



Competition Compliance Programmes



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Foreword

This paper focuses on developments in competition agency policies relating to corporate compliance programmes targeting in particular cartels.

Competition agencies have continued and intensified their efforts to promote competition compliance programmes, and competition compliance in the wider sense. Policy changes with regard to rewarding compliance have taken place, and agency approaches differ. Compliance programmes have also become part of the obligations that agencies impose in cartel cases. Some agencies will engage in the evaluation of compliance programmes outside the narrow enforcement context.

Agencies that engage in advocacy or assessment of compliance programmes inevitably take a position on the elements they consider essential for an effective competition compliance programme, even when they are trying not to be prescriptive.

Based on observed agencies' approaches, a number of enforcement indicators, the academic debate, and insights from anti-corruption and public procurement policies, some elements can be identified, which could help to improve the effectiveness of competition compliance programmes. These elements address company-internal detection and subsequent reporting of misconduct, the relevance and consequences of management level involvement in infringements, the alignment of compliance incentives with performance incentives, the pro-active monitoring of business processes, and compliance efforts going beyond the company itself to include business partners.

While these are not the only required elements, and are certainly not sufficient, agencies may want to pay special attention to them when evaluating or designing their compliance policies to ensure that they fit their cartel enforcement frameworks, and remain relevant and fit for purpose.

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1. Introduction

Competition agencies are interested in competition compliance by business. An effective compliance policy will help prevent violations of competition laws and the resulting harm to competition and consumers. A discussion held at the OECD in 2011 (OECD, 2011^[1]) addressed various factors which promote compliance, primarily through deterrence, such as corporate fines, sanctions against individuals (including imprisonment), leniency programmes, private damages actions, debarment and director disqualification orders, and whistleblowing (or bounty) systems. Only a shorter part of the discussion was dedicated to prevention and in particular to corporate compliance programmes.

In light of the increasing engagement of competition agencies with preventive compliance efforts, through advocacy and specific compliance guidance, this paper focuses on competition compliance programmes and related advocacy efforts as such, and will look at these programmes from an agency perspective. This perspective asks if compliance programmes and related agency efforts have a proven effectiveness: do they increase compliance and which elements can make a programme truly effective? When an agency engages in providing guidance or acknowledging compliance programmes, it expects pay-offs, such as an increase in prevention, detection and deterrence of competition infringements. Approaches used in other policy areas such as procurement or anti-corruption can provide interesting additional insights and inspiration.

The main elements of a corporate compliance programme and policy (Box 1.1) are well known, and any programme needs to be adjusted to the specificities of the firm, its main compliance risks, and over time. There is no one-size-fits-all definition. However, identification of the essential elements rendering a programme effective from an agency perspective may also inform business efforts in improving their compliance policies, without suggesting they may be sufficient for prevention purposes or to protect from sanctions.

Box 1.1. Characteristics of effective compliance programmes

A compliance programme reflects the specificity of the firm, the environment in which it operates and the risks that it faces in its day-to-day operations. However, it is possible to identify common elements that characterise a well-designed programme.

- **Risk assessment, prioritisation, and abatement** – A firm should regularly identify and assess its compliance risks, in particular when entering new markets or hiring for key staff. Companies should identify operations, units and personnel most at risk.
- **Strong leadership and management commitment** – Compliance programmes must have the full, visible support of the firm's leadership – President, Board, CEO. The resources committed to the programme, including (in larger firms) a dedicated and empowered compliance officer, demonstrate the commitment of senior management to compliance.
- **Transparency, communications and documentation** – including from the company leadership in the form of, for example, guidelines, and public statements, to increase accountability and contribute to awareness raising and education. Coherent and regular messages from management should make clear that competition violations will not be tolerated,

i.e. that the company will not defend or support violators and that they will face negative consequences. Implementation of a compliance programme should be well documented to assist with continuous improvement and attest to compliance efforts.

- **Auditing, monitoring, evaluation** – The compliance programme should be characterised by a drive for continuous improvement. Therefore, it should be subject to regular monitoring to ensure it remains up to date, effective and continues to deliver the core objectives which should also be continuously assessed. Effectiveness can be tested, for example, through surveys, training evaluations, interviews with key individuals to verify knowledge of and attitudes towards compliance and illegal conducts.
- **Training** – A compliance programme should include mandatory compliance training for all staff in positions with identified risks as well as part of new employee induction. Training should be adapted to the company's risks and profile.
- **Reporting** – A system that ensures that staff can report contraventions of the compliance programme or competition infringements confidentially and without the threat of retaliation.
- **Ex-post review** to verify whether infringements have occurred, why they occurred, whether management has dealt with them appropriately, and identifying measures that can be taken to strengthen the compliance programme.

Sources: (OECD, 2011^[1]); (Competition Bureau Canada, 2015^[2]); (U.S. Department of Justice, 2019^[3]); (European Commission, 2013^[4]); (International Chamber of Commerce, 2013^[5]).

As most of the debate centres around cartels, the most severe and, from a legal and economic perspective, most clear-cut competition infringement, this is the focal point of the compliance discussions in this paper. They are also risks common to any firm, regardless of firm size and market position, which is different from risks related to unilateral conduct or vertical agreements. Such risks, including merger compliance, should nevertheless be included in company compliance efforts and agency advocacy, as appropriate.

The paper is structured as follows:

- Section 2. provides an overview of developments in agency approaches to compliance programmes over the last 10 years and motivations for changes.
- Section 3. analyses indicators for the effectiveness of public and private compliance efforts. It provides some enforcement statistics to inform the policy debate.
- Section 4. compares approaches to compliance programmes in anti-corruption and competition enforcement.
- Section 5. asks what makes compliance programmes effective, and outlines a few key elements that could help improving the effectiveness, and how they can be addressed by competition agencies.
- Section 6 summarises and concludes.

2. Compliance policy developments

When the OECD discussed competition compliance programmes last in 2011 (OECD, 2011^[6]), the discussion focused mostly on the question if compliance programmes should be rewarded and incentivised through fine reductions. The participating jurisdictions were divided in their approaches. While there was widespread agreement that compliance programmes can help prevent anti-competitive behaviour, facilitate detection and/or reduce the duration of such behaviour, there was no consensus if such programmes should be incentivised by means of fines reductions or other benefits. Some agencies contended that a fine reduction to reward existing or future compliance programmes was not justified, as leniency and settlement bonuses already reward the implementation of successful compliance programmes indirectly. Offering extra reductions could also incentivise “sham” programmes and would impose a serious burden on competition agencies, which would have to check the validity and efficiency of the programmes. Other agencies believed that genuine compliance programmes could prevent new cartels from forming, and that misconduct by a few should not discredit an otherwise effective programme. The administrative burden of looking into such programmes would not be overly high as the burden of proof for the effectiveness would be on the companies (OECD, 2011, pp. 14-15^[1]).

These arguments are reflected in the academic debate on competition compliance programmes, which often also centres around the question if competition authorities should incentivise and reward business compliance efforts. In his seminal paper, (Wils, 2013^[7]) argues that, while individual liability for competition law infringements should be strengthened (see also (Wils, 2006^[8])), there is no good reason for reducing corporate liability at the same time by offering rewards for (failed) compliance efforts or for prospective compliance measures. The appropriate incentive and main reward are leniency reductions for reporting wrongdoing to competition authorities. Many authors take a different view, in particular based on the observation that no compliance programme can prevent violations completely, and that there should be some advantage to those who invested in genuine compliance compared to those who did not.¹ They also argue in favour of a pro-active agency role in the form of compliance requirements in leniency or settlement proceedings, and reconsideration of parental liability for subsidiary wrongdoing for genuine compliance programmes.²

The following parts provide a short overview of agency policy developments vis-à-vis compliance programmes. They cover advocacy and enforcement policy approaches, and will point out changes over the last decade. The overview of agency policies to date shows that agencies have continued and intensified their efforts to promote competition compliance programmes, and competition compliance in the wider sense. Policy changes with regard to rewarding compliance have taken place, and compliance programmes now play an important role in enforcing the law, as part of negotiated procedures or direct obligations. However, there are still significant differences in particular in the enforcement approaches, and the agency and academic debate is far from over.

2.1. Advocacy

Compliance guidance

Many competition authorities have, next to their ongoing enforcement efforts, invested significantly in guidance on competition compliance. While in 2011 only few agencies had issued official guidance on compliance programmes,³ since then many jurisdictions have added to or updated the existing guidance (see Agency guidance). This underlines the importance competition agencies attach to firms' preventive efforts.⁴ It is interesting to note that of the 26 jurisdictions that have issued guidance, the majority (20) has done so in the last five years.⁵

Box 2.1. Peru – 2020 guidelines for competition compliance programmes

Indecopi, the Peruvian competition enforcer, issued guidelines on competition compliance programmes in 2020. These guidelines comprise approaches by other jurisdictions, and include practical examples and resources to support businesses.

The guidelines identify costs of non-compliance and benefits of compliance, and identify the following essential components:

- Real commitment to comply from the senior management
- Identification and management of current and potential risks
- Internal procedures and protocols
- Training for employees
- Constant update and monitoring of the compliance programme
- Audits on compliance programme
- Procedures for consultations and complaints
- Designation of a compliance officer or committee

In addition, they detail complementary or optional components, which may increase the effectiveness of compliance programmes:

- A competition manual
- Incentives for employees
- Disciplinary measures

Further sections outline the relevance of early detection and reporting to the agency and implications for the calculation of the fine, compliance injunctions imposed by Indecopi, and how to contact the agency.

