management to establish such defense. Thus, if a corporation has established an effective compliance program, the IAA will likely refrain from indicting its senior management for their indirect liability. It should be stressed that this policy applies only to ex-ante compliance programs and only to officers that are not directly implicated (took no part in the offence and were unaware of the circumstances surrounding it).

320. The IAA's position is that a genuine compliance program is one that meets the multiple requirements set in the MCP (notable requirements were detailed in section 2 above).

In general, a parent company is not criminally liable for offences carried out by its subsidiary. However, officers of the parent company often serve as directors or officers in the subsidiary, and thus may benefit from the implementation of a compliance program by the subsidiary.

321. Apart from its important role in defending against indirect personal liability, a compliance program may enable the corporation to be favorably treated in terms of its ability to seek the IAA's guidance in antitrust issues.

322. The IAA provides a special pre-ruling track for corporations that adopted a voluntary compliance program. The IAA's guidelines regarding "Answer to Business Review Inquiry from the Antitrust Director-General" (1999 IAA Website 3004265[E]).).) state that "*An answer to a business review inquiry is given as a response to an appeal from a corporation which is implementing an internal compliance program. The business review inquiry procedure refers to a specific and express set of facts that raises an antitrust question, which is submitted to the Antitrust Director-General by the corporation that is carrying out an internal compliance program*". English version of the guidelines is available at http://eng-archive.antitrust.gov.il/ANTItem.aspx?ID=31&FromSubject=100232&FromYear=2012&FromPage=0

Japan

325. Such fine reduction is not set forth under the Anti-Monopoly Act. However, there is a possibility that smaller amount of fine as a criminal penalty is ordered by court in extenuation of implementing sufficient compliance programs though no precedent is found, but it depends on the circumstance of infringement and the content of compliance program, etc. Smaller amount of fine may be ordered, for example, in the event that a few employees violate the Anti-Monopoly Act regardless of sufficient training to employees.

326. On the other hand, the surcharge imposed by payment order of FTC is not reduced even if the company conducts a voluntary compliance program because the rate of surcharge is definitely set forth under the Anti-Monopoly Act and FTC has no discretion to reduce the surcharge.

327. Originally, the parent company does not have a liability with regard to the infringement of its subsidiary, so that the adoption of a compliance program has no impact in that respect.

328. As in above, there is a possibility that criminal liability is limited by court if implementation of compliance programs is considered as a mitigating factor in criminal court proceedings, but it depends on the circumstance of infringement and the content of compliance program, etc.

329. A compliance program would have little impact on damage actions because the damage of the counterparty would not decrease even if the violating company has implemented such compliance programs.

Netherlands

330. In exceptional circumstances a voluntary ex-ante compliance programme may result in a reduction in fine. According to the NMa, the compliance programme should in such event have a fully implemented and sufficiently effective internal control system to encourage compliance. In addition, no high-placed representatives of the undertaking should have been involved in the infringement. However, there has been no precedent to date.

Pakistan

331. According to the Guidelines on Imposition of Financial Penalties (Fining Guidelines) released by the Commission, having a voluntary ex-ante compliance program at the time an infringement is considered as one of the mitigating factors during the assessment and imposing of an appropriate penalty on the concerned undertaking. Section 8.1 of the guidelines lists one of the mitigating factors as being:

"adequate steps taken with a view to ensuring compliance with the prohibitions of Chapter II of the Ordinance, for example, existence of any compliance programme; and…"

332. On what would be considered as a genuine compliance program and what mitigating value would be accorded to the existence of any such program, 8.2 of the guidelines state:

"In considering how much mitigating value may be accorded to the existence of any compliance scheme of an undertaking, the Commission may consider:

- whether there are appropriate compliance scheme and procedures in place;
- whether such scheme has been actively implemented;
- whether it has the support of, and is observed by, senior management; and
- whether such scheme is evaluated and reviewed at regular intervals?"

323. The imposition of a penalty is however at the discretion of the Commission and the assessment of an appropriate penalty to be imposed for all types of infringements shall depend on the facts of each case.

324. The only information available related to the relationship of parent and subsidiary companies in the case of an infringement being committed by a subsidiary can be found in the fining guidelines. section 9.4 states:

"The anti-competitive conduct of an undertaking can be attributed to its parent company where the subsidiary does not independently determine its market behavior but, mainly because of economic and legal ties has essentially followed its instructions, in such instances commission can choose whether to attribute the infringement committed by the subsidiary to it or to the parent company".

325. Having a voluntary ex-ante compliance program is one of the mitigating factors during the assessment of penalties by the Commission in the event of an infringement. Penalties include criminal liability as well, so the same principles would apply on it.

326. Section 8 of The Competition (Leniency) Regulations, 2007 states the following: "*Effect of leniency. – Immunity granted by the Commission cannot exclude claims by third parties who may have suffered loss as a result of the activities in respect of which immunity is granted. Third parties, therefore, shall have the right to pursue the private claims for damages before the Court of competent jurisdiction*".

Singapore

327. The CCS has stated in its guidelines that it would consider a compliance programme as a mitigating factor. However, this would depend on:

(a) Whether there are appropriate compliance policies and procedures in place;

(b) Whether the programme has been actively implemented;

(c) Whether it has the support of, and is observed by, senior management;

(d) Whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and

(e) Whether the programme is evaluated and reviewed at regular intervals.

328. The CCS has issued no guidelines as to what would be considered a genuine compliance program. However, in our experience, the following would be required in a compliance program:

(a) An introduction of the law;

(b) Examples of breaches;

(c) An introduction of the penalties;

(d) A system of reporting;

(e) Audits, hotlines;

(f) Internal sanctions for breaches;

(g) Document publicity;

(h) Document retention policy;

(i) Regular training and updating programmes; and

(j) Commitment from management.

329. The CCS would not automatically deem a parent and subsidiary a single economic entity ("SEE") for the purposes of the Act, and hence, liability will not typically attach to both. Whether a parent and subsidiary is a SEE depends on whether the subsidiary is autonomous and economically independent.

330. If the parties are considered a Single Economic entity, then there is a possibility of parental liability where the subsidiary has been in violation. In such an instance, the presence of a group compliance program may mitigate against parental liability. However, this is dependent on the effectiveness of the compliance programme.

331. There is no criminal liability in Singapore.

332. A voluntary ex-ante compliance program is a mitigating factor only when it relates to financial penalties issued by the CCS. Nevertheless, it can potentially have an impact on private actions for damages, although the general principle of damages is to compensate for loss. This stems from the party causing the loss having endeavoured to take steps to mitigate any violations.

South Korea

333. The primary benefit of implementing a compliance program is that in the event that is found by the KFTC to have violated the FTL, it can qualify for a reduction of penalties if the test result equivalent to or above "A" is achieved. For your information, according to KOFAIR, 44 companies applied for qualification in 2010, and 29 companies received levels equivalent to "A" or above (22 companies received "A", and 7 companies received "AA").

334. According to the Notification, the benefits expected by establishing a compliance program and obtaining qualification thereof can be summarized as follows:

→ Upon a violation of the FTL, KFTC may reduce the administrative fine to be imposed on the company by up to 20% once (certain exceptions exist, such as for a cartel or high officer's involvement in the violations).

→ Upon a violation of the FTL, the KFTC may reduce the level of public disclosure order to be imposed on the company by one time (the same exceptions as above (i) exist).

→ KFTC would not conduct an *ex officio* investigation on the company for up to two years (certain exceptions exist, such as when the company is penalized for obstruction of the KFTC's investigation within two years or when there exist clear suspicion of violation).

335. Please note in this regard that the potential reductions in any monetary fines that may be payable apply to violations of the FTL in the future and do not extend to past violations. Accordingly, implementation of the compliance program would not immunize a corporation against a potential finding of violation for past practices.

336. As a general matter, a parent company will not be found liable for the acts committed by its Korean subsidiary, unless there is evidence implicating the parent company. Accordingly, a voluntary ex-ante compliance program initiated by a group will not change anything in terms of parental liability if an infringement is committed by a subsidiary.

337. For criminal liability and civil damage claims, a compliance program would not, from a strict legal perspective, change the amount of exposure. However, if a company has duly implemented a compliance program, this may be considered by the reviewing court as an extenuating factor in determining the liability.

Turkey

338. Since the competition law compliance program is a newly introduced notion to the Turkish competition law, case law on the subject is very limited. There is no recognition of a fine reduction to companies with voluntary ex-ante compliance programs. The existence of a compliance program is mentioned in only a few Competition Board decisions.

339. One of these decisions is the Unilever decision[130]. During the onsite investigations conducted by the case handlers on the premises of Unilever Turkey, various educational documents covering general competition law matters and previous decision of the Competition Board regarding Unilever Turkey was found. Moreover a competition law compliance guideline with a foreword written by the chairman and the chief legal counsel was also encountered during the onsite investigations. While the wording of the decision does not explicitly state that the existence of these efforts was taken into consideration in the final decision itself (the Competition Board decided that there was no need to open an investigation), these documents were considered as an indication that Unilever is trying to comply with competition rules.

340. Since the competition law compliance program is a newly introduced notion to the Turkish competition law, case law on the subject is very limited. Having said that, showing due diligence on the adoption of competition law policies would be in favour of the infringing party.

130 The decision of the Competition Board dated 17.3.2011 and numbered 11-16/287-92.

341. As explained above, the sanctions that could be imposed under the Competition Law are administrative in nature (i.e. no criminal sanctions). That said, there have been cases where the matter had to be referred to a public prosecutor after the competition law investigation is complete. On that note, bid-rigging activity and illegal price manipulation (i.e. manipulation through disinformation or other fraudulent means) may be criminally prosecutable under the Turkish Criminal Code. Such prosecutions do not have any relationship with competition law and would be solely based on the Turkish Criminal Code. Therefore, it is theoretically possible for a defendant to raise the existence of an ex-ante compliance program during criminal prosecutions. However, the effectiveness of such claims would be arguable since the final judgement of whether the existence of an ex-ante compliance program could be considered as a mitigating factor would rest on the criminal judge.

342. While the lack of precedents limit a clear cut answer, it is theoretically possible for either party to raise the existence of an ex-ante compliance program in damages actions. Theoretically speaking, raising the existence of a compliance program could work for (e.g. damaging party took all the necessary intercompany measures to avoid breaching competition law) or against (e.g. possible evidence for bad faith) the defendant depending on the properties of the case.

United Kingdom

1. Reduction in Fines for Voluntary Compliance Programmes

343. In section 7 of its detailed guidance, the OFT states that its starting point in relation to setting penalties for businesses that have undertaken compliance activities is "neutral".

344. There are no automatic discounts or increases in the level of financial penalty where an infringing party has been operating a competition compliance programme. However, the amount of a financial penalty imposed for a competition law infringement may be reduced at the discretion of the OFT, where the infringing party can demonstrate that "adequate steps" had been taken with a view to ensuring compliance with the prohibitions on anti-competitive behaviour in the Competition Act 1998 and article 101 and 102 TFEU[131].

345. Each case will be assessed on its own merits. An infringing party, depending on the size of the business and level of exposure to competition law risk, would be expected to adduce evidence of adequate steps having been taken in relation to:

- → achieving a clear and unambiguous commitment to competition law throughout the organisation;
- → risk identification;
- → risk assessment;
- → risk mitigation, and
- → review.

131 This point was already made in the OFT's 2004 guidance on the appropriate amount of a penalty (OFT 423), at paragraph 2.16.

346. The OFT states that, at its complete discretion, and if it considers that a reduction in financial penalty is justified in the first instance, then it may reduce that level of fine by up to 10 per cent.

347. The OFT makes it clear that if a discount is appropriate then it can take into account compliance efforts undertaken either prior to the infringement or "implemented quickly following the business first becoming aware of the potential competition infringement".

2. Parental Liability – Voluntary Compliance Programmes

348. The OFT[132] and the CAT[133] have emulated the jurisprudence of the European courts, established in the Akzo case. Where a parent company exercises "decisive influence" over the commercial policy of its subsidiary, the presumption is that this subsidiary will form part of the same "undertaking" as the parent company[134]. As part of that same undertaking, the parent company will be jointly and severally responsible for any infringement of competition law.

349. The parent company can attempt to rebut this presumption, in order to escape the liability of its subsidiary which has been found to have infringed competition law. The parent company can do so by showing that the subsidiary and parent company's commercial policy are in fact separate. In Akzo, the Court of Justice stated that the parameters relevant for establishing a subsidiary's independence are not limited to "commercial policy" in the strict sense (e.g., the subsidiary's conduct with respect to pricing, production, distribution, sales objectives, gross margins, sales costs, cash flow, stocks and marketing) but also extend to all relevant factors "relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list".

350. It is possible therefore that competition compliance programmes, specifically designed for a particular subsidiary, may fall within this broad definition of "commercial policy", but it is likely that a whole range of other commercial activities may act to determine "decisive influence". No competition cases to date have been brought by an infringing party in the UK courts where evidence of a competition compliance programme, specific to the subsidiary, would exonerate liability of a parent company.

3. Criminal Liability – Voluntary Compliance Programmes

351. The cartel offence in section 188 of the Enterprise Act 2002 states that an individual is guilty of an offence if he "dishonestly" agrees with one or more persons anti-competitive arrangements. The test for "dishonesty" is well understood in English criminal law and is set out in the case of R v Ghosh.[135] This has created a two-part test:

132 Case CE/4327-04 "*Bid-rigging in the construction industry in England*" (21 september 2009), No. CA98/02/2009.

133 Durkan Holdings Limited, Durkan Limited and Concentra Limited (formerly known as Durkan Pudelek Limited) v Office of Fair Trading [2011] CAT 6.

134 Case C-97/08 *Akzo Nobel and others v. Commission* (10 September 2009).

135 [1982] QB 1053, 75 Cr. AppR. 154 CA, 2 All ER 689, CA.

1. Was the act one that an ordinary decent person would consider to be dishonest (the "objective test")? If so:

2. Must the accused have realised that what he was doing was, by those standards, dishonest (the "subjective test")?

352. The fact that a company has voluntarily introduced an ex-ante compliance programme would logically indicate that its staff and directors objectively and subjectively know and believe that anti-competitive behaviour is dishonest. Extending this logic further, it would therefore be unlikely to limit criminal liability for the individuals concerned if an infringement is committed afterwards. On the contrary, evidence that the relevant individuals had completed the relevant compliance programme and still went ahead with the anti-competitive behaviour would be important aggravating evidence for any jury to consider.

353. The extent to which any criminal liability may apply will depend very much on the facts of each case but directors should remain very much conscious of this risk.

4. Damages Actions – Voluntary Compliance Programmes

354. Follow-on damages actions are generally brought by third parties after the OFT has issued an infringement decision on which that third party can rely for evidence of an infringement. The existence of a compliance programme will not therefore be usually relevant in that specific regard. However, the discovery exercise required during litigation before the English courts will likely uncover the fact that there was a compliance programme, the content of it, and any potential competition law infringements uncovered as a result of that compliance programme. Any infringement which has been uncovered as a result of the compliance programme would likely be very useful to the third party's damages action, as it would constitute direct evidence of wrong doing. The best way to protect such material from being subsequently disclosed is to engage in-house and outside legal counsel so that legal privilege would apply to the greatest extent possible[136]. This could mean having in-house and outside legal counsel involved in the compliance programme, seeking any advice on any material uncovered by that programme, making any leniency application and carrying out any discovery exercise.

United States

355. As noted above, under the United States Sentencing Guidelines, fine reductions are available for "effective" compliance programs, except in the area of antitrust. The Sentencing Guidelines provide nonbinding recommendations[137] to courts as to the proper amount of fine based on the nature of the violation, and certain factors that may increase the fine (e.g., repeated violations), or factors that may mitigate a fine (e.g., a compliance program). In the presence of a compliance program, a $1 million fine might be reduced to $50,000. Although there are no statistics available, anecdotal evidence indicates that many to prosecutors frequently decide not to prosecute a corporation when it is clear that a violation was caused by a "rogue employee" and the corporation, as evidenced by its compliance program, had no intent to violate the law.

356. In a private treble damage action, a compliance program will not have any effect, since the private plaintiff does not care. If the private plaintiff was injured, it wants to recover damages.

2. In your jurisdiction, are there risks entering into voluntary compliance programs if they do not prove to be 100% effective?

Please notably explain:

→ *whether a voluntary compliance program would be considered by the authorities/agencies or courts in your jurisdiction as a flawed/sham compliance program in case an infringement occurs or do they recognize that a compliance program may be sincere and effective even if not 100 % successful?*

→ *Whether the commitment of an infringement after the adoption of a voluntary compliance program has been/could be considered as an aggravating circumstance to increase fines or other penalties?*

→ *Whether failed compliance programs are likely to facilitate criminal prosecution against the company and/or executives concerned (revealing willful conduct) i.e. as proof that a violation was knowing and willful?*

→ *Whether the adoption of a voluntary compliance program at the very least creates an obligation to go for leniency when an infringement is discovered?*

Australia

357. Where a compliance program is inadequate or ineffective, this is not treated as an aggravating factor by the Federal Court in determining the level of penalty, i.e., the ineffectiveness of the compliance regime will not, *per se*, increase the fine[138].

358. However, an ineffective compliance program may neutralise the weight given to the compliance program and diminish or negate its significance as a mitigating factor when it is considered by the Federal Court[139]. Little or no credit will be given by the Court where the steps taken by a company are inadequate or superficial[140].

136 The OFT recognises legal privilege for in-house counsel in competition cases as a matter of English law but the European Court has confirmed that it takes the opposite view: Case C-550/07 P *Akzo Nobel v Commission*, 14 September 2010. Under European competition law, only outside counsel benefit from legal privilege.

137 http://www.ussc.gov/Legal/Primers/Primer_Organizational_Fines.pdf.

138 ACCC v George Weston Foods Ltd [2000] FCA 690.

139 *Ibid.*

140 ACCC v Visy Industries Holdings Pty Limited (No. 3) [2007] FCA 1617.

359. For example, the Federal Court is unlikely to regard with favour compliance initiatives where:

- → the compliance program is comprised of booklets or brochures, but these are not widely distributed or are out-of-date;
- → measures taken by a corporation are too general;
- → there has been no recent or regular training of relevant personnel; or
- → there is evidence that compliance guidelines were in place, but were ignored by senior management.

360. In cases such as these, the ACCC usually requires the contravening corporation to remedy any shortcomings in its compliance procedures.

361. In addition, where a corporation has implemented a carefully designed and properly implemented compliance program, but unlawful behaviour has nevertheless occurred within the corporation, especially if it has occurred multiple times, then the program is more likely to be regarded as deficient, and the risk is that the contravention is more likely to be regarded as deliberate.

Brazil

362. There is no case law in Brazil, regarding increase of fines and penalties in case of flawed/sham compliance program, to enable the assessment of risks for companies with a voluntary ex-ante compliance program that are condemned by CADE. However, both the article 27 of the Antitrust Law and article 45 of the New Antitrust Law determines that the good-faith of the defendant will be considered in the calculus of the fine to be imposed over the defendant. Therefore, if CADE concludes that the company acted with bad faith or willful misconduct, the fine may be increased.

363. It seems clear that the Brazilian antitrust authorities shall not consider the existence of a program as an aggravating circumstance.

364. However, an ineffective and unenforced voluntary ex-ante compliance program may be interpreted by CADE as an instrument to give the false idea that the company complies with the legislation. Since there is no case law in this regard, it is not possible to assert if such ineffective compliance program would lead to a willful misconduct or bad faith interpretation.

365. The willful misconduct or bad faith of the defendants are interpreted by CADE as a behavior of the companies to hide the unlawful practice or mislead the antitrust authorities. For example, in an administrative proceeding regarding cartel formation, judged on August 31, 2011, CADE applied an increase over the fine imposed to the companies. The members of the cartel created a mechanism to mislead the antitrust authorities by lowering the prices periodically to simulate competition.

366. Notwithstanding, the article 7 of SDE Ordinance provides that the SDE can revoke the Certificate if the company is condemned by CADE due to anticompetitive practices. Furthermore, the non-enforcement of a compliance program established by a Settlement or Performance Commitment will be considered a breach to the agreement between the company and CADE.

367. As for criminal prosecution, there is no legislation or case law regarding ineffective voluntary ex-ante compliance programs.

368. The implementation of compliance programs does not make it obligatory to apply for leniency. However, the application for leniency by a company with a voluntary ex-ante compliance program may be seen the Brazilian antitrust authorities as a tentative to remedy the unlawful practice in which the company engaged.

Canada

369. In the Bulletin, the Bureau notes that if a program is a sham and used only to conceal or deflect liability, it may be considered an aggravating factor for sentencing purposes or administrative monetary penalties.

370. However, the Bureau considers that, in some cases, a compliance program that has not been completely successful can still be genuine and, in a situation where a violation of the Act would have occurred, could make recommendations to strengthen an existing compliance program.

371. In the Bulletin, the Bureau points out that where senior managers of a company either participated in or condoned conduct that breaches the Acts, the Bureau will conclude that senior management's commitment to compliance was not serious and the program was neither credible nor effective. The Bureau also notes that knowingly contravening the law despite the existence of a program may be considered an aggravating factor for individuals involved in the offence when the Commissioner assesses whether to recommend that charges be laid against them. In such cases, the Bulletin states that the Commissioner would also recommend that charges be laid against the company.

372. There is no obligation for a business to seek leniency under any circumstances.

Czech Republic

373. As explained, in its guidelines the Office described the main features of the compliance programme in order to be considered effective. Since to date the Office has not reviewed or considered any compliance programme as mitigating circumstance, thus there should not be any risks for entering into a compliance programme not successfully implemented.

Egypt

374. A voluntary compliance program will be taken into consideration by the ECA and the court in light of the acts of the person in breach. However, as stated earlier, the anti competitive practices under Egyptian law are criminal in nature so if committed and proved they are considered crimes.

375. There is no stipulation in the Law concerning considerations of infringement after the adoption of a compliance program being an aggravating circumstance.