Annexes include a model competition manual, and compliance checklists for different-sized companies.

Source: (Indecopi, 2020^[9]).

Guidance varies in scale and scope, but is often very detailed, with practical examples and case references from the same or other jurisdictions, and provides explanations on substance next to guidance on the compliance process and requirements.

Guidance targeting specific groups

Trade associations receive specific attention in agencies' advocacy and enforcement efforts. A number of competition agencies has issued specific guidance on legitimate and illegal or risky trade association activities, often in considerable detail and with illustrative case examples, for example Japan (Ministry of Economy, Trade and Industry, 2010^[10]), France (Autorité de la Concurrence, 2021^[11]), Romania (Romanian Competition Council, 2019^[12]), Ireland (Irish Competition Authority, 2009^[13]) or Australia⁶.

Box 2.2. France – compliance guidance for professional bodies

The French Autorité de la Concurrence issued guidance to professional bodies in 2021, which helps identify competition risks in their activities, explains the applicable sanctions framework, and also takes due note of their pro-competitive functions – including the implementation of competition rules and increasing member compliance.

In terms of risks, it identifies the following broad categories and provides detailed explanations and case examples:

- Cartels
- Dissemination of pricing instructions
- Dissemination of commercially sensitive strategic information
- Exclusionary strategies, such as boycotts, membership conditions or technical standards
- Anti-competitive practices disguised as misinterpretation of regulations
- Anti-competitive practices in the course of lobbying
- Collective bargaining

In terms of the pro-compliance functions of professional bodies, the guidance identifies

- A role in the enforcement of competition law, which may consist in
 - Advisory referrals, allowing the Autorité to provide an opinion on any competition issues
 - Complaints about suspected anti-competitive practices
 - Participation in investigations by providing information
- A role in raising their members' awareness about compliance with competition law.

Source: Autorité de la Concurrence, Study on Professional Bodies (Autorité de la Concurrence, 2021^[11]).

Another target group often addressed with specific guidance are small and medium-sized undertakings (SME), taking into account their more limited capacity to implement comprehensive compliance programmes. Examples are France (Autorité de la Concurrence, 2020^[14]), Belgium (Belgian Competition Authority, 2016^[15]), Hong Kong; China (Hong Kong Competition Commission, 2015^[16]), or the ACCC, with its compliance templates differentiated according to business size.⁷ The International Chamber of Commerce has, next to its Antitrust Compliance Toolkit (International Chamber of Commerce, 2013^[5]), also issued a specific SME Compliance Toolkit (International Chamber of Commerce, 2015^[17]).

Other initiatives

Further agency initiatives to promote compliance with competition law are widespread and innovative. A recent award initiative offers interesting insights into various approaches.⁸ Examples are a short video made

by Sweden to promote leniency, the provision of compliance programme templates by Australia, and Hong Kong; China's trainings for non-specialist lawyers, videos as part of a cartel criminalisation awareness campaign by New Zealand, a bid rigging campaign by Ireland, a series of competition podcasts by Canada, videos on bid rigging and compliance programmes by Peru, a public procurement toolkit by India, mangas and videos by Singapore, or an educational cartel game by Latvia.

More targeted initiatives include the UK's CMA blog,⁹ where officials report on recent cases and competition law developments. In addition, the CMA publishes "open letters" targeting specific parts of the business community to explain general lessons from recently concluded cases,¹⁰ often with case studies, that explain the competition problem in an accessible way. France has recently started a similar initiative, and includes a message for compliance in any press communication about a decision.¹¹

Such initiatives demonstrate that agencies are not sitting back and waiting for violations to happen, and that they invest considerable effort in prevention.

2.2. Enforcement practice

Approaches and developments in enforcement practice show that, next to advocacy, many agencies take active steps to incentivise compliance programmes, or to include them as mandatory conditions in infringement decisions or different types of negotiated procedures.

Reward policies

Agencies show significant differences in their approaches to rewards for compliance programmes, and many agencies have changed their approach over the last decade. Some agencies don't grant credit, and others that do have different conditions attached to it, or pursue different policies with regard to pre-existing programmes or programmes introduced following an offence.

Credit for compliance programmes

The number of jurisdictions which will grant credit for compliance programmes has increased considerably since 2011 (Table 2.1).

Table 2.1. Credit for compliance

	2011	2021
Jurisdictions that grant credit	Australia, Denmark, Korea, Mexico, New Zealand, Norway, United Kingdom, United States	Australia, Brazil, Canada , Chile , Germany , Hong Kong; China, Hungary, India, Italy, Japan, Malaysia, Netherlands, Peru, Romania , Singapore, Spain, Switzerland, United Kingdom, United States
Jurisdictions that do not grant credit	Canada, France, Germany, European Union, Bulgaria, Romania, Russia	Bulgaria, European Commission, Finland, France , Greece, Korea , Mexico , Netherlands, Sweden, Turkey

Note: The 2011 assessment is based on the country contributions to the 2011 Roundtable (OECD, 2011^[1]), and includes declarations of a general willingness/legal obligation to consider fine reductions or other benefits for a proven effective compliance programme. When no clear indication was given, the jurisdiction was not included in the table. The 2021 assessment is based on Lexology, 10 September 2020, Should compliance programmes offer discounts from fines for anticompetitive activity? A global viewpoint; (Lexology, 2020^[24]); and additional OECD Secretariat research of agency sources and materials. The table does not represent a complete survey of all jurisdictions worldwide.

In bold: Jurisdictions known to have changed their policy approach. United States has changed from 2011 to 2021, as it will consider charging credit in addition to sentencing credit in 2021.

There is no discernible regional differentiation in the trend to grant credit for a compliance programme or not. Many jurisdictions in Asia are willing to grant fine reductions,¹² and ASEAN guidance suggests that a mitigation of fines might set an incentive for the introduction or improvement of such programmes (ASEAN Secretariat, 2018^[18]). A number of Latin American jurisdictions have developed compliance policies, and Brazil,¹³ Chile,¹⁴ and Peru¹⁵ will all grant fine reductions if the criteria set out in their guidance documents are met. Similarly, some European jurisdictions are prepared to reduce fines.¹⁶ For North America, the landscape appears to have changed fundamentally since 2011, with Canada and the US now communicating clearly that they are willing to take compliance programmes into consideration.¹⁷

At the same time, it is not possible to find a dividing line in the approaches to compliance rewards between jurisdictions that have criminal or administrative cartel enforcement regimes.¹⁸

When agencies grant credit for compliance, agency approaches show considerable variance in their treatment of pre-existing or newly introduced or amended compliance programmes. In the UK, a company's compliance activities can lead to a discount of up to 10% of the fine if it can show that adequate steps were taken with a view to ensuring compliance (UK CMA, 2018^[19]). The CMA focuses on forward looking changes rather than on existing programmes.¹⁹ Brazil adopts a similar approach (CADE, 2016, p. 41^[20]).

Other agencies are willing to consider granting discounts for compliance programmes that existed at the time of the infringement. Korea's KFTC has an evaluation programme in place, which allowed reductions for programmes previously rated "A" or higher.²⁰ Canada's policy change explicitly addressed fine mitigation for pre-existing programmes,²¹ and Chile,²² Peru,²³ and Romania (Romanian Competition Council, 2017^[21]) also target existing programmes. Russia intends to introduce rules that would allow credit or even full exoneration from fines for existing programmes.²⁴

Others will consider both, existing and newly created or significantly improved compliance programmes. Examples are Germany²⁵ and Italy,²⁶ Spain, though the latter with an emphasis on existing programmes (CNMC, 2020, p. 12^[22]), and the US, where recognition of existing programmes is the new policy element, in addition to crediting forward looking compliance measures (Box 2.3).

Box 2.3. Policy change in the United States

Coming from an “all-or-nothing” policy designed to emphasise the value of the DoJ’s leniency programme as the most important investigation tool, the United States Department of Justice (US DoJ) has undertaken a policy change with guidance published in 2019 on the evaluation of corporate compliance programmes in criminal antitrust investigations (U.S. Department of Justice, 2019^[3]). This primarily internal guidance sets out the considerations which prosecutors should apply at the charging and the sentencing stage.

At the charging stage, DoJ prosecutors can since 2019 consider a set of factors to determine whether the company can resolve charges through a plea or through a deferred prosecution agreement in which a company is charged criminally and agrees to co-operate for a period of time, after which the charges against the company are dismissed. Compliance programmes existing at the time of the offense can now be taken into consideration at the time of the charging decision, and if charged, at sentencing. DoJ internal guidance defines the basic characteristics of an effective compliance programme, and asks three preliminary questions, namely if the compliance programme addressed and prohibited criminal antitrust violations; if it detected and facilitated prompt reporting of the violation; and to what extent a company’s senior management was involved in the violation. The main factors prosecutors consider when evaluating compliance programmes are “(1) *the design and comprehensiveness of the program*; (2) *the culture of compliance within the company*; (3) *responsibility for, and resources dedicated to, antitrust compliance*; (4) *antitrust risk assessment techniques*; (5) *compliance training and communication to employees*; (6) *monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program*; (7) *reporting mechanisms*; (8) *compliance incentives and discipline*; and (9) *remediation methods*.” (U.S. Department of Justice, 2019, pp. 3-4^[3]).