376. Failed compliance programs may facilitate criminal prosecution as they are considered as indication or partial evidence of criminal intention.

377. Adoption of a voluntary program does not create obligation to go for leniency when an infringement is discovered.

European Union

378. In a 1998 decision[141], the Commission held that committing a infringement while having a compliance programme could be considered an aggravating circumstance for the calculation of the fine. The circumstances of that case were however particular, as the company concerned had obtained a reduction in fine a few months before on the basis of a commitment to adopt a compliance program.

379. In its information brochure, the European Commission acknowledges that a compliance programme may be considered as effective even if it may not prevent any infringement from occurring[142]. The Commission even expressly states that having adopted a compliance programme that failed to prevent an infringement from occurring would not be considered an aggravating circumstance[143]. It is however the responsibility of the company to put an immediate end to the infringement when discovered. The Commission also advises to go for leniency in such circumstances but does not consider it is an obligation[144].

380. It is also to be noted that the existence of a compliance program may facilitate the evidence that the company entered into a prohibited behavior intently (see [145] above) therefore justifying the imposition of fines.

381. The Commission has not given any indication that an infringement committed while a compliance program is in place should be considered by national criminal courts as a revealing willful conduct, although this is not in our view to be excluded.

France

382. A compliance programme that is not 100% successful would not be considered as a sham compliance program.

384. Indeed, in its Framework-Document, the Authority acknowledges that a programme meeting all the conditions to be considered as effective may not prevent any infringement from occurring[146].

385. The Framework-Document also clearly states that a compliance programme that failed to prevent an infringement will not be considered as an aggravating circumstance[147], even if it turns out that corporate officials or managers took part in the infringement despite their commitment to comply with competition law and support the company's programme.

386. However, the Authority considers that the effectiveness of a compliance programme is partly revealed ex post, by the decisions made by the company when discovering such an infringement. The Authority clearly considers that companies have a duty to stop the infringement and apply for leniency.

387. We are not aware of criminal precedents referring to compliance programs in force at the time the infringement was committed but it is not excluded that this could contribute to evidence that employees knowingly participated to the infringement. In its Framework-Document, the Authority itself states that it will definitely consider referring the case to criminal courts where directors who have endorsed compliance program and later on participated to an infringement[148].

India

388. The Act is silent in this regard. The Guidelines, while discussing the need for the review of competition compliance programmes, refers to the evaluation of the programme against the results achieved to determine its efficacy. The Guidelines do appear to implicitly acknowledge

141 Decision of the European Commission of 14 October 1998 in Case IV/F-3/33.708 "British Sugar plc"; paragraphs 208 and 210: "British Sugar acted in a manner contrary to the clear wording contained in its compliance programme, which it announced to the Commission 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. (…)In conclusion, the aggravating factors mentioned justify an increase of 75 %, namely ECU 18,9 million in the basic amount for British Sugar".

142 "Compliance Matters" Brochure, page 18: "An effective compliance strategy will be expected to simply prevent any infringement from happening. Yet it may prove insufficient to ensure compliance, and there may nevertheless be instances of wrongdoing".

143 "Compliance Matters" Brochure, page 21: "It goes without saying that the existence of a compliance programme will not be considered an aggravating circumstance if an infringement is found by the enforcement authorities".

144 "Compliance Matters"Brochure, pages 18 and 19.

145 See decision of the European Commission of 14 October 1998 cited above at para.192.

146 The President of the Autorité de la concurrence, Bruno Lasserre also stated at its conference of 21 June 2011 at the MEDEF that:"To be effective, a compliance programme must be consistent with the undertaking's culture and defined by the company itself. Under no circumstance will an undertaking be criticized for having implemented a compliance programme that failed. The chosen approach focuses on incentives"(free translation).

147 Framework-Document of 10 February 2012, para. 26.

148 Framework-Document of 10 February 2012, para. 26.

that even a genuine and *bona fide* competition compliance programme might not be a 100% effective.

389. Whether the adoption of a compliance programme could prove to be an aggravating circumstance with respect to the imposition of penalties for the contravention of the Act would depend on the facts and circumstances of each case. If it is demonstrated that a compliance programme was not intended to be genuine or effective, it could potentially go against the party and serve to enhance the quantum of the penalty imposed or adversely affect criminal proceedings against a company or its executives under the IPC.

390. There is no obligation under the Act or the rules, regulations or notifications framed thereunder that creates an obligation to file for leniency if an enterprise were to adopt a voluntary competition compliance programme.

Israel

391. Generally, a sincere and effective compliance program, even if not 100% successful, may be sufficient to invoke the defense under section 48 of the Antitrust Law and prevent indictment of senior management.

392. In addition, the fact that a compliance program was in place, even if not successful, may play a role in the IAA's decision to settle an infringement of the Antitrust Law, without criminal proceedings. See for instance Approval of a Consent Decree between the General Director and the Israeli Association of concrete manufacturers, 2007 IAA Website 5000478 (compliance program as one of the reasons for waving the criminal path).

393. However, a sham compliance program may serve as an aggravating circumstance in a criminal proceeding against senior management, because it may indicate that the corporation willfully and deliberately breached the law.

394. There is no requirement to go for leniency when an infringement is discovered after the adoption of a voluntary compliance program exists under Israeli Law.

Japan

395. As an infringement occurs, it is more likely that such compliance program is considered to be flawed/sham rather than sincere and effective, depending on circumstances. The investigator of FTC has made a similar claim in a hearing proceeding in FTC.

396. The amount of surcharge imposed by the payment order of FTC does not change as above. Also, the adoption of the compliance program would not be a reason for FTC not to issue the cease-and-desist order if the infringement was committed.

397. On the other hand, although precedents are not found, there is possibility that larger amount of fine as criminal penalty is ordered, depending on circumstances. The court may deem the infringement to be malicious because the violator recognizes the illegality of the infringement if the compliance program is implemented. This would be especially true in the event that the directors violate the compliance program which they established.

398. The failed compliance program would be directly related to the possibility of the criminal prosecution. However, if the infringement is deemed to be malicious because of the failed compliance program as above, criminal prosecution is more likely to be conducted.

399. The adoption of a voluntary compliance program is not related to an obligation to go for leniency.

Netherlands

400. First of all, we note that (given the absence of any formal or informal rules on compliance programmes), there are no rules sanctioning voluntary non-100% effective compliance programmes. Neither are there any precedents in the Netherlands on which to rely for guidance in respect of this question. In theory however, it is conceivable that the NMa would consider the entering into a non-effective compliance programme an aggravating factor in determining a fine, e.g. if it was purposely set-up as a "sham". Other than that, the risks of entering into a non-100% effective programme seem very limited.

Pakistan

401. The Act is fairly recent and there is not enough case material on the subject to answer this question.

402. While the presence of an ex-ante voluntary program is one of the mitigating factors when assessing fines and other penalties in cases of infringements, the list of aggravating factors in the fining guidelines does not include the adoption of a voluntary compliance program as being an aggravating circumstance to increase fines or other penalties. The guidelines however state that there is no binding or exhaustive list of criteria that must be taken into account in every case when assessing the gravity of an infringement and that it has to be determined by reference to numerous factors such as circumstances of case, its context and the dissuasive effect of the fine.

403. As discussed earlier above, the adoption of a voluntary compliance program by an undertaking is one of the mitigating factors according to the fining guidelines released by the Commission when assessing penalties in cases of infringements. However the discretion to assess and impose penalties on undertakings lies solely with the Commission and courts of law and there is no obligation to go for leniency in the case of adoption of a voluntary program when an infringement is discovered.

Singapore

404. There are many factors into considering whether a voluntary compliance programme is a sham or whether it is sincere and effective. This would largely depend on whether:

(a) Whether there are appropriate compliance policies and procedures in place;

(b) Whether the programme has been actively implemented;

(c) Whether it has the support of, and is observed by, senior management;

(d) Whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and

(e) Whether the programme is evaluated and reviewed at regular intervals.

405. If there is a genuine intention to have and to implement a compliance programme, then it will not be considered flawed or a sham.

406. The commitment of an infringement after the adoption of a voluntary compliance program is unlikely to be considered by the CCS to be an aggravating circumstance.

407. The following factors are considered aggravating circumstances when considering the level of penalties:

(a) Role of undertaking as a leader in, or an instigator of, the infringement;

(b) Involvement of directors or senior management;

(c) Retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;

(d) Continuance of the infringement after the start of investigation;

(e) Repeated infringements by the same undertaking or other undertakings in the same group;

(f) Infringements which are committed intentionally rather than negligently; and

(g) Retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

408. There are no criminal penalties for cartel behavior or abuses of dominance. In any event, an officer found for example misleading or failing to produce documents or information may be subject to criminal prosecution. A failed compliance program does not assist one way or the other on this front.

409. The adoption of a voluntary compliance program does not *per se* create an obligation to go for leniency when an infringement is discovered. Applying for leniency would be a commercial decision taken by the affected undertaking.

South Korea

410. In Korea, there is no appreciable risk associated with entering into a compliance program even if it is not 100% effective. A failed compliance program plan would not likely be considered as an aggravating circumstance to increase fines or other penalties or facilitate criminal prosecution against a company or executives. Finally, adoption of a voluntary compliance program does not create an obligation to apply for leniency when an infringement is discovered.

Turkey

411. The Competition Authority is more inclined to consider the existence of a compliance program to be a sincere effort by the undertakings even if the compliance program is not entirely successful.

412. There are no precedents that would suggest that a commitment of an infringement after the adoption of a voluntary compliance program could be considered as an aggravating circumstances under Turkish Law.

413. We are not aware of any precedents that would suggest failed compliance programs may facilitate criminal prosecution.

414. There is no requirement to go for leniency when an infringement is discovered after the adoption of a voluntary compliance program. However, we have performed compliance programs for clients for the purpose of obtaining information and data to be used in a prospective leniency application.

United Kingdom

→ Aggravating Circumstances / Sham Arrangements

415. The OFT has stated in section 7 of its detailed guidance that it will not, subject to some exceptions, ordinarily regard the existence of a competition law compliance programme as a factor to warrant an increase in the amount of the fine to be imposed against that undertaking for a competition law infringement. The exceptions include situations where the purported compliance programme had been used to facilitate the infringement, to mislead the OFT as to the existence or nature of the infringement, or had been used in an attempt to conceal the infringement.

→ Criminal Prosecutions

416. Please see the responses to question 3.1. above in relation to criminal prosecutions.

→ Leniency Obligation

417. The adoption of a voluntary compliance programme by a company will not create an obligation on the company to apply for leniency when an infringement is discovered.

418. A compliance programme simply acts as a mechanism to try and prevent anti-competitive behaviour and to identify when that might be occurring. However, even where anti-competitive behaviour is identified as a result of a compliance programme, under the UK leniency regime, a company is not under an obligation to apply for leniency[149]. Leniency programmes are designed to encourage infringing parties to benefit from immunity if they do come forward voluntarily with evidence of cartel activity (see question 4.1 for a fuller discussion).