Beginning in 2015, the DoJ started to credit forward-looking compliance efforts at the sentencing stage in several cases to improve future compliance and prevent the recurrence of a violation. Moreover, under the U.S. Sentencing Guidelines, DoJ prosecutors may recommend a three-point reduction in a corporate defendant’s culpability score if the company has an “effective” compliance programme. Such a reduction is difficult to qualify for because it is not available in the case of an unreasonable delay in reporting a violation, and, as a rebuttable presumption, a compliance programme is not considered effective when “*high-level personnel*” or “*substantial authority personnel*” “*participated in, condoned, or [were] wilfully ignorant of the offense*.” Such personnel includes “*individuals in charge of sales units, plant managers, sales managers, or those who have the authority to negotiate or set prices or negotiate or approve significant contracts*.” (U.S. Department of Justice, 2019, pp. 11-12^[3]).

It remains to be seen if the 2019 guidelines are the dramatic policy change some commentators would like to see. The conditions to qualify for credit at the charging stage are demanding, and to date the DoJ has not entered into a deferred prosecution agreement on the basis of the existence of an effective compliance programme.

Sources: Speech by Makan Delrahim, “Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs”, 11 July 2019, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0>; (OECD, 2011, pp. 193-200^[2]), US Sentencing Guidelines (§ 8C2.5(f)); Principles of Prosecution of Business Organizations, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300>; <https://www.linklaters.com/en/insights/publications/2019/july/us-doj-antitrust-division-reverses-long-standing-policies-and-issues-detailed-guidance>; <https://www.lw.com/thoughtLeadership/new-doj-guidance-increases-benefits-for-robust-antitrust-compliance-programs>; <https://www.jonesday.com/en/insights/2019/07/antitrust-alert-new-doj-criminal-enforcement>.

No international statistics exist on cases where compliance programmes actually led to fine mitigation. For pre-existing programmes, while discounts are in principle available, Spain, Canada and the US have not reported any cases yet.²⁷ This is different for Italy, which, between 2015 and March 2021, reviewed applications in 18 antitrust investigations, and granted reductions in 13 cases ranging between 5 and 15%, of which one led to the highest reduction of 15%.²⁸ This would require an existing programme leading to detection and reporting to the Italian Competition Authority (AGCM) prior to an official investigation.²⁹ In Australia, courts consider existing compliance programmes a relevant factor, and they have played a role in the consideration of sanctions in about 60% of the cases since 2007.³⁰

The arguments of the jurisdictions that have introduced credit, and often changed their approach compared to 2011, usually address the necessity to incentivise the prevention of competition law violations through effective compliance programmes.³¹ In the same vein, the US DoJ states that retrospective enforcement is often of limited deterrent value, and that robust compliance programmes can prevent or detect crime early.³²

Younger jurisdictions see a need to create a culture of competition, which they want to promote.³³ For mature jurisdictions, the Canadian Competition Bureau's policy change³⁴ may be representative: it intended to emphasise the value of prevention, and signal a more open and collaborative approach with the public. In addition, it sought to address a perceived imbalance, when white-collar offenders could expect a mitigation of sentences for the ex-post introduction of a compliance programme, which was not available to companies that had made the effort of having one all along.³⁵ Russia's intended policy change is based on the reasoning that companies having implemented all necessary measures should not be punished for illegal acts by some of their employees.³⁶ Chile was following a court ruling when adjusting its policy (Box 2.4).

Box 2.4. Chile – role of courts in defining the approach to compliance programmes

According to the Chilean competition prosecutor's (FNE) longstanding policy, the FNE may take a sound compliance programme into consideration in relation to the fine when filing a complaint before the Competition Tribunal (TDLC) (Fiscalía Nacional Económica, 2012, p. 20_[23]). This policy was subject to diverging court rulings in a recent case.

In 2016, the FNE filed a complaint before the TDLC, alleging that a number of supermarkets had conspired with a number of poultry suppliers to set and fix resale prices for poultry products in a so-called hub-and-spoke cartel (see also (OECD, 2019_[24])). A 2019 TDLC ruling confirmed the allegations and imposed fines on the supermarkets. For one defendant, the TDLC accepted an existing compliance programme as a mitigating factor with a fine reduction of 15%. Subsequently, the FNE issued a guideline on the criteria it will use when determining the fine that it will request the court to impose, including the effects of a compliance programme. The requirements are a pre-existing programme, which was serious and effective and applicable to the individuals involved in the infringement, including preventive measures specifically related to the infringement. The burden of proof is on the parties (Lexology, 2020, pp. 27-28_[25]).

However, in 2020, in the same case that led to the adoption of the FNE's new fining guidelines, the Chilean Supreme Court not only doubled the fines imposed by the TDLC, it also rebuked the defendants' claims to reduce the fines because of pre-existing compliance programmes firmly. The Court stated that for a compliance programme to be effective, it has to prevent conduct such as the one in the case at issue (hub-and-spoke cartel), and the proven four year violation demonstrated clearly that the programmes in place were not effective.

Sources: Decision of Supreme Court of Chile, 8 April 2020, *Fiscalía Nacional Económica en contra de Cencosud S.A. y otras*; and also <https://www.concurrences.com/en/bulletin/news-issues/april-2020/the-chilean-supreme-court-upholds-a-landmark-decision-by-the-competition>; accessed 22 February 2021.

No credit for compliance programmes

Among the jurisdictions that will not offer credit for compliance programmes when issuing a fine, either for pre-existing or prospective programmes, the European Commission is probably the most prominent. The 2013 publication “Compliance matters” (European Commission, 2013^[4]) sets out the EC’s approach. While recognising the need for and the relevance of compliance programmes, neither the existence nor the setting up of a programme in the wake of an investigation will serve as mitigating circumstances. The effectiveness of compliance programmes is only judged in terms of their success.³⁷ The ultimate reward for a functioning compliance programme is immunity or a reduced fine under the leniency programme. France stands for a jurisdiction, which has changed its approach from reward to non-recognition,³⁸ together with Korea and Mexico. A 2017 decision of the Autorité de la concurrence states that it can be expected that companies of a certain size incorporate compliance programmes in their day-to-day management, and that, consequently, these will not be considered as a mitigating factor when calculating fines in cartel cases.³⁹

Compliance obligations

Compliance obligations can be part of leniency policies or consensual case resolution mechanisms supporting the investigation - deferred prosecution agreements, plea agreements, settlement or commitment procedures,⁴⁰ which are not detection instruments in the first place, but facilitate effective procedures by rewarding co-operation in the investigation process (see (OECD, 2019, pp. 42-49^[26])). Jurisdictions take different approaches, for example:

- Canada can ask for the introduction or improvement of a compliance programme as part of a settlement, and can attach monitoring obligations (Competition Bureau Canada, 2015, p. 8^[2]).
- The US DoJ, when recommending corporate probation for an offender that did not have an effective compliance programme, can ask for periodic compliance reports as a condition for probation (U.S. Department of Justice, 2019, p. 15^[3]).
- Brazilian CADE may consider obligatory compliance programmes as part of a settlement procedure, and the introduction or improvement can lead to a maximum additional reduction of the fine of 4%.⁴¹
- Hong Kong; China makes the introduction or improvement of a compliance programme a mandatory requirement for entering into leniency agreements in the first place.⁴²

Australia⁴³ and the Philippines⁴⁴ accept compliance programmes as some form of commitment as well. Other jurisdictions will impose compliance obligations as part of the penalty, not linked to leniency or investigatory support, for example Chile or Peru.⁴⁵ India can direct repeat offenders to conduct competition-awareness programmes.⁴⁶

Evaluation of compliance programmes

Some agencies engage in evaluating compliance programmes outside the immediate enforcement context. They do so for different purposes and reasons, for example:

- Italy grants compliance ratings and reviews of compliance systems mostly relating to criminal and administrative law, and only marginally to competition law. The legality rating is a point-based system, which leads to advantages for obtaining bank credit and participating in public tenders. Such a rating is not available to companies that have seriously infringed the relevant laws. Since 2012, 9 000 – 10 000 applications for ratings were handed in to the AGCM, and an evaluation process of the rating system has started in 2021.⁴⁷
- Korea had already gained significant experience with compliance programmes in 2011 (OECD, 2011, pp. 121-130^[2]), and in order to incentivise compliance it would grant a reduction of fines for

existing compliance programmes.⁴⁸ After observing that a number of compliance programmes were introduced mostly to benefit from reduced sanctions, Korea introduced a compliance programme evaluation programme, carried out by the Korea Fair Trade Mediation Agency, a government-funded agency under the KFTC. A reduction in fines and other sanctions would only be available for programmes rated A or higher.⁴⁹

- The German Bundeskartellamt will review corporate compliance programmes in the context of a release from debarment in public procurement. Companies that seek an early release will have to apply for such a review. There is no implementation practice by the Bundeskartellamt yet (see also section 4.1).⁵⁰
- In 2020, the Russian competition law was amended to include the concept and basic requirements for antimonopoly compliance.⁵¹ In this context, companies may submit their compliance programmes to FAS Russia for review and confirmation that they are in line with the law.⁵² The law is silent on benefits of such an approval other than increased compliance with the law.

So far, no systematic assessment of such type of reviews seems to exist. It would be interesting to learn how in particular schematic, point based reviews can take account of a firm's unique circumstances and requirements, and what kind of agency-internal expertise would be required. Many agencies will refrain from such evaluations, as they can create the risk of creating an informal "safe harbour" (see US contribution to (OECD, 2011, p. 199_[11]) for companies that obtain approval or a certain rating, leading to foreseeable disputes in subsequent enforcement cases.