United States

419. The Sentencing Commission recognizes that a good faith compliance program may not be 100% effective. If the compliance program satisfies the Sentencing Guidelines, then credit would still be available.

420. However, the Antitrust Division does not currently credit compliance programs, and views any program that is not perfect as a "failed" program[150]. For antitrust enforcement, it has an amnesty/leniency program that will provide complete amnesty from criminal liability for the first party that confesses to participation in a cartel[151]. The only qualification to the receipt of amnesty is to be the first party to come to the Department of Justice with information that it did not have. The party is not required to have had a compliance program, and is not required to have one thereafter.

421. The Department justifies the amnesty program as being the most effective tool to uncover international cartels. The lack of any compliance factor is not explained anywhere.

IV. Compliance programs in leniency/settlement proceedings

1. In your jurisdiction, can the competition authority authority/court impose the adoption of a compliance program when an infringement is uncovered? Have there been precedents?

Australia

422. There are several means by which a corporation can be required to adopt or improve its compliance program.

423. Pursuant to section 87B of the CCA, in cases where a contravention has occurred, the ACCC may be prepared to accept court-enforceable administrative undertakings ("*87B undertakings*"). In an 87B undertaking, corporations or individuals generally agree to remedy the anticompetitive behaviour, accept responsibility for their actions and to establish, or review and improve, their compliance programs and compliance culture.

424. Towards this, the ACCC has developed four specific compliance program templates, which give an indication to corporations as to the type and level of commitment expected to be given, depending on the size of the corporation, the level of competition risk and the nature of the contravention that the 87B undertaking is intended to remedy[152].

425. These templates include commitments which range from training employees, up to and including extensive commitments to appoint a compliance officer, instigate complaints-handling procedures, engagement of an independent third party to complete an annual review of compliance procedures and the submission of compliance documentation to the ACCC for review. Corporations usually commit to implementing the amended program within a specified timeframe[153].

426. While internal reporting requirements may be included in 87B undertakings, in Australia companies are not currently required to include commitments to self-report contraventions or apply to the ACCC for leniency as part of their compliance program.

427. The ACCC maintains a public register listing the 87B undertakings it accepts annually[154].

428. Where the ACCC has instituted legal proceedings against a company, 87B undertakings may also be given to the ACCC in conjunction with the settlement of legal proceedings before the Federal Court, described in further detail below.

429. In addition to 87B undertakings accepted by the ACCC, under section 86C of the CCA, the Federal Court also has the power to order a corporation to implement a competition compliance program. Where this is the case, each order must fit the circumstances of the case and must be tailored to the particular contravention. The Court will be reluctant to order a party to implement a compliance program where there is no clear benefit to the party's future behaviour[155], or in circumstances where there has been a deliberate breach by personnel when the Court is satisfied that a well-designed compliance program is already in place[156].

149 Thus in its guidance for directors, the OFT provides practical worked examples, advising that "*The companies should consider making a leniency application to the OFT or the European Commission (or both)*". Note that this is expressed as advice and not as a mandatory obligation. See OFT Guidance OFT1340, *Company directors and competition law*, June 2011, page 28 onwards.

150 Comments of Scott D. Hammond, Deputy Assistant Attorney General, at American Bar Association Section of Antitrust Law Spring Meeting, "Agency Update with the Antitrust Division DAAGs" (Washington, D.C., Mar. 30, 2011).

151 http://www.justice.gov/atr/public/criminal/leniency.html.

152 See ACCC website: http://www.accc.gov.au/content/index.phtml/itemId/716224.

153 See ACCC website: http://www.accc.gov.au/content/index.phtml/itemId/716224.

154 See ACCC website: http://www.accc.gov.au/content/index.phtml/itemId/815599.

155 *ACCC v 4WD Systems Pty Ltd* [2003] FCA 850.

156 *ACCC v George Weston Foods Ltd* [2004] FCA 1093.

Brazil

430. CADE can impose the obligation to implement a compliance program in the negotiation of a Settlement, although this negotiation can occur before any evidence regarding the anticompetitive practice is gathered. However, in case of condemnation, there is no specific provision in the Antitrust Law or New Antitrust Law regarding an obligatory implementation of a compliance program. Notwithstanding, the article 38, item VII, of the New Antitrust Law, provides that CADE may impose "any act or measure necessary for the elimination of the harmful effects to the economic order". Using an extensive interpretation, this disposition could be construed as possibility for CADE to impose the implementation of a compliance program.

Canada

431. Yes. In a number of cases, the Bureau entered into a consent agreement with businesses which agreed to implement a corporate compliance program following the investigation of a violation of the Act. These consent agreements can be embodied in a court decision, if they relate to criminal matters, or negotiated by the parties and registered with the Tribunal, for non-criminal matters.

Czech Republic

432. In general, the Office may impose various obligations which may, in theory, consist also in the adoption of a compliance programme. However, this kind of obligation has never been imposed.

Egypt

433. Yes, the ECA has the power according to the law (article 20) to take any measure to remedy the situation and stop the violation.

However, we are note aware of any precedents.

European Union

434. Under article 7(1) of Regulation N° 1/2003, the Commission may impose "any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end". In addition, article 9 provides that the Commission may, where appropriate, close proceedings on the basis of commitments proposed by companies to meet its concerns in one given enforcement case. These provisions are not used so far as a basis to impose or make compliance programs binding on companies.

France

435. The French Competition Authority can impose "specific conditions" on companies found guilty of an infringement but the Authority is not imposing compliance programmes on that basis.

436. The French Competition Authority may also close proceedings on the basis of the commitments proposed by the companies concerned to address its concerns on practices likely to fall into the scope of the prohibition[157]. Such commitments have included compliance programmes in a number of cases[158].

India

437. While there is no express provision of law under which the CCI may impose the adoption of a compliance programme, the Act does vest the CCI with broad powers to "pass such order or issue such directions as the CCI may deem fit". It would therefore appear that, when an infringement is uncovered, the CCI is well within its powers to require an enterprise to adopt a compliance programme.

Israel

438. In several cases, the IAA conditioned the approval of a restrictive arrangement or a contemplated merger, by an undertaking's adoption of a compliance program in line with the MCP. This requirement was made, among others, where the IAA came to realize, during the course of its investigation, that the applicant was part to an illegal activity or where the IAA sought to diminish potential anticompetitive prospects of the joint venture for which the application was made.

439. See, for instance, CR 48/04 (AT 513/04) "ACUM" – the Composers, Authors and Publishers Society of Israel, Ltd v. the General Director, 2004 IAA Website 5000043 (approval of a collecting society approved under a condition that a compliance program in the format of the MCP will be adopted); Conditional approval of a merger between Arad Ltd and Aram *Ltd.*, 2001 IAA Website 3011974 (merger approved under the condition that the merged entity will implement a compliance program in the MCP format; Decision under Section 14 of the Law, to exempt an arrangement between the Israeli Federation of Hotels and its members, 2002, IAA Website 3015709 (approval of a joint purchasing activity subject to adopting a compliance program in the MCP format). We note, though, that such a requirement is less common in approvals granted in recent years.

Japan

440. In many cases, the adoption of a compliance program is imposed by a cease-and-desist order issued by FTC. In the cease-and-desist order, FTC's approval before the adoption of a compliance program and the report to FTC after its adoption are obligated.

Netherlands

441. The NMa has been known to close in-depth investigations in exchange for the setting up of a (industry-wide) compliance programme (for instance in the cases regarding pharmacy,

157 Article L 464-2 of the code de Commerce.

158 See, e.g., Autorité de concurrence - Décision n° 10-D-29 of the 27 september 2010.

real-estate agents, publishers and shrimps). In addition, the drawing up of a compliance programme is often part of commitments offered in commitments proceedings.

Pakistan

442. There have been no precedents where the competition authority or courts have imposed the adoption of a compliance program on an undertaking in the case of an infringement being uncovered. Pursuant to section 31 of the Act, the Commission enjoys the power to require an undertaking to take such actions as may be necessary to restore competition and not to repeat the prohibitions specified in Chapter II of the Act or to engage in any other practice with similar effect. As such it may require an undertaking to adopt a compliance program.

Singapore

443. There have not been decisions where the CCS imposed the adoption of a compliance programme when an infringement has been uncovered.

444. However, Section 69(1) of the Act allows the CCS to issue any directions it considers appropriate to bring the infringement to an end, or to remedy, mitigate or eliminate any adverse effects. This could include imposing the adoption of a compliance programme.

South Korea

445. While the KFTC can certainly recommend that a company adopt a voluntary compliance program, it cannot under the law force a company to adopt one. There has been no precedent to our knowledge of the KFTC ever imposing a compliance program on a company.

A. Leniency

446. While Korea does have a leniency program, adopting a compliance program is not a condition to obtaining immunity or a reduction in fines.

B. Settlement

447. On November 22, 2011, the Korean National Assembly passed an amendment to the FTL introducing a "Consent Decision" system to the FTL.

448. The Consent Decision system applies in order to reach a settlement with KFTC in investigation cases involving alleged violations that are not severe, except for a cartel. The respondent in an investigation by the KFTC may propose appropriate remedial measures for recovery of consumer harm and the competitive order and the KFTC may bring a rapid conclusion to the case without making a finding of illegality, after consultations with the Prosecutor General and providing interested parties and government agencies with the opportunity to submit their opinions.

449. The main characteristics of the Consent Decision system introduced by the amendment are as follows:

→ an enterpriser or enterprisers' organization being investigated by the KFTC may submit a written application for a Consent Decision. However, the application may be withdrawn before the Consent Decision is actually issued.

→ The written application shall include (i) remedial measures necessary to recover the competitive order or improve the transactional order, and (ii) remedial measures necessary to recover or prevent harm to consumers or other enterprisers.

→ A Consent Decision does not signify that the conduct in question has been recognized as a violation of the FTL, and no one may assert that certain conduct is in violation of the FTL by reason of a Consent Decision.

→ The KFTC must provide interested parties the opportunity to submit their opinions at least 30 days prior to the date of issuance of the Consent Decision, by either individual or public notice to such parties. The KFTC must also give notice to interested government agencies and consider their opinions, and must consult with the Prosecutor General prior to issuing the Consent Decision.

→ The KFTC may impose an enforcement fine of KRW 2 million per day on persons who do not comply with a Consent Decision within a reasonable amount of time and without reasonable justification for such non-compliance, until the Consent Decision is complied with or cancelled.

→ In case of non-compliance of the Consent Decision, the KFTC may cancel the Consent Decision and resume the original investigation.

450. However, the following cases cannot be subject to a Consent Decision:

→ conduct in violation of article 19(1) of the FTL (Prohibition of Unfair Collusive Conduct);

→ conduct that meets the criteria requiring the KFTC to file a criminal complaint to the Prosecutor General as it is objectively in clear and material violation of the FTL and causes severe harm to the competitive order.

Turkey

451. There have been no precedents where the Competition Board imposed the adoption of a compliance program. There are no normative roadblocks preventing the Competition Board to make such decisions. Theoretically, the Competition Board may impose different behavioural sanctions on the infringing undertakings (one of such behavioural sanctions could be the implementation of a compliance program). Considering the fact that compliance programs drew attention only recently, it is possible to see Competition Board decisions that would impose such sanctions in the future.