2.3. Resource implications

Any agency involvement with compliance programmes, be it advocacy or enforcement, will inevitably require the use of agency resources. There are obvious resource needs when agencies engage in active review and certification of compliance programmes, as for example in Korea, Russia and Germany. When the implementation or improvement of a compliance programme is part of a requirement for leniency or settlements, a commitment, or of a plea or deferred prosecution agreement, agencies need to monitor and verify their implementation, possibly for years. When compliance programmes are taken into account as mitigating factors, their critical review is required as part of the case investigation and fining decision.

Even if the burden of proof for showing the existence of a compliance programme, its main elements and its effectiveness is usually on the company's side, it may become very costly for an agency to verify such claims, if done in depth, and not just as a ticking the box exercise. The introduction of new, dedicated units by agencies such as the Canadian Bureau,⁵³ the US DoJ,⁵⁴ Chile's FNE⁵⁵ or the German Bundeskartellamt⁵⁶ proves the point.

An alternative to in-depth agency monitoring of compliance obligations could be the appointment of independent third parties as external corporate monitors. The use of such external monitors is a practice widely known in anti-corruption enforcement, but there are also instances in which the appointment of an external compliance monitor was imposed in an antitrust case (Box 2.5). 21 out of 52 non-trial resolution systems⁵⁷ allow for the appointment of a compliance monitor to oversee a programme imposed as a condition for out-of-court settlements in corruption cases (OECD, 2020, p. 20_[27]). The US DoJ appointed corporate monitors in more than 170 foreign bribery cases from 2000 to 2018. (Sarubbi and Vital Mesquita, 2020, p. 296_[28]). In the Odebrecht case,⁵⁸ a dual monitorship with monitors from the US and Brazil was agreed.⁵⁹

Box 2.5. Apple vs US – external compliance monitoring

In the US Apple e-books case, Apple was found in violation of laws for orchestrating a horizontal conspiracy between e-book publishers. As part of the ruling, the District Judge imposed an injunction and required Apple to implement compliance measures, including the appointment of an internal compliance officer, and an external compliance monitor.

Apple was ordered to inform its employees of the judgement, provide adequate training to prevent the reoccurrence of the same or other antitrust violations, audit its compliance measures and to take immediate action in case of violations, including reporting to the authorities.

The external monitor was required to review existing and amended compliance policies, as well as trainings, and then to report his findings and issue recommendations to the parties and the Court in order to improve Apple's compliance policies. To exercise his tasks effectively, he had the powers to interview employees, inspect and copy documents, and to request Apple to compile data and documents as needed.

Apple had to assume the costs of the external compliance monitor and his staff.

Two monitoring reports published on the DoJ website provide interesting insights into the evaluation criteria used for assessing Apple's compliance efforts.

Source: U.S. V. APPLE, INC., ET AL., <https://www.justice.gov/atr/case/us-v-apple-inc-et-al.>; <https://regmedia.co.uk/2015/04/17/apple-settlement-report.pdf>.

Such third-party monitoring is not new to competition agencies. They apply this tool on a regular basis in merger cases, and some have used it in cases of anti-competitive conduct as well. While the supervision and review of the work of an external monitor also puts a strain on agency resources, it may be less costly than keeping a full set of dedicated staff resources. The choice will ultimately depend on the particular case and on the long-term strategy of an agency with regard to compliance programmes. A foreseeable and constant involvement in compliance monitoring might justify the creation of agency-internal expertise.

Any decision on the nature of agencies' engagement with business compliance efforts needs careful balancing of the costs and benefits of such an approach with agency resources, most likely diverted from enforcement, on the cost side, and the likelihood of actual effects of strengthened compliance programmes in terms of prevention or early detection on the plus side.

3. Effectiveness of compliance efforts

The previous section demonstrates that competition authorities have, next to their ongoing enforcement work, invested significantly in the promotion of competition compliance programmes over the last decade, be it through advocacy or enforcement related measures. It may thus be timely to ask for visible effects, as the resources invested should be worth the effort. Effects would ideally show in an increased awareness of competition rules and legal requirements by businesses, leading to fewer competition law infringements and more competition on markets, which should in turn have an impact on various enforcement parameters.

An additional factor to nourish the expectation of increased compliance is the high public awareness and condemnation of cartel practices. Studies on the public perception of anti-competitive behaviour in France (Combe and Monnier-Schlumberger, 2019^[29]), and the UK, Germany, Italy and the US (Stephan, 2017^[8]) show that around three quarters of the population – except for the US, where the number is 66% - agree that cartels cause consumer harm and have to be punished. The increasing number of jurisdictions prosecuting individuals and able to impose criminal charges reflects the public perception.⁶⁰

In line with the increased attention to compliance programmes by competition agencies, it is safe to assume that businesses have introduced or upscaled more corporate compliance programmes, which include a competition component.⁶¹ Stricter and more demanding regulatory requirements for anti-corruption compliance (see section 4.2), environmental, health, labour, data, or financial market regulations have increased firms' overall compliance efforts and systems (Box 3.1), which would not be complete without a competition component.⁶²

Box 3.1. Corporate compliance areas

Within the corporate context, compliance carries a broad definition and scope, and the scope of what a firm defines as compliance risks is not an exact science. However, most firms use a similar list of compliance risk areas within the universe of their programmes (e.g., environmental, labour, accounting, corruption, etc.), even if the specific compliance risks within each area may differ. The constellation of risks, and their relative importance, that a firm faces and must mitigate through a compliance programme – regulatory, corporate and corporate social responsibility measures - will vary depending upon the sector and jurisdiction in which it operates. The compliance requirements of a firm operating within, for example, the garment industry will vary compared to firms in pharmaceuticals, aviation, or accounting sectors. As illustrated below, competition is but one element in the universe of compliance risks. Some industries will have more regulatory and ethical demands than others will, with varying degrees of obligatory government reporting requirements or social pressures and public exposure. Certain jurisdictions impose requirements such as France where under the Loi Sapin a compliance programme to fight corruption is a legal requirement.



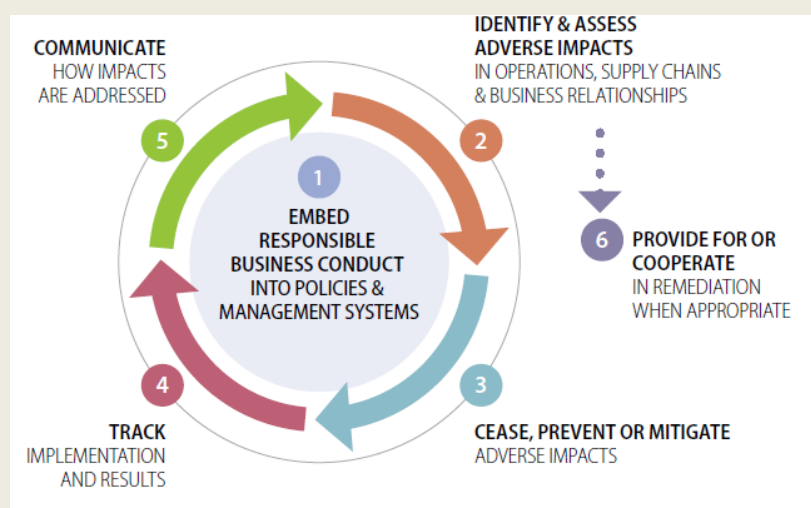
Other factors will influence the risks that are incorporated into a firm's compliance programme. Public pressure and awareness, as in the case of the Rana Plaza tragedy or the financial scandals of the early 2000s, may also raise the profile of specific areas requiring more attention to some compliance measures over others. Furthermore, the demands upon firms to implement new compliance measures are continually changing as can be seen with the advent of the digital economy which brings with it privacy and security issues, for example EU General Data Protection Regulation (GDPR).

Sources: <https://www.coso.org/Documents/Compliance-Risk-Management-Appling-the-COSO-ERM-Framework.pdf>; <https://www.reutersevents.com/sustainability/business-strategy/integrating-esg-issues-global-risk-compliance-integrity-programmes>; Deloitte New Horizons Compliance 2020 and Beyond, (Deloitte, 2016^[30]), figure reprinted with the kind approval of Deloitte.

The OECD also has a long history of supporting and promoting business compliance in all relevant fields (Box 3.2), including competition.

Box 3.2. OECD work on corporate compliance

The [OECD's corporate governance](#) work aims to support businesses to build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity. Initiatives relevant to corporate compliance are the [Trust in Business](#) project, the Due Diligence Guidance for Enterprises, and the [OECD Centre on Responsible Business Conduct](#) (RBC), which uses RBC standards and recommendations to shape government policies and help businesses minimise the adverse impacts of their operations and supply chains. OECD standards and tools on RBC are the OECD Guidelines for Multinational Enterprises (MNE guidelines), and the [OECD Due Diligence Guidance](#) for Responsible Business Conduct. The MNE guidelines provide non-binding principles and standards for responsible business conduct. They are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting. They cover the areas human rights, employment, environment, bribery, consumer interests, science and technology, competition and taxation. The Due Diligence guidance provides practical support on the implementation of the MNE guidelines by providing plain language explanations. In particular, the guidance suggests the following processes:



Measures against bribery and anti-corruption are an integral part of the MNE guidelines, and they are a self-standing and very important area of OECD work. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the [Anti-Bribery Convention](#)) is a legally binding international agreement, and parties to the Convention agree to establish the bribery of foreign public officials as a criminal offence under their laws and to investigate, prosecute and sanction this offence. The OECD's [Anti-Corruption & Integrity Hub](#) promotes a number of additional topics that are essential to companies' integrity and compliance efforts, such as illicit trade, natural resources, public procurement, tax compliance, whistle-blower protection and due diligence guidance in responsible supply chains.