United Kingdom

452. The OFT's competition compliance guidance published for business is a suggested process and it is not mandatory for companies to follow this guidance. There is no specific statutory provision which directly states that either the OFT or the Courts have the power to impose a requirement that an infringing party must adopt a competition compliance program, as part of a range of "sanctions" that the competition authorities may impose.

United States

453. The Federal Trade Commission frequently includes compliance requirements in decrees used to resolve its actions. The Justice Department will often include compliance requirements when settling actions other than antitrust[159].

2. If a leniency program exists in your jurisdiction, please explain whether adopting a compliance program is a condition to obtain immunity/fine reductions?

In the affirmative, please notably explain:

- → *the main features of the leniency program;*
- → *the conditions applicable to such a compliance program (compliance officer, level of commitment from management, audits, hotlines, sanctions, publicity, document retention policy etc.);*
- → *whether the competition authority/agency or court will review the implementation of the program;*
- → *the consequences in case infringements are uncovered after the implementation of such programs.*

Australia

454. The ACCC operates a cartel immunity policy and cooperation policy for enforcements matters, which are intended to encourage self-reporting of cartel involvement[160].

455. The cartel immunity policy does not include a requirement that a successful applicant must have a compliance program in place, nor is it conditional upon the adoption of one by an applicant.

456. In cases where infringements are discovered subsequent to the implementation of a competition compliance program, this will not render the corporation ineligible for immunity. The prior existence, or otherwise, of a compliance program is not a factor that is taken into account when a corporation approaches the ACCC seeking leniency.

457. As mentioned above, obligations to self-report or apply for leniency are not currently a feature of compliance programs in Australia.

Brazil

458. The adoption of a compliance program is not a condition to obtain immunity/fine reduction under a leniency agreement.

459. In order to benefit from the Brazilian leniency program, the applicant must be the first to propose leniency to the SDE and the authority will accept only if it does not have enough information to carry out a potentially successful cartel investigation and prosecution. SDE shall grant a marker – valid for 30 days – in order to protect the applicant's position as the first cartel member to cooperate. The applicant shall comply with the following requirements: (a) to confess the participation in the cartel; (b) to cease and desist from the unlawful practice; (c) to declare that it was not the leader of the cartel; and (d) to agree to cooperate with the investigation. Its cooperation with the authorities shall result in the identification of the other cartel members and the gathering of documents and additional evidences. The effective cooperation after the execution of the leniency agreement will guarantee full administrative and criminal immunity to the applicant.

460. The benefit granted to qualified company shall also benefit its directors, officers and employees involved in the cartel, since they cooperate with the authorities and agree to execute the leniency agreement as well.

Canada

461. The Bureau's immunity and leniency bulletins do not address this issue.

Czech Republic

462. The implementation of the compliance guidelines is not a precondition to obtain immunity under the leniency programme.

Egypt

463. Adopting a compliance program is not a condition to obtain immunity or fine reduction.

European Union

464. Adopting a compliance programme is not a condition to obtain immunity or fine reductions under the EU leniency procedure[161].

159 Recently, in United States v. Bridgestone Corp., No. 4;11-cr-00651 (S.D. Tex. Oct. 5, 2011), a case involving both antitrust and improper payments, the agreement settling the matter contained a compliance program for improper payments, but no mention of compliance regarding antitrust.

160 See ACCC websites: http://www.accc.gov.au/content/index.phtml/itemId/879795 and http://www.accc.gov.au/content/index.phtml/itemId/459482.

161 Commission Notice on Immunity from fines and reduction in fines in cartel cases (2006).

France

465. Adopting a compliance programme is not a condition to obtain immunity or fine reductions under the French leniency procedure[162].

India

466. The adoption of a compliance programme is not a pre-requisite for eligibility for the grant of a reduction in fines under the Lesser Penalty Regulations.

467. The Act and the rules and regulations thereunder do not presently provide for any settlement proceedings.

Israel

468. In 2005, the IAA adopted a Leniency Program, which accords a corporation, a director or an employee of a corporation an immunity from criminal prosecution in cartel cases provided, among other conditions, that the applicant was the first to move foreword, that it was not the leader of the alleged cartel, that it provided the IAA with complete information before the investigation was made public and fully cooperated with the investigation, and that it had ceased its involvement in the cartel (under the IAA's guidance). See An Immunity Program for Antitrust Offences, 2005 IAA Website 5000097.

469. The Immunity Program does not require the adoption of a compliance program as a pre-condition for the immunity. Moreover, the adoption of a compliance program when an investigation is active or expected, may raise potential obstruction of justice issues and requires prior consultation with a local antitrust expert.

Japan

470. A leniency program exists in Japan, but adopting compliance program is not required for reduction and exemption in leniency program.

471. If the violator who conducted a cartel applies for the leniency program, the surcharge imposed by FTC is reduced or exempted.

472. Only five violators can apply for it in one cartel case (the number of the violators who apply for it after the investigation of FTC is up to three). In the event that a violator applies for it primarily before the investigation of FTC, its surcharge is exempted. The surcharge of the second applicant before the investigation of FTC is reduced by 50%. The surcharge of rest applicant is reduced by 30%.

473. However, it is required to cease violation by the date of the investigation of FTC for application of the leniency program

474. They do not review the implementation of the compliance program because it is not required in the leniency program.

475. However, if the infringements of the applicant for the leniency program are uncovered after the investigation of FTC, such applicant is disqualified at the leniency program.

Netherlands

476. The adoption of a compliance programme is not a condition laid down in the NMa's leniency guidelines. The guidelines do, however, state that a leniency applicant should immediately terminate its involvement in the cartel, unless otherwise agreed with the NMa's Leniency Office.

Pakistan

477. As discussed earlier above, the adoption of a voluntary compliance program by an undertaking is one of the mitigating factors according to the fining guidelines released by the Commission when assessing penalties in cases of infringements.

478. There is a leniency program that exists in the jurisdiction of Pakistan called "The Competition (Leniency) Regulations, 2007" ("Leniency Regulations"). However there is no mentioning of the adoption of a compliance program being a condition to obtain immunity/fine reductions. Nevertheless, the main features of the leniency program are as follows:

479. Total immunity from financial penalties possible if:

- → The Undertaking is the first to provide the Commission with evidence of any activity leading to violations of the competition laws, provided that the Commission does not already have sufficient information to establish the existence of the alleged activity.
- → The undertaking provides the commission with all information, documents and evidence available to it regarding the prohibited activity.
- → Maintains complete cooperation throughout the proceedings
- → Refrains from further participation in the alleged activity from the time of its disclosure to the commission
- → Must not have taken steps to incite another undertaking to take part in any of the activities in question.

480. Regulation 4 of the Leniency Regulations, deals with the reduction of penalty and provides:

481. "4. Grant of reduction in the amount of penalty.–

(1) An undertaking may benefit from a reduction in the financial penalty of up to 100% if:

162 Communiqué de procédure du 2 mars 2009 relatif au programme de clémence français, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=260&id_article=1296.

→ the undertaking seeking reduction is the first to provide the Commission with independent, additional or corroborating or contemporaneous evidence of any of the activities prohibited under Chapter II of the Ordinance; and

→ this information is given to the Commission:

→ prior to issuance of a show cause notice under section 30 of the Ordinance; or

→ after initiation of proceedings under Section 30 of the Ordinance but before the Commission has passed any Order under Section 31 of the Ordinance confirming infringement and violation under Chapter-II;

(2) An undertaking may benefit from a reduction in the financial penalty up to 85% if:

→ the applicant undertaking gives information to the Commission prior to the conclusion of the proceedings before the Appellate Bench of the Commission or prior to participation in proceedings before the Supreme Court where the original order is passed by two or more Members/ or prior to recovery of the penalty imposed upon passing of the original order by single Member (where no appeal is preferred) under the Ordinance; and

→ the applicant undertaking submits additional evidence previously unknown to the Commission which represents significant added value with respect to the evidence already in Commission's possession thus further substantiating the infringement under the Ordinance.

(3) Any application for leniency under these Regulations shall be entertained subject to the conditions imposed by the Commission including that the applicant shall: (a) admit infringement of the offence unconditionally, b) abandon its participation in any prohibited activity forthwith and c) makes full and true disclosure.

(4) Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, the Commission will take into account:

→ the stage at which the undertaking comes forward;

→ the evidence already in the Commission's possession; and/or relied upon by the Commission; and

→ the quality and nature of the information provided by the undertaking.

482. Provided further that the undertaking cooperates genuinely, fully and on a continuous basis from time it submits its application throughout the Commission's administrative procedure".

Singapore

483. Adopting a compliance program is not a condition to obtain immunity or reductions in fines within the CCS's leniency programme.

484. The CCS will grant an undertaking the benefit of total immunity from financial penalties if all of the following conditions are satisfied:

(a) The undertaking is the first to provide the CCS with evidence of the cartel activity before an investigation has commenced, provided that the CCS does not already have sufficient information to establish the existence of the alleged cartel activity; and

(b) The undertaking:

→ Provides the CCS with all the information, documents and evidence available to it regarding the cartel activity;

→ Maintains continuous and complete co-operation throughout the investigation and until the conclusion of any action by the CCS arising as a result of the investigation;

→ Refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCS (except as may be directed by the CCS);

→ Must not have been the one to initiate the cartel; and

→ Must not have taken any steps to coerce another undertaking to take part in the cartel activity.

485. The CCS will also take into account:

(a) The stage at which the undertaking comes forward;

(b) The evidence already in the CCS' possession; and

(c) The quality of the information provided by the undertaking.

486. The CCS has also introduced a leniency plus programme. Here, an undertaking co-operating with an investigation by the CCS in relation to cartel activity in one market may also be involved in a completely separate cartel activity in another market, which also infringes the Section 34 prohibition.

487. To qualify for leniency plus, the CCS would have to be satisfied that:

(a) The evidence provided by the undertaking relates to a completely separate cartel activity. The fact that the activity is in a separate market is a good indicator, but not always decisive; and

(b) The undertaking would qualify for total immunity from financial penalties in relation to its activities in the second market.

488. If the CCS is satisfied with the above, then the undertaking would receive a further reduction in the financial penalties imposed on it in relation to the first market, which is additional to the reduction which it would have received for its co-operation in the first market alone.

489. Such information must be sufficient to allow the CCS to exercise its formal powers of investigation or genuinely advances the investigation.

490. The CCS will grant an undertaking which provides evidence of cartel activity but is not the first to come forward a reduction of up to 50 percent in the level of financial penalties. Aside the fact that the undertaking has to come forward before the CCS issues a written notice of its intention to make a decision, the undertaking has to satisfy the criteria above.

491. The CCS will not review the implementation of the programme.

492. As mentioned above, in question 3.3, the commitment of an infringement after the adoption of a voluntary compliance program is not considered by the CCS to be an aggravating or mitigating circumstance.

South Korea

493. Adopting a compliance program is not a condition to entering into a Consent Decision.

Turkey

494. The implementation of the compliance program is not a condition to obtain immunity or fine reduction under Turkish Law.