Sources: (OECD, 2018, p. 21^[31]) (OECD, 2011^[6]).

Taken together, all these efforts and influences should lead to managers' better understanding of compliance requirements, including competition law and its related business risks. However, very few studies attempt to measure the level of managers' competition law awareness in selected jurisdictions, and studies about the actual implementation of compliance programmes and their design are equally rare.

3.1. Competition law awareness and compliance programmes

Awareness

Two relatively recent studies on the level of competition law awareness of managers come to rather disappointing results, showing an overall insufficient familiarity of senior business representatives with competition law.

A 2018 study commissioned by the UK's Consumer and Markets Authority (CMA) (ICM Unlimited, 2018^[32]) shows only small improvements of competition law awareness of UK firms compared to findings from a 2014 survey.⁶³ Only a quarter of businesses claim to have a good knowledge of competition law. While the illegality of price fixing and its consequences were understood by 60%, more than half believed that the risk for anti-competitive behaviour was low in their sector. Only six per cent of respondents received a competition law training in the last year, and less than 20% reported senior management discussions on the topic. Almost 70% were not sufficiently aware of sanctions for non-compliance, and almost two thirds did not know who enforces competition law in the UK. More than half of the respondents were not aware that reporting illegal cartel activity could lead to immunity from sanctions, and only one third knew about the illegality of resale price maintenance. All respondents to the survey were senior individuals with sales responsibility.

A 2017 study on the perception of competition topics and Cofece's, the Mexican enforcer, work (McKinsey&Company, 2017^[33]), undertaken for Cofece, surveyed business representatives, private practitioners, public servants and other opinion makers, and provides differentiated results for business representatives. While more than 90% of the respondents knew that Cofece's mandate was to review mergers and prosecute anti-competitive practices,⁶⁴ more than 80% of the business representatives had very little or no knowledge of the competition law, and only 4% said that they had a good familiarity with the investigation procedures. The majority of business representatives affirmed that they had experienced anti-competitive practices in the industries they represent, but they had not previously considered reporting them to Cofece. Only 9% of business representatives knew of the leniency programme, and a third of those had doubts about its effectiveness. Except for specialised competition lawyers, basically none of the respondents would ever use guidance material published by Cofece. Representatives of larger companies stated that they had compliance programmes in place, which was not the case for medium and small businesses.

Compliance programmes

A study by (Götz, Herold and Paha, 2016^[34]) presents the results of a 2013/14 survey on competition law compliance in Germany, Austria, and Switzerland.⁶⁵ It was carried out against the background of high enforcement activity of the European Commission, significant fines and successful leniency programmes, and a rise of damages actions, to see if preventive efforts in the form of effective compliance programmes could be observed in response. The study shows a steep increase in the number of implemented programmes since 2005. More than half of the programmes addressed antitrust risks, and of those that did, about half of the implementing firms had been engaged in cartel activity in the past. More than 80% thought that their employees' knowledge of competition law and the legal consequences of violations was incomplete, and about 80% believed that their employees underestimated detection risks. Of the respondents that had previously violated competition laws and had implemented compliance programmes, more than 90% provided information and training, which had been the case for only half of them when their last competition infringement occurred. The study also finds that most respondents did not go much beyond training and were not addressing actual risk factors for cartels appropriately, such as demand shocks, changes in the competitive environment, changes in profit, or adverse promotion or salary incentives. The authors conclude that more active and targeted risk mitigation strategies were needed, as well as clearer communication of internal sanctions for competition law violations.

Box 3.3. Corporate Anti-Corruption Compliance Drivers

The 2020 OECD Study on Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change (OECD, 2020^[27])

The study is based on the responses of 130 business representatives from 28 countries to a 2019 survey, representing a variety of industries throughout the world. Almost all of the respondents had anti-corruption compliance programmes in place. Additional OECD research and country reporting were used to inform the study. Chapters two and six explore reasons and challenges for adopting compliance programmes. They may be of particular relevance to the competition debate. Other chapters cover risk assessment, specific compliance measures, resources to inform the compliance policy, and ways forward.

Chapter two of the study looks at compliance motivation. Almost 80% of respondents reported the wish to protect the company's *reputation and/or to avoid prosecution* as the major motivation for adopting a compliance programme. Nearly 70% indicated that having a compliance programme in place would *allow them some "credit"* in their jurisdiction, either in the form of a company defence or mitigation of damages. However, the study did not establish a clear causal relationship between the availability of "credit" and having a compliance programme. 14 out of 124 respondents with a compliance programme did not come from credit-granting jurisdictions. As a secondary reason for establishing compliance programmes, the study identifies the desire to *compete for government or non-government contracts*, which applied to about half of the respondents.

Chapter six discusses challenges for implementing anti-corruption programmes. Almost 60% of the respondents reported a *lack of understanding that a compliance programme was needed*. Almost the same percentage reported a *lack of executive commitment*. For approximately 50%, the *lack of financial or staff resources* was a serious constraint. The *pressure to make profit* was reported as being fundamentally at odds with compliance policies in some companies. About a third of the respondents stated that large *geographic diversification* of the company activities presented a problem. Local adaptation, third-party compliance and cultural hurdles were identified as obstacles, as was the effectiveness of the rule of law in certain jurisdictions.

All studies have distinct terms of reference and goals, and their results cannot be easily compared. However, they have one common theme, which is insufficient knowledge of business representatives of competition law requirements and reporting opportunities, and an underestimation of detection risks. The results of the (Götz, Herold and Paha, 2016^[34]) study imply an overreliance on training. Insights from anti-corruption compliance point in a similar direction, indicating a lack of executive commitment and lack of sufficient compliance resources (Box 3.3). More studies, and studies that use comparable terms of reference across jurisdictions could help to inform the debate.

3.2. Cartel enforcement statistics⁶⁶

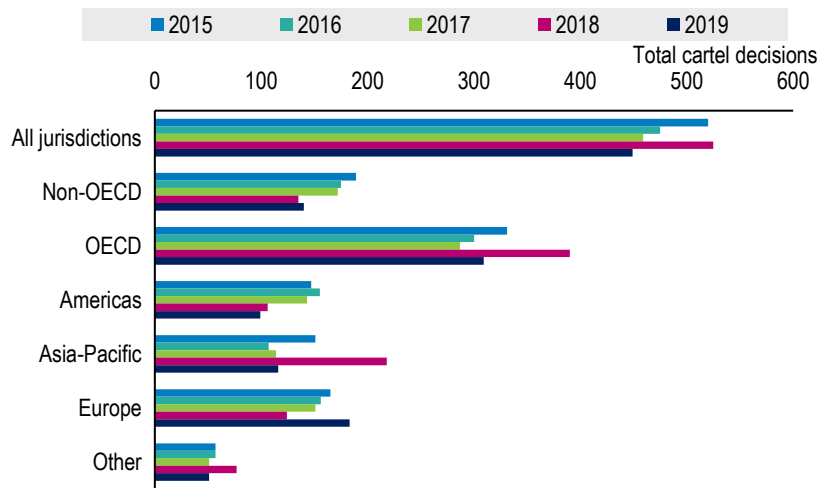
In order to measure the success of widespread public and corporate competition compliance efforts, ideally a measure of the intensity of market competition and its change over time should be used. Ultimately, successful compliance efforts should lead to the reduction of anti-competitive behaviour and a corresponding increase in market competition and consumer welfare. This is however, a next to impossible endeavour. Measuring market competition as such is far from trivial, and all measures have their own limitations (see (OECD, 2021^[35])). Finding a causal relationship between compliance programmes and market competition on top of this adds a level of complexity, which would be hard to meet. There are so many possible determinants of market competition that it would seem extremely challenging to isolate the impact of compliance efforts.

Cartel statistics may be used to at least inform the discussion, but it needs to be kept in mind that their analytical value for the question at hand is limited. Given the secret nature of cartels, statistics can only be based on detected cartels. There is no way of inferring any insights from these numbers on the actual (secret) cartel activity, its increase or decrease, and much less on causality for any alleged changes in activity levels.

For lack of better data, and acknowledging the limitations of the data used, we will look at some developments in cartel detection, cartel fines, leniency applications and dawn raids. Their developments could be at least indicative of the success of cartel prevention, assuming there were no ground-breaking changes in detection methods,⁶⁷ leading to increased detection rates, and will inform the discussion on elements of effective compliance programmes (section 5.).

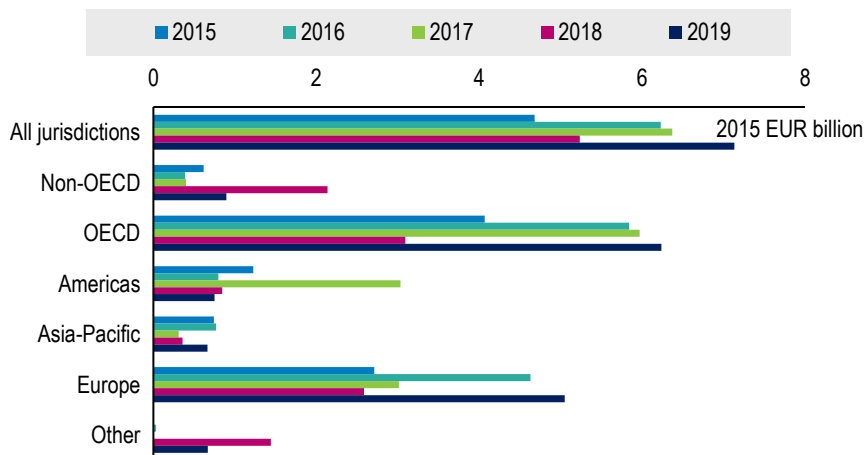
There is no clear trend in the number of cartel decisions over the last five years; they remain relatively stable, with some regional differences. The same is true for fines; they fluctuate more strongly, but without a general trend to decrease, and they peak in 2019.

Figure 3.1. Total number of cartel decisions, 2015-2019



Note: Data based on the 50 jurisdictions in the CompStats database that provided data for five years. Source: (OECD, 2021, p. 12_[36]).

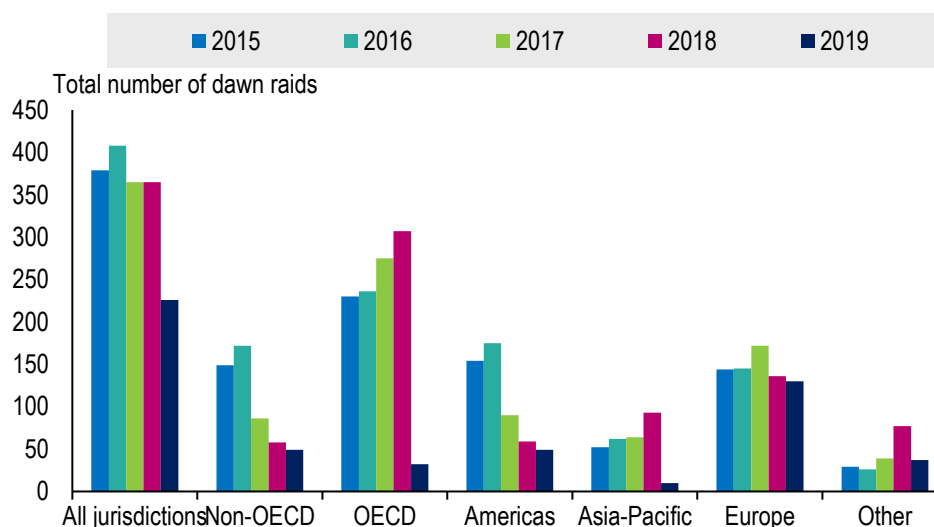
Figure 3.2. Total of cartel fines imposed, by year, 2015-2019



Note: Data based on the 50 jurisdictions in the CompStats database that provided data for five years. Fines are in 2015 EUR (non-euro currencies are converted using 2015 official exchange rates on 31 December 2015). Source: (OECD, 2021, p. 22_[36]).

The number of dawn raids has decreased significantly, by at least 40 % in 2019,⁶⁸ compared to the average number of dawn raids in the four previous years, and this drop aligns strongly with a marked decrease in leniency applications, which have dropped by 60% across all jurisdictions compared to 2015. In addition, the number of ex-officio investigations has decreased as well.

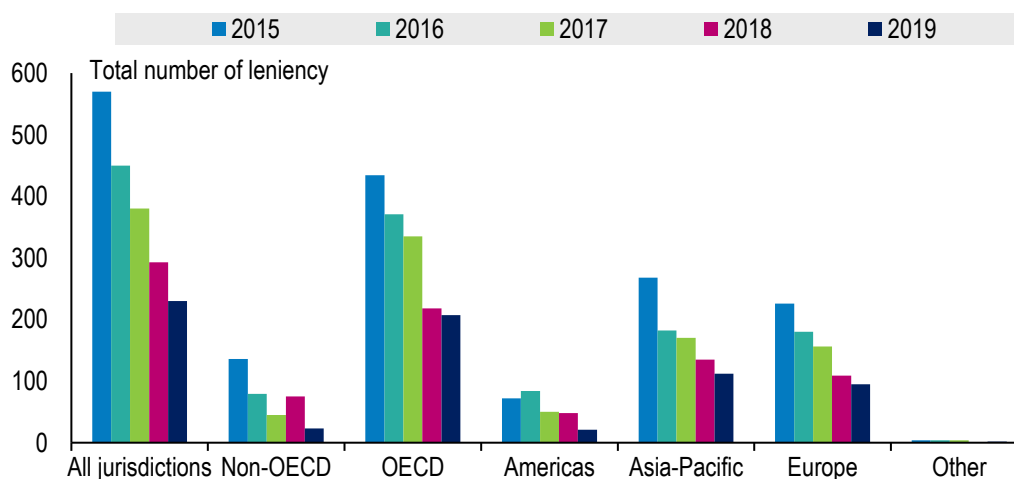
Figure 3.3. Total number of dawn raids, 2015-2019



Note: Data based on the 50 jurisdictions in the CompStats database that provided data for five years. 4 jurisdictions have reported the total number of dawn raids for both cartels and abuse of dominance cases.

Source: (OECD, 2021, p. 11^[36]).

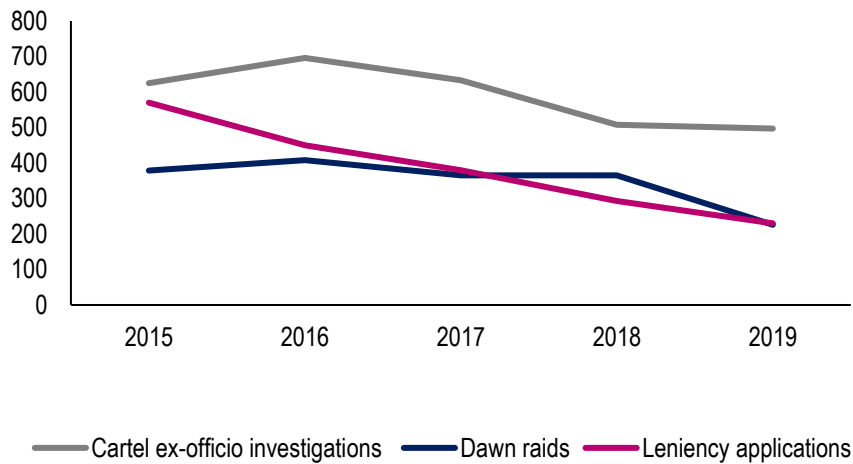
Figure 3.4. Total number of leniency applications, 2015-2019



Note: Data based on the 50 jurisdictions in the CompStats database that provided data for five years.

Source: (OECD, 2021, p. 12^[36]).

Figure 3.5. Leniency applications, dawn raids and ex-officio investigations in cartel cases, 2015-2019



Note: Data based on the 50 jurisdictions in the CompStats database that provided data for five years. 4 jurisdictions have reported the total number of dawn raids for both cartels and abuse of dominance cases.
Source: OECD CompStats Database.

The statistics leave room for interpretation. The constant numbers of prosecuted cartel cases and continuously high fines (almost EUR 30 billion from 2015-2019) could suggest that cartel activity is unchanged. Competition authorities using their standard detection tools and their given resources manage to detect, prosecute and fine a “standard” amount of cartel activity. This would be in line with the findings of limited business awareness and compliance programmes focusing on form rather than actual cartel risks. However, as mentioned at the outset, detected cartel activity is not necessarily a good proxy for market competition and the success of compliance efforts.

Looking at likely future developments, cartel enforcement numbers can be expected to go down.⁶⁹ The sharp decline in leniency applications and a corresponding drop in investigatory activity should in all likelihood result in fewer cartel decisions, unless agencies manage to boost their proactive detection efforts significantly. Would this then indicate a higher effectiveness of firms’ and agencies’ compliance efforts?

It is a possible explanation, but it may not be the most plausible. While a few recent statements by private practitioners claim that in particular large multinational companies and financial services firms have stepped up their competition compliance, leading to lower cartel activity,⁷⁰ the rise in private enforcement and perceived risks of managers’ personal liability may offer better explanations for the decrease of leniency.⁷¹ They are factors which weigh heavy against applying for leniency when wrongdoing is detected internally (see also section 5.1). The International Competition Network sees indications in an upward trend of private enforcement (International Competition Network, 2019, pp. 2-3^[37]). (Ysewyn and Kahmann, 2018^[38]) confirm this trend for Europe and see it as the main reason for the decline in leniency applications.⁷² This was confirmed by a recent survey (Covington; Brussels School of Economics, 2020^[39]), where the threat of civil damages actions is by far the number one reason given for a decline in immunity and leniency applications by practitioners.⁷³

The obvious limitations of the available data and studies do not allow clear conclusions on the effectiveness of agency and business compliance efforts. At the same time, no data sources are available that would allow to draw the conclusion that business competition compliance has improved significantly, despite a significant increase in agency compliance activity. It is thus worth exploring where agency and business compliance efforts may fall short and how they could be improved to increase effectiveness and impact.

4. Insights from other policy areas – public procurement and anti-corruption

Before going into more detail on some of the main features for effective competition compliance and possible shortcomings to be addressed, it is worthwhile taking a look at two close policy neighbours: procurement, as one of the main targets of collusive conduct; and corruption, as a similar type of illegal corporate conduct and white-collar crime. Compliance insights and initiatives from both policy areas could inform the competition discussion.