United Kingdom

495. There is no requirement for the company to adopt a compliance programme in order to benefit from the leniency programme.

496. The OFT operates a leniency programme whereby a company may obtain total immunity from a fine if it is the first company to inform the OFT of a cartel's existence (type A immunity), and to provide it with significant evidence of the cartel's operation.

497. In order to benefit from the OFT's type A immunity under its leniency programme, the conditions which a company must satisfy are:

- provide the OFT with all information available to it regarding the cartel activity;
- maintain continuous and complete co-operation with the OFT throughout the investigation;
- refrain from further participation in the cartel (unless otherwise directed by the OFT); and
- not have taken steps to coerce another undertaking to take part in the cartel.

498. A company may also receive a reduction in fine (but not immunity) if it is not the first company to come forward, but as the "second mover" it is still able to provide the OFT with substantial and new evidence in relation to the cartel.

499. Where a company has applied for leniency, the OFT's focus will be on the leniency applicant complying with the requirements of the four conditions above, rather than the implementation of a compliance programme.

500. As regards uncovering further infringements, compliance programmes are not a condition of leniency applications in the UK, and any consequences would not, strictly speaking, arise after the implementation of a compliance programme. Instead, the consequences would potentially flow from breaching the OFT's requirement to refrain from further participation in the cartel (condition three in the four bullet-points above).

United States

501. As noted above, the leniency program of the Department of Justice does not contain a compliance requirement. The leniency program of the Sentencing Commission does contain a compliance requirement, but is not currently applied to antitrust. Compliance requirements are frequently found in consent decrees with the Federal Trade Commission.

3. If settlement proceedings are available in your jurisdiction, please explain whether adopting a compliance program is a condition?

In the affirmative, please notably explain:

- *the main features of the settlement procedure;*
- *the conditions applicable to such a compliance program (compliance officer, level of commitment from management, audits, hotlines, sanctions, publicity etc.);*
- *whether the competition authority/agency or court will review the implementation of the program;*
- *the consequences in case infringements are uncovered after the implementation of such programs.*

Australia

502. A negotiated settlement between the ACCC and a contravening party is generally not conditional upon implementation of a compliance program by the contravening

corporation. Rather, settlement tends to be dependent on the level of cooperation offered by the contravening party and the parties' ability to reach a statement of agreed facts and a proposal as to the penalty to jointly submit to the Federal Court.

503. However, the ACCC will often request the contravening corporation to provide a court-enforceable 87B undertaking setting out the improvements it will make to its existing compliance program. Where this is the case, the parties usually ask the Court to take note of the compliance undertaking in its decision, although this does not amount to an order by the Federal Court.

Brazil

504. The implementation of a compliance program is not a condition to request a Settlement with CADE. However, CADE may require the company to adopt a compliance program in order to negotiate a Settlement, as per the article 129-A, item III, of CADE's Internal Rules, and Brazilian case law. It is important to emphasize that, due to the enactment of the New Antitrust Law, the current CADE's Internal Rules shall be replaced by a new version.

505. The Settlement under the New Antitrust Law is not significantly differ from the Antitrust Law provisions. The Settlement must contain: (i) specification of the obligations of the defendants in order to cease the anticompetitive practice; (ii) determination of the penalty in case of non-compliance with the obligations set forth in the Settlement; and (iii) the value of the pecuniary contribution to the Collective Rights Defense Fund, if applicable (provided that, in case of cartel formation, this pecuniary contribution is obligatory). The Settlement can only be proposed once by the undertakings. If there was leniency in the case, CADE's Internal Rules impose the obligation to plea guilty in order to reach a Settlement. If there was no leniency, CADE will decide the convenience of the guilty plea requirement for a Settlement.

506. There is no pre-established conditions to such compliance program. However, in a previous occasion[163], CADE requested: (i) appointment of an officer to be in charge of the enforcement and supervision of the antitrust compliance program; (iii) periodic reports regarding the enforcement of the compliance program; (iv) compliance training for employees, managers, officers and directors; (v) a hotline to report anticompetitive practices; and (vi) identification of the prohibited practices and the people or department that are more susceptible to commit them.

507. CADE's Attorney Office periodically verifies if the undertakings are complying with the conditions of the Settlement. If it finds that the company is breaching the Settlement, CADE will revoke it and restart the administrative proceeding. Therefore, CADE may periodically verify if the company is duly enforcing its compliance program and, if it considers that the program is ineffective, it may declare the breach of the Settlement. It is important to emphasize that the Settlement obligatorily sets forth a fine for non-compliance of its conditions. Therefore, besides the restart of the proceeding, the company will also bear an administrative fine.

508. In case the company does not cease the anticompetitive practice that was subject to the Settlement, CADE will revoke the Settlement, restart the administrative proceeding and impose a fine for the non-compliance of the Settlement. In this case, the breach of the Settlement will have more relevance to CADE's judgment than the breaching event (ineffectiveness of the compliance program, which was a condition set forth in the Settlement).

509. If the company engages in another anticompetitive practice, in addition to the practice that was subject to Settlement, it shall face difficulties in trying to qualify for another Settlement.

Canada

510. In Canada, there is no formal settlement proceedings; in criminal matters, it is however possible to enter into a plea agreement with the DPP. Such agreement must be sanctioned by the court and may include, for example, a recommendation for the issuance of a prohibition order and, sometimes, an undertaking by the parties in relation to the implementation of a compliance program.

Czech Republic

511. The adoption of a compliance programme is not a condition for entering into settlement procedure.

Egypt

512. There exist settlement proceedings in the Law. However, there is no stipulation in the Law that adopting a compliance program is a condition to settle with the person in breach.

513. In order to settle, the person in breach has to pay a fine ranging between double the minimum and maximum limits of the fine provided for in the Law. The Competent Minister is to decide the amount of settlement (this power has been delegated in November 2011 to the chairperson of ECA).

European Union

514. Adopting a compliance programme is neither a condition to enter a settlement nor to obtain a fine reduction under this procedure[164].

163 Settlement in administrative proceeding No. 08012.005328/2009-31.

164 Regulation N°622/2008 and Commission Notice on the conduct of settlement procedures (2008).

France

515. Adopting a compliance programme is not a condition to enter into a settlement with the Authority under the procedure of "non contestation des griefs" but such a commitment is likely to maximize the reduction in fine which may be obtained on that basis.

516. The "non-contestation des griefs" procedure is laid down in article L464-2 III of the code de commerce and the French Authority has recently provided detailed guidance in that respect[165].

517. Under this procedure, companies receiving a statement of objections may decide not to discuss or challenge these objections, in which case the maximum fine incurred is reduced from 10 to 5% and the Authority can give a reduction of fine up to 10%. If, in addition, the company commits to adopt a compliance programme, an additional reduction of up to 10% can be applied. Other kind of remedies may also be proposed for a reduction up to 5%. As a result, the maximum fine reduction which is available is of 25%.

518. In case such a commitment is given to the Authority and the company is later found to have participated to a new infringement, the Authority could impose a fine for violation of the commitment[166].

India

519. The Act and the rules and regulations thereunder do not presently provide for any settlement proceedings.

Israel

520. The adoption of a compliance program is not a formal precondition to a settlement with the IAA, but such a requirement was part of past settlements. It is less common in settlements made in recent years.

Japan

521. Settlement proceedings are not established in the administrative procedures and the criminal procedures. In the civil procedures, settlement proceedings are often implemented but adopting a compliance program is not a condition.

522. The settlement in the civil procedures is conducted in the extrajudicial consultation or in the judicial consultation with judges.

Netherlands

523. It is possible to negotiate a settlement with the NMa. This may result in the NMa closing its investigation in exchange for appropriate measures, either informally by way of a "non-sanction" decision or formally through the commitments procedure. The drawing up of a compliance programme is often part of commitments offered in commitment proceedings. If the undertaking fails to comply with the commitment, the NMa can – without further investigation – impose a fine amounting to the higher of 10 per cent of turnover or EUR 450,000. It can also decide to reopen its investigations.

Pakistan

524. The settlement proceedings are not available in our jurisdiction

Singapore

525. Settlement proceedings are not available in a formal sense in Singapore. Only an application for leniency is available in Singapore.

South Korea

526. Adopting a compliance program is not a condition to entering into a Consent Decision.

Turkey

527. Adopting a compliance program is not a condition to obtain immunity/fine reductions in leniency applications in Turkey.

United Kingdom

528. There is no condition requiring that a party must already have in place a competition compliance programme, before entering into settlement discussions with the OFT, in relation to any potential competition infringement under consideration.

529. No detailed rules exist on settlement discussions with the OFT. The OFT enters into early resolution or settlement discussions at its discretion and on a case-by-case basis, and would most likely do so where the OFT considers that the evidential standard for an infringement has been met. Settlement negotiations are generally without prejudice and by their nature are non-prescriptive in process.

530. In March 2011, the OFT provided general principles in its revised guidance on investigation procedures[167]. This guidance states that entering into an early resolution or

165 Communiqué de procédure relatif à la non-contestation des griefs, of 10 February 2012, available at: http://www.autoritedelaconcurrence.fr/doc/communique_ncg_10fevrier2012.pdf.

166 Article L 464-3 of the Code de Commerce and Framework-Document of 10 February 2012, para. 26.

167 See OFT Guidance 1263: "A guide to the OFT's investigation procedures in competition cases", (march 2011).

settlement process may apply where the company under investigation admits to infringing competition law and subsequently cooperates with the OFT's investigation. In return the OFT will reduce the penalty it imposes on the infringing company.

531. The OFT guidance does not state whether an undertaking to implement or update an existing compliance programme will be taken into account by the OFT during the course of any settlement discussions, nor whether the OFT will monitor or review the implementation of a compliance programme. To the extent that a compliance programme were to be considered at all, it is likely to be treated as ancillary to other conduct remedying the infringement.

United States

532. As noted above, compliance programs are a frequent component of settlement agreements of the FTC and other government agencies, but not the Antitrust Division of the Department of Justice.

533. The provisions of the compliance programs vary widely depending on the agency and laws involved. In general, they do track the requirements of the Sentencing Guidelines. In some cases, the agency may appoint a monitor to oversee the implementation of the compliance program[168].

4. Please detail any other procedural framework in which compliance programs may be submitted to the competition authority/agency or court (such as closure of proceedings when a company proposes remedies in non cartel cases)

Australia

534. These processes are described in detail above.

Brazil

535. The undertakings can submit a compliance program to CADE in case of a Settlement proposal, as mentioned above.

Canada

536. There is no other procedural framework in which compliance programmes are explicitly mentioned as possible or necessary steps to be taken.

Czech Republic

537. There is no specific procedure for submitting the compliance guidelines to the Office; however, the companies may submit their compliance programme to the Office within the competition advocacy.

Egypt

538. There is no other procedural framework in which compliance programmes are explicitly mentioned as possible or necessary steps to be taken.

European Union

539. There is no other procedural framework in which compliance programmes are explicitly mentioned as possible or necessary steps to be taken.