4.1. Public procurement

Observed developments in public procurement can influence the competition compliance discussion in two ways. One is that the participation in public procurement procedures can be made conditional upon the existence of effective compliance programmes and thus promote the introduction or improvement of such programmes. This is, for example, the case in Brazil. Some states, notably Rio de Janeiro and Distrito Federal,⁷⁴ after the experience with the competition and corruption fallout from “operation car wash”,⁷⁵ have made participation in high-value procurement processes⁷⁶ conditional upon having an effective compliance programme in place. Similarly, “approved” compliance programmes can lead to advantages. The Italian AGCM provides “legality ratings” to companies, in which it rates corporate compliance programmes on a wider scale going beyond competition compliance.⁷⁷ Public purchasers can take them into account in public tender procedures,⁷⁸ and companies can use these ratings for easier access to credit and public funds.⁷⁹

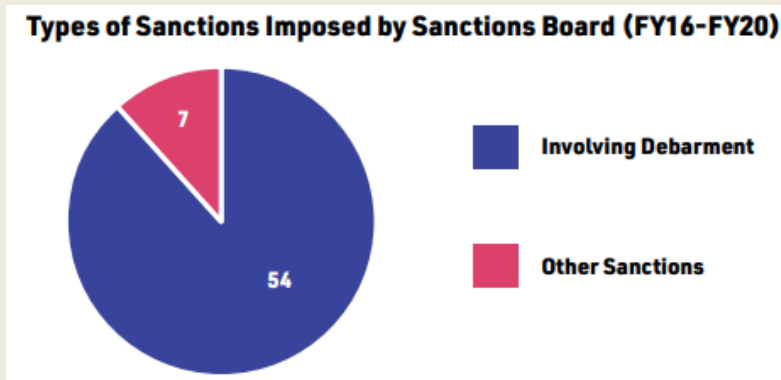
Another way in which public procurement rules may have considerable impact on agencies’ compliance policies is the role of corporate compliance programmes in self-cleaning for companies, which are excluded from tender participation because of illegal conduct. The EU procurement directive (Box 4.2) provides that companies, which have been barred from participation in public tenders because they have committed illegal acts, can be cleared when they prove that they have undertaken sufficient self-cleaning measures. This includes adequate steps to prevent future misconduct – compliance measures. The World Bank Group pursues a similar policy and can release a debarred party when it meets certain conditions (Box 4.1).

Box 4.1. Compliance Programmes – conditional release from debarment

The World Bank Group (WBG) foresees debarment as a sanction for the violation of its procurement rules, and has agreed on cross-debarment with other International Financial Institutions. Debarment can be fixed, conditional or with conditional release. For a release, the WBG will require that an adequate compliance policy is put in place.

The WBG's Integrity Compliance Guidelines provide an overview of the required steps and measures to be implemented for a release to be considered.

Between 2016 and 2020, of the 61 sanctions imposed, 54 involved debarment.



In 2020, 18 sanctioned parties were released from their debarment sanction. The WBG's Integrity Compliance Office works with the sanctioned entities from the start, explaining the compliance requirements, recommending improvements and monitoring implementation.

Source: <https://www.adb.org/sites/default/files/institutional-document/32774/files/cross-debarment-agreement.pdf>
<https://wallensteinlawgroup.com/wp-content/uploads/2017/12/WBG-Integrity-Compliance-Guidelines-full.pdf>;
 (World Bank Group, 2020^[40]).

The self-cleaning provisions of the European Procurement Directive (Box 4.2) may turn into drivers for change towards a wider recognition of competition compliance programmes when setting fines. This was communicated by Spain (CNMC, 2020, pp. 3-4^[22]), and is reflected in policy changes in Germany and Romania.

Box 4.2. Self-cleaning under European procurement law

The European [Directive 2014/24/EU on public procurement](#) foresees mandatory and facultative exclusion grounds for bidders in public tenders, and collusive agreements are among the facultative exclusion grounds (Art. 57 IV).

However, bidders “*may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.*” (Art. 57 VI). In this case, the contracting authority can admit the bidder to the tender. Such **self-cleaning** requires that the bidder provides evidence that it

- Has or will **compensate any damage** caused by the offence or misconduct
- **Collaborated with the investigating authorities** to clarify facts and circumstances
- Has taken concrete technical, organisational and personnel **measures to prevent future offences or misconduct.**

Recital 102 illustrates what is expected in terms of compliance measures. These can include *staff reorganisation, severance of all links* with persons or organisations involved in the misbehaviour, the implementation of *monitoring and control systems, internal liability and compensation* rules, and an internal audit structure to monitor compliance.

In Germany, the Bundeskartellamt will evaluate self-cleaning measures under procurement law for those companies included in the central registry of excluded bidders, and decide about the early release of an offender from the three year debarment period,⁸⁰ which fits in with the newly introduced fining provisions in the competition law. They foresee that the Bundeskartellamt, when setting the fines for an infringement, shall consider as relevant circumstances “adequate and effective precautions taken prior to the infringement to prevent and detect infringements”, and “the company’s efforts to detect the infringement and to compensate the damage as well as precautions taken after the infringement to prevent and detect infringements”.⁸¹ The Bundeskartellamt had in the past opposed credit for compliance beyond its rewards for leniency applicants.⁸² Given that one and the same agency evaluates compliance programmes for procurement purposes and when applying its fining conditions, a certain policy alignment may be expected.

The Romanian Competition Council, which also adopted a policy change towards recognition of competition compliance programmes, has issued a joint opinion with the Romanian National Agency for Public Procurement regarding how the legal requirements to avoid debarment can be interpreted in relation to competition offences. The communication states that the application for leniency, an admission of guilt and also evidence of an effective compliance programme aiming for the prevention of bid rigging offences can serve as evidence for self-cleaning, and this may have an influence on the Competition Council’s fining practices as well.⁸³ It remains to be seen if the developments in procurement law and jurisprudence will actually lead to significant changes in the enforcement and fining practice of competition authorities. Other European Union member states have not followed this approach (yet).⁸⁴

In general, competition agencies should be aware of developments in the area of public procurement and the opportunities for compliance they present. The ability to have access to public tenders can provide a strong incentive for the implementation of compliance programmes, and *competition* compliance would naturally be high on the list when it comes to public tendering processes. Competition agencies could promote such policies in their jurisdictions and play an active role in their implementation. However, any provision making compliance programmes mandatory should ensure that this does not create an obstacle to tender participation by smaller market players, thus potentially reducing the number of competitors and competition. In addition, the resource implications for the evaluation and monitoring of compliance programmes should

not be underestimated, and carefully balanced against the benefits (see section 2.3). Any regulation that merely incentivises compliance on paper will not be worth the effort, and the likelihood for such programmes may be higher when they are mandatorily imposed from the outside.

4.2. Anti-corruption

Compliance programmes also play an important role in anti-corruption policies. The OECD is a global frontrunner in the fight against corruption and has adopted over 20 legal instruments to fight corruption and bribery, and to promote integrity in the public and private sector. They include Decisions, Recommendations, Declarations, and International Agreements.⁸⁵ The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention) (OECD, 1997^[41]) made it mandatory for its 44 signatories⁸⁶ to establish the bribery of foreign public officials as a criminal offence under their laws and to investigate, prosecute and sanction this offence. Ongoing monitoring of the Convention's implementation provides data about enforcement practices and incentives for anti-corruption compliance as well as for co-operation with law enforcement agencies.⁸⁷

Some authors argue that competition law violations are not very different from corruption offences – they are often committed (or silently allowed) by senior management, they can be the essence of an illegal business model, and they can benefit the company by generating higher profit.⁸⁸ When it comes to compliance programmes, however, there is a marked difference in their treatment and recognition by law enforcement. While many jurisdictions will acknowledge compliance programmes when dealing with anti-corruption offences, and their existence can even preclude corporate liability, or at least have a significant mitigating effect on any penalty,⁸⁹ this is not common practice for competition offences. Are competition compliance programmes therefore the “poor relation” in the compliance world (Riley, 2019, p. 4^[42])? Thépot argues that this difference in treatment is not justified by the nature of the infringement, nor by liability being mostly administrative and on corporations, and that competition agencies should incentivise compliance programmes. This could help to solve principal-agent problems within a firm, and bring benefits in the form of better prevention, and freeing agency resources (Thépot, 2019, pp. 196-237^[43]).

Insights from OECD work on corruption show that the approach to compliance programmes is in fact different from competition, but they also show that there may be good reasons for such difference in approaches. This may justify competition's less forthcoming attitude towards rewarding compliance programmes or even exoneration from fines.

Historically different liability regimes

Corruption is a criminal offence, and enforcement has historically targeted individuals. It is only over the last 20 years, following the entry into force of the Anti-Bribery Convention, that corporate criminal liability was established in more and more jurisdictions.⁹⁰ Contrary to this, and with a few notable exceptions, competition offences traditionally resulted in corporate liability, and individual wrongdoing would be imputed to the firm. Many jurisdictions work primarily in an administrative enforcement regime, and sanctions against individuals are often weak, and rarely lead to prison terms, even when the enforcement regime is criminal.

Historically, the business rationale to establish a *competition* compliance regime was thus always stronger, as the companies would be directly hit by a fine, and the need for competition agencies to provide additional incentives to firms was lower.

Fundamental difference in reporting and detection

Even more importantly, and explained by the different nature of competition and corruption or other corporate infringements, there are marked differences in detection and reporting of offences, enabling effective

enforcement in the first place. Cartel conduct is unique, as it involves not only co-ordination within or action by one firm, but between two or more firms. While the difference has not gone unnoticed (Abrantes-Metz and Sokol, 2013, p. 2^[44]), the consequences of this unique feature for detection and enforcement and subsequently for incentivising compliance programmes do not seem to have attracted much attention yet.⁹¹

For cartels, the larger number of unrelated parties to an infringement, which pursue their individual goals, significantly increases the risk of and the chances for detection compared to corruption offences. The number of potential sources for tip-offs to the agencies is much higher. They can be company internal, as for other offences, but the numerous potential external sources are a lot more promising, and they are absent in other offences. Harmed customers may occasionally become aware and report. Every cartelist or employee of a cartelist could turn to the authorities to report the cartel. Third parties often play a co-ordinating role and could report as well.⁹² Consequently, promoting reporting through leniency programmes has become one of the main tools in detecting cartels (OECD, 2018^[45]). Competition leniency and immunity programmes benefit from playing cartel participants against each other, using the cartel-inherent forces of self-destruction.