France

540. There is no other procedural framework in which compliance programmes are explicitly mentioned as possible or necessary steps to be taken.

India

541. The Act does not contain specific framework for submission of compliance programmes to the CCI. However, there is nothing in the Act that precludes a party from including a compliance programme in submissions filed before the CCI, whether it be proceedings in an abuse of dominance case or while filing for pre-approval in a merger. The parties may voluntarily agree to adopt a draft compliance programme as a measure to mitigate any competition concerns.

542. However, there is no instance of this being done in practice thus far and this has not been borne out in orders or practice.

Israel

543. There is no other procedural framework in which compliance programmes are explicitly mentioned as possible or necessary steps to be taken.

Japan

544. There is no other procedure in which compliance programs are submitted to FTC or court.

Netherlands

545. Please see the answer above.

168 See, e.g., In re Coca-Cola Co., FTC File No. 101-0107 (sept. 27, 2010).

Pakistan

546. No such information is available

Singapore

547. The above is not applicable.

South Korea

548. The procedure is described above.

Turkey

549. There is no settlement procedure in Turkey.

United Kingdom

550. There are three other forms of procedural frameworks relevant to this question: merger remedies, market investigations and abuse of dominance cases.

Compliance with Merger Remedies

551. Compliance monitoring outside of cartel cases may take place in the context of merger remedies, which may be agreed by the parties with the OFT or the Competition Commission ("the CC"). Such merger remedies can take the form of either divestitures of parts of the business or behavioural remedies and are designed to remedy, mitigate or prevent a substantial lessening of competition ("SLC") and adverse effects resulting from a merger.

552. The CC provides guidance in its Merger Remedies guidelines[169]. The CC guidelines explain that monitoring of merger remedies is designed to facilitate the proper compliance and on-going implementation of the remedies suggested by the CC, which may be required before a merger clearance is approved. Although there are no rules as to the types of conditions that are applicable to either divestments or to other remedies, generally structural remedies will provide that a disposal takes place within a specified and reasonable timeframe. The CC is not prescriptive about divestments but normally these divestments take place within six months. It is also normal for the OFT or the CC to approve the purchaser.

553. The CC's guidelines explain that the Enterprise Act requires that the CC, when considering these remedial actions, shall "in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it". To fulfil this requirement, the CC will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective.

554. Where divestiture undertakings are in place, the CC will normally require the appointment of an independent monitoring trustee to oversee the parties' compliance with the undertakings[170]. The trustee will report to the CC at regular intervals. The trustee's overall duty is to act in the best interests of securing an appropriate divestiture. The trustee will monitor the ongoing management of the divestiture package and the conduct of the process. The CC will have the right to propose and direct measures necessary to ensure compliance with the undertakings.

Compliance with Undertakings and Orders in Market Investigations

555. Where the OFT has referred a market to the CC, the CC will then investigate that market for up to two years. The CC's final report may identify an adverse effect on competition which it is then obliged to remedy, mitigate or prevent. The CC can do so via enforcement orders or undertakings. Under section 162 of the Enterprise Act 2002, the OFT is obliged to monitor compliance with these undertakings and orders and to determine whether they are no longer appropriate and need to be varied or revoked. The OFT is also obliged to monitor the effectiveness of these undertakings and orders and report back to the CC or the Secretary of State. Under section 167 of the Enterprise Act 2002, the OFT has the power to enforce undertakings or orders via civil proceedings where they are breached. Any person affected by a breach may also bring an action for damages.

Compliance with Commitments in Dominance Cases

556. In certain circumstances, the OFT may be prepared to accept structural or behavioural commitments to resolve a case involving allegations of an abuse of a dominant position. However, the OFT has clearly stated that it will not accept binding commitments in cases involving a "serious abuse" of a dominant position. The OFT will use its discretion on a case by case basis to determine the seriousness of an abuse but in general it will treat predatory pricing as a "serious abuse". In addition, the OFT will not accept binding commitments in circumstances:

- → where compliance with and the effectiveness of any binding commitments would be difficult to discern, and/or
- → where the OFT considers that not to complete its investigation and make a decision would undermine deterrence[171].

557. Once the OFT has accepted any binding commitments, the OFT can respond to any breach of them by requiring compliance via a court order. Any failure to comply with the court order will be treated as contempt of court, penalised by imprisonment or fines[172].

169 "Merger Remedies: Competition Commission Guidelines"(november 2008).

170 *Op. cit.*, footnote 28; para 3.23.

171 OFT 407, December 2004: Enforcement: Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments. See paragraphs 4.4. and 4.5. on page 12. See also OFT Guidance 1263: "A guide to the OFT's investigation procedures in competition cases", (march 2011): paragraph 10.17, page 54.

172 OFT 407, december 2004: see paragraph 4.28, page 17 and paragraph 2.9, pages 5/6.

United States

558. There is no other procedural framework in which compliance programmes are explicitly mentioned as possible or necessary steps to be taken.

V. Lack of any compliance program

In your jurisdiction, are there risks not entering into compliance programs for companies/trade associations which have already been involved in enforcement actions aside from the risks of violations?

Australia

559. It is rare that, following enforcement action, a corporation would not implement a compliance program. Typically, the ACCC would require implementation of such measures, either through an 87B undertaking or by seeking the appropriate orders from the Federal Court.

560. However, if a corporation was to fail to comply with the terms of its 87B undertaking, then the ACCC may apply to the Federal Court for orders requiring the corporation to comply. In doing so, the ACCC is not required to prove that the failure was deliberate, although this may be a relevant consideration for the Federal Court in deciding what orders to make.

561. In the absence of a compliance program following a further infringement, it is unlikely that the contravening corporation will be considered to have a culture of compliance, a fact which would be taken into account by the Court, as would the fact that there has been a subsequent "repeat" infringement by the company, when determining the penalty to be imposed.

Brazil

562. No, there is no explicit risk based on the Antitrust Law or CADE case law. However, enter into compliance programs is a positive decision for companies/trade associations which have already been involved in enforcement actions in order to prove they seriously seek to comply the antitrust provisions and avoid new violations.

Canada

563. In Canada, in a situation where a company or a trade association has been involved in enforcement actions by the Bureau, the prohibition order against that party, or the consent agreement entered into between the Commissioner and the party, will generally require that the other party implement a compliance program. In such case, if the company or trade association does not implement the required compliance program, it will be in breach of the order and would likely be subject to further enforcement action by the Bureau.

Czech Republic

564. There is no risk connected with non-entry into the compliance programme for undertakings which have already been sanctioned.

Egypt

565. Egyptian Competition Law does not provide for any penalty for not entering into a compliance program.

European Union

566. No provision explicitly refers to the risks of not having a compliance program for companies which have already been involved in enforcement actions. However, as mentioned above, the European Commission enjoys a broad margin of discretion in determining the aggravating factor to be applied in cases of repeated offences as well as in order to ensure a sufficient deterrent effect to fines. A company involved in prior enforcement actions which has not taken any step to ensure compliance with competition rules could therefore face higher fines.

France

567. No provision explicitly refers to the risks of not having a compliance program for companies which have already been involved in enforcement actions. However, the French Authority enjoys a broad margin of discretion in determining the aggravating factor to be applied in cases of repeated offences and might notably consider that the very existence of a repeated infringement attests that the previous finding of infringement and the financial penalty that may have been attached to it have not proved sufficient to drive the undertaking towards compliance with competition rules[173]. A company involved in prior enforcement actions which has not taken any steps to ensure compliance with competition rules could therefore face higher fines.

India

568. Given the limited precedence and development of jurisprudence, it is not possible to comment on or evaluate the risk of not entering into compliance programmes at present. It is however recommended that a sound competition compliance programme be adopted by any enterprise that has been involved in enforcement actions.

Israel

569. This matter was never directly discussed in Israeli case law. In general, past convictions are an aggravating circumstance. This aggravating circumstance may be mitigated by the adoption of a compliance program by the alleged repeated offender.

173 See the Communiqué de procédure relatif à la méthode de détermination des sanctions pécuniaires of 16 May 2011 available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=260&id_article=1601.

Japan

570. In the event that the company received the cease-and-desist order which requests to establish compliance program, it deem violation of such an order unless establishing requested compliance program. In such a case, the company is likely to be punished by fine of not more than JPY three hundred million and the offender of the company is likely to be punished by imprisonment with work for not more than two years or by a fine of not more than three million yen.

Netherlands

571. First of all, we note that (given the absence of any formal or informal rules on compliance programmes), there are no rules sanctioning the failure to adopt a compliance programme subsequent to having been subjected to enforcement actions. Neither are there any precedents in the Netherlands on which to rely for guidance in respect of this question. Obviously, there are risks if the adoption of a compliance programme was part of previous commitments agreed with the NMa, or of a settlement. In theory – depending on the circumstances of the case – it is also conceivable that the NMa would consider the failure to enter into a compliance programme an aggravating factor in determining a fine for a "repeat offender".

Pakistan

572. The adoption of a compliance program by an undertaking remains a voluntary exercise. However there are additional penalties for undertakings who are involved in continuous violations of the competition laws.

Singapore

573. There are no direct risks of not entering into compliance programmes for companies/trade associations which have already been involved in enforcement actions.

574. However, the practical effect of a lack of compliance programmes is the risk of repeated infringements. Repeated infringements by the same undertaking would be an aggravating factor in assessing the amount of financial penalty imposed.

South Korea

575. In Korea, there is no appreciable risk in not entering into a compliance program for companies/trade associations which have already been involved in enforcement actions.

Turkey

576. The case law does not suggest the existence of standalone risks associated with not adopting a compliance program.

United Kingdom

577. The OFT has not established any specific rules in relation to companies / trade associations that have repeatedly infringed competition law and have failed to implement a compliance programme, although there is a risk that it would comment adversely in any decision finding an infringement. The key risk that a company / trade association would face from not implementing a compliance programme is that the entity may inadvertently commit further competition law infringements. Committing more than one competition law infringement has a substantial impact on the penalty imposed by the OFT for the infringement.

578. The OFT has a wide discretion to increase a company's penalty for infringements by up to 100% if the company has previously breached competition law[174]. It is likely that the OFT would increase a recidivist company's penalty by a high percentage if it had not attempted to prevent a further breach, i.e. by failing to implement a compliance programme. The company would also lose the opportunity to gain a 10% reduction in its fine for taking adequate steps to comply with competition law.

579. The increase in the likelihood of breaching competition law and the potentially substantial increase in the level of fine for doing so are therefore the key risks of not implementing a compliance programme following an initial breach of competition law. In addition, by not reforming its corporate culture to avoid future such infringements, the company would have unnecessarily deprived itself of the opportunity to be the first cartelist to seek leniency from the OFT and thereby forfeit full immunity.

580. Further, a failure by the directors to introduce a proper compliance programme even after the company has been subject to enforcement actions might be regarded as a breach of their fiduciary duties to the company and / or negligence by its shareholders. Those shareholders might seek legal advice as to whether they could bring an action against those directors, which could prove to be costly for all those involved.

United States

581. Prosecutors in areas other than antitrust have used the lack of a compliance program, or the reduction of assets devoted to compliance, as evidence of intent to violate the law[175].

174 OFT Draft Guidance as to the appropriate amount of a penalty, October 2011. See paragraph 1.17, page 7, paragraph 5.40, page 41, and paragraph 5.46, page 43, at http://oft.gov.uk/shared_oft/consultations/oft423con.pdf.

175 See, e.g., United States v. Merck-Medco Managed Care, Case No. 00-CV-737, complaint (E.D. Pa. Sept. 29, 2003).

VI. Compliance programs in other fields

In your jurisdiction, are you aware of more proactive policies towards compliance programs (i.e. anti-bribery, environment etc.).

Australia

582. In Australia, the standards-setting organisation, Standards Australia, has published Australian Standard, *AS 3806-1998 Compliance Programs*, which sets out the principles for the development, implementation and maintenance of effective compliance programs in both public and private organisations, across all sectors of the economy. The principles contained within *AS 3806-1998* are designed to enable organisations to identify and remedy any deficiencies in their compliance with laws, regulations and codes and develop processes for continual improvement in this area[176]. However, there is no legal obligation to comply with the Standard.

583. The Australasian Compliance Institute is also active in the promulgation of compliance. It is the principle association for compliance professionals in Australia and is involved in the ongoing training and accreditation of professionals working across a wide range of compliance fields in Australia. It is also active in making submissions to Australian regulators regarding changes to regulations or laws which affect corporate compliance in Australia.

Brazil

584. Brazil has proactive policies towards compliance programs regarding environmental and corporate law. Although the Brazilian governmental authorities do not issue guidelines, the companies have developed compliance programs in order to enhance their reputation and market value.

Canada

585. No mechanism such as fine reduction has been implemented so far in case of application of compliance program.

Czech Republic

586. Even if the compliance programme is not mandatory, many companies, especially those listed in various stock exchanges, implement not only the competition compliance programme but also compliance programmes focused on anti-bribery, data protection or the environment.

176 See Standards Australia website: http://infostore.saiglobal.com/Store2/Details.aspx?productID=304428.

Egypt

587. Consumer protection, there was a campaign led by the Consumer Protection Authority for compliance with the provisions of the Consumer Protection Law in 2009/2010.

588. Anti bribery, there is an anti bribery committee that was established in 2010 following Egypt's ratification of the UN Convention on Combating Corruption.

589. Income Tax compliance program, which was adopted after the promulgation of the income tax law No. 91 of 2005.

European Union

590. Compliance programmes exist in other fields than competition law. However, we are not aware of similar incentive mechanism providing as fine reduction so far in case of adoption and implementation of a compliance program.

France

591. Compliance programmes exist in other fields than competition law. However, we are not aware of similar incentive mechanism providing as fine reduction so far in case of adoption and implementation of a compliance program.

India

592. Companies in India do frame and implement compliance programmes to ensure compliance with anti-bribery laws, labour laws and tax laws. Companies also adopt programmes to ensure general corporate governance as well as adherence of the listing agreement, where applicable.

593. At the moment, the importance and awareness of compliance is increasing amongst Indian companies, but have not fully developed.

Israel

594. Israeli corporations adopt compliance programs in many areas including sexual harassment, environment regulation, anti-bribery and safety.

595. A relatively new area of compliance, which develops rapidly, is compliance with Securities Law regulations. This is of special interest, because of the clear similarities to antitrust compliance program.

596. Israeli Securities Law, 1968 (the "Securities Law") was amended recently, and the Israeli Securities Authority (the "ISA") was accorded with powers to impose significant administrative sanctions (mostly monetary payments) on individuals, unless they can prove they had taken all reasonable measures to prevent Securities Law violations. This defense is very similar to the one afforded to senior management under the Antitrust Law.

597. Like the IAA – the ISA published a Model Compliance Program, announced that adoption of this program would be a relevant factor in its decision whether to choose criminal or administrative measures, and explained that it may serve as a safe harbor for senior management against possible criminal and administrative sanctions for their indirect liability under the Securities Law.

Japan

598. Some companies in Japan adopt other compliance programs related to an anti-bribery, environment, management of information (including personal information), industry laws applicable to the companies, etc.

Netherlands

599. No mechanism such as fine reduction has been implemented so far in case of application of compliance program.

Pakistan

600. There are no as such proactive policies towards compliance programs in Pakistan. Various companies in the country do follow certain compliance codes in the working of their businesses but the adoption and implementation of any compliance program is voluntary. Major institutions of the economy like the State Bank of Pakistan, Securities and Exchange Commission of Pakistan, Pakistan Environmental Protection Company etc, stress for compliance to the relevant laws and rules and regulations to the companies in the market but there are no as such proactive policies seen towards drafting of specific compliance programs for companies.

Singapore

601. In Singapore, proactive policies towards compliance programmes present in certain industries and sectors.

602. With respect to anti-bribery, while compliance programme are not per se advocated by the Corrupt Practices Investigation Bureau ("CPIB"), strict laws against public officers who take bribes would encourage public bodies to pro-actively initiate compliance programs. Hence, it is common to find these as part of employment or ethics handbooks.

603. For example, section 8 of the Prevention Of Corruption Act (Cap. 241) ("PCA") states that any gratification given or received by a public officer is presumed to be a bribe and is therefore punishable. Punishments are also harsh, with Section 13 providing that offenders may have to pay a penalty equal to the amount of bribe received apart from punishment in the form of fines and/or imprisonment term.

604. The CPIB has also recommended preventive measures as well as a list of dos and don'ts relating to anti-bribery. This would guide public bodies in shaping their compliance programmes to ensure that activities which breach the PCA do not occur. These measures and the list of dos and don'ts can be seen from the following link on CPIB's website: http://app.cpib.gov.sg/cpib_new/user/default.aspx?pgID=167.

605. There have also been proactive policies toward compliance programmes with respect to matters pertaining to the environment, such as clean air, clean water and hazardous materials. For example, Section 20 of the Environmental Protection And Management (Hazardous Substances) Regulations states that every person authorised to store hazardous substances shall ensure that his agents and employees have received adequate instruction and training to enable them to understand the nature of the dangers of all the hazardous substances being stored, as well as an emergency action plan to be implemented in the event of any accident or emergency. A compliance program would thus be appropriate to educate one's employees regarding the dos and don'ts of storing hazardous materials.

606. Singapore has also taken steps to encourage compliance in its anti-money laundering and combating the financing of terrorism regimes ("AML/CFT"). Singapore's main legislations are the Corruption, Drug Trafficking And Other Serious Crimes (Confiscation Of Benefits) Act Cap. 65A ("CDSA") and the Terrorism (Suppression of Financing) Act Cap. 325 ("TSFA"). Soft laws (for banks and financial institutions) consist of notices and regulations issued by the Monetary Authority of Singapore ("MAS"), such as the Monetary Authority of Singapore (Anti-Terrorism measures) Regulations 2002 as well as the Notice to Banks on Prevention of Money Laundering and Countering the Financing of Terrorism [MAS Notice 626] ("MAS Notice"). Soft laws also exist for some professions, such as lawyers.

607. As Singapore adopts a risk-based approach to customer due diligence ("CDD"), it means that banks must implement a prescribed minimum level of checks to be carried out according to the money laundering risk posed by the customer in question. Similar requirement exists for other financial institutions as well as certain professions, such as law firms.

608. There is also an internal export control compliance programme present for the Strategic Trade Scheme ("STS") within the Singapore Customs. Such a compliance programme is necessary to obtain permits for traders who export or import strategic goods or weapons and their related technology. The assessment criteria for the compliance programme is seen in the STS handbook present in the Singapore Customs website.

609. A final example can be in the national good laboratory practice compliance programme, which reviews a research laboratory's process and conditions in which its non-clinical studies are planned, performed, monitored, recorded, reported and archived. The system can be applied to the risk assessment of chemicals for registration of products. The basic document dealing with the GLP is the Organisation for Economic Co-operation and Development ("OECD") Principles of Good Laboratory Practice, which is produced by the OECD GLP Working Group.

Turkey

611. The Regulation on Compliance Programs for Anti-money Laundering and Combating the Financing of Terrorism[177]:

611. The objective of this regulation, for the implementation of Law No. 5549 on Prevention of Laundering Proceeds of Crime dated October 11, 2006, is to regulate principles and procedures regarding establishment of compliance programs and assignment of compliance officers by obliged parties for the purpose of anti-money laundering and combating the financing of terrorism. The compliance program to be established, on a risk based approach for the purpose of ensuring the required compliance with the law and regulations and communiqués issued in accordance with the law, shall cover the following measures in order to prevent laundering proceeds of crime and financing of terrorism:

a) Developing institutional policy and procedures,

b) Carrying out risk management activities,

c) Carrying out monitoring and controlling activities,

d) Assigning compliance officer and establishing the compliance unit,

e) Carrying out training activities,

f) Carrying out internal control activities.

United Kingdom

612. In the area of financial and corporate crime, the UK has a number of regimes which should lead to a more pro-active approach towards wider compliance programmes.

613. Under the UK Bribery Act 2010 (which came into force on 1 July 2011), the only defence available to a commercial organisation charged with the corporate offence of failing to prevent bribery (which is punishable by an unlimited fine), is demonstrating that it had adequate procedures in place to prevent bribery. This coupled with the fact the absence of anti-bribery procedures may increase the risk that personnel may have (inadvertently) committed other bribery offences (which could lead to a prison sentence of up to 10 years and/or an unlimited fine for the individual) has led to greater awareness and increased pro-activity in anti-bribery compliance programmes (although a significant number of companies have yet to adequately address this area).

614. Those businesses which are within the scope of the Money Laundering Regulations 2007, are required to establish and maintain appropriate and risk-sensitive policies and procedures relating to matters such as customer due diligence. This requires such businesses to have pro-active policies and compliance programmes in this area. In addition, firms supervised by the UK Financial Services Authority are subject to an overarching requirement to have effective systems and controls to counter the risk that the firm might be used for the purposes of financial crime.

615. It should be possible to integrate such policies as part of a business's overall compliance programme. In this regard, we note that paragraph 1.7 of the OFT's detailed guidance (OFT1341) states that "competition law compliance can sit comfortably and be addressed in an integrated fashion with other items on a business's governance agenda, such as anti-bribery and corruption, internal anti-fraud controls, health and safety and environmental concerns".

United States

616. In areas such as improper payments (Foreign Corrupt Practices Act), securities law violations, environmental compliance, worker safety, and employment discrimination, enforcement agencies routinely include compliance programs as part of settlement agreements.

Others

617. On 18 February 2010, the OECD Council has adopted a Good Practice Guidance on Internal Controls, Ethics and Compliance[178], as an integral part of its Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions. The Guidance is intended to serve as non-legally binding guidance to companies in establishing effective internal compliance programmes for preventing and detecting foreign bribery. It does not suggest reductions in penalties when such programmes are applied but it is likely that that enforcement agencies and courts will take into account such initiatives – or their absence – in enforcement actions.

177 Published in the Official Gazette No. 26999 of September 16, 2008.

178 www.oecd.org/dataoecd/5/51/44884389.pdf.

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