In corruption cases, neither the recipient nor the giver of a bribe are likely to report, direct victims can be hard to identify, and third parties may have only scant information in case of a suspicion (OECD, 2017, p. 9^[46]). This explains anti-corruption's heavy emphasis on whistleblowing and the focus on the prevention of offences – compliance. The rationale for granting strong incentives for compliance and enforcement co-operation is based on an acknowledgement that companies have a competitive advantage compared to law enforcement agencies when it comes to preventing and detecting offences within the company – they know much better what is happening inside – and that enforcement should tap into this resource to increase its effectiveness. Data show that self-reporting has proven to be the most relevant and reliable single source of detection for the crime of foreign bribery - 22% of foreign bribery schemes are detected through self-reporting (OECD, 2017, p. 10^[46]),⁹³ and self-reporting is the highest yield reporting mechanism when it comes to sanctions in reported cases.⁹⁴

A comparison of the statistics for international bribery cases and international cartel cases⁹⁵ shows that anti-corruption cases are fewer and involve a significantly lower number of (sanctioned) players. Between 1999 and 2019, parties to the Anti-Bribery Convention had convicted or sanctioned at least 651 natural and 230 legal persons for foreign bribery through criminal proceedings, and at least 87 natural and 115 legal persons through administrative or civil proceedings (OECD, 2019^[47]), making it a total of 345 sanctions against legal persons in 20 years. For international cartels, between 1999 – 2018, more than 1 000 cartels were discovered, involving more than 9 000 legal entities. Assuming that corruption offences happen at least as often as cartels, this may prove two important and related points: (i) the current leniency-based cartel detection system is more effective in detecting infringements, and (ii) the number of parties involved, which could be incentivised to report, is many times higher.

This also implies that competition agencies should be wary of compromising the reporting incentives most meaningful to them. They only exist when sanctions are sufficiently high, and they consist mostly of monetary fine reductions. To grant additional reductions from fines for compliance programmes would decrease the economic incentives to apply for leniency. In light of already decreased leniency applications, any policy change towards more generous rewards for compliance programmes would need to be considered very carefully.

5. Effective compliance programmes

When competition agencies spend time and resources incentivising, evaluating and rewarding corporate competition compliance programmes, this should pay off in more prevention and detection, and, ultimately, more competition.

To date, and based on the evidence available, no firm conclusions can be drawn on the success of agencies' compliance efforts. The question about what is essential to ensure that a compliance programme is effective remains. Answers to this question would allow agencies to better focus their compliance efforts in enforcement and advocacy, and businesses to improve their policies.

There is widespread unanimity about the main elements of a compliance programme, and the criteria established by the US guidance (U.S. Department of Justice, 2019^[3]) can serve as a good starting point (Box 2.3). It is one of the most recent guidance documents, and most other agency guidelines (see Annex Agency guidance) use similar criteria (see Box 1.1).⁹⁶ It also provides helpful and operational checklists, which can facilitate internal and external assessments.

This chapter, instead of expanding on well-known, existing elements, will look selectively at a few elements of compliance programmes which could be particularly relevant for the effectiveness of compliance policies, and which could merit more attention by competition agencies wanting to promote compliance more effectively.

The elements are detection and facilitation of prompt reporting, senior management involvement, monitoring and auditing, compliance incentives, and third-party compliance. They are elements where jurisdictions take different approaches, or which are not routinely included in agency guidance documents, but which could make the difference between an effective and a “paper” programme. This focus does not imply that the other elements are less relevant.

5.1. Detection and prompt reporting

A number of agencies emphasise that to be considered effective a compliance programme has to lead to the detection of violations and to subsequent reporting to the authorities. This is also the rationale of enforcers such as the European Commission, which consider leniency and immunity as the ultimate reward for an effective compliance programme. Peru requires reporting to Indecopi as a prerequisite for fine mitigation accounting for a compliance programme (Indecopi, 2020, p. 38^[9]). In Germany, in general, a compliance programme should not be considered effective and worthy of a fine reduction if it did not lead to the detection and reporting of the infringement.⁹⁷ The US DoJ asks whether the programme detected the violation and facilitated prompt reporting as one of the basic, preliminary questions when assessing the effectiveness of a programme, although a failure to do so is not dispositive. Other jurisdictions such as Canada, Italy, Spain, Romania or Australia will also consider reporting to the competition agency as an important element of an effective programme, albeit not an essential pre-condition.⁹⁸

A similar approach is followed in the EU procurement directive (Box 4.2), which makes damage mitigation and collaboration with the investigating authorities pre-conditions of an early release from debarment.

Box 5.1. Reporting – the business perspective

From the business perspective and that of their advisors, the decision to report and to apply for leniency or immunity, where applicable, is far from obvious. (Ysewyn and Kahmann, 2018, p. 44[13]) note that there is no legal obligation to report and apply for immunity and state that **“Making an immunity application is the result of a complex weighing of the benefits and disadvantages—and a detailed risk analysis.”**

On the pro side, immunity and fine reductions are obvious benefits, as are better working relationships with competition enforcers, positive investor reactions, avoidance of appeal costs, partial protection from damages payments, and protection of individuals. On the negative side there are legal uncertainties, losing a chance to escape a fine without co-operation, uncertainty about jurisdiction and discretionary marker regimes, high administrative hurdles and costs, the duration of cartel proceedings, domino effects, relationships with competitors, consequences for employees, and, as the most important factor, the risk of private damages. This results in the conclusion that an obvious strategy to pursue, when the balance is negative, would be to have a leniency file ready in case of detection, and to otherwise play the “waiting game” until the limitation period is reached (Ysewyn and Kahmann, 2018, p. 58[13]). Similarly, (Stephan and Nikpay, 2014[83]) conclude that the decision to apply for leniency entails a careful balancing of a number of uncertainties, and list follow-on damages actions as an important factor.

Other commentators have equally stressed that a leniency application is a balancing exercise, weighing in particular costs from private damages actions against the benefits from fine reductions.

Source: PARR, 24 March 2021, Increasing damages, compliance programmes slow EC cartel enforcement – Analytics, <https://app.parr-global.com/intelligence/view/intelcms-qbwbrb>.

These agency perspectives stand in stark contrast to the views expressed by the business side (Box 5.1). There the message is far from simple, and businesses will weigh costs and benefits before applying for leniency, when a violation is detected internally. However, what does not seem to be included in the cost/benefit calculation are the implications of such a seemingly rational balancing strategy for the credibility of a company’s compliance message and policy.

While it is true that there is no legal obligation to report a competition law violation to a competition agency, the compliance perspective should at least strongly suggest such reporting, and can be seen as a test case for the credibility of corporate ethics claims and the leadership’s commitment to these ethics.

As leniency is one of the most important detection tools for competition agencies, conditioning the effectiveness of compliance programmes to a pro-active decision of the company to self-report a detected (cartel) infringement would likely contribute to stopping the decline in applications and reversing the trend. Next to addressing many of the legitimate concerns that companies have when reporting for leniency, the approach taken by jurisdictions such as the Peru, Germany, Canada or Spain, making reporting a requirement for sanction mitigation or other advantages that a company can gain for having a pre-existing compliance programme could help to make leniency regimes more effective again. Such an approach can also be incorporated in agency policies that grant credit for prospective or improved existing programmes. A commitment to report could be made an express requirement of future compliance obligations. When imposing compliance obligations, this could equally be included as a basic tenet of the compliance policy.

5.2. Management involvement

It is a constant and recurrent feature of compliance literature and agency guidelines that for a compliance programme to be effective, the tone from the top is essential. Senior management needs to lead by example and express clear expectations regarding compliance, creating a “culture of compliance”. In the same vein, senior management involvement in the competition law violation, promotion or ignoring of anti-competitive conduct⁹⁹ are considered very strong indicators of an ineffective compliance programme and culture. The US Sentencing Guidelines,¹⁰⁰ when considering mitigating factors for existing compliance programmes, consider it a rebuttable presumption of ineffectiveness; similarly the DoJ’s compliance guidance considers whether the company promoted a culture of compliance and whether company leadership was involved in the misconduct (U.S. Department of Justice, 2019, p. 14_[3]), also Spain (CNMC, 2020, p. 8_[22]), and Germany.¹⁰¹ Canada also sees it as an indication that a compliance programme was not effective, and may in addition consider management involvement as an aggravating factor when determining the fine (Competition Bureau Canada, 2015, p. 8_[2]). The flipside of this coin is the acknowledgement by jurisdictions willing to accept an effective, pre-existing compliance programme as a mitigating factor that even the best compliance programme cannot completely prevent anti-competitive action by an employee set to engage in it, the famous “rogue employee”.

In order to make compliance efforts more effective, empirical evidence about the extent of senior management involvement could be useful, as it would allow conclusions on where compliance efforts by agencies and businesses could be improved and better targeted.

Box 5.2. Cartels with top level management involvement

France – the sandwich cartel

The French Autorité de la Concurrence has imposed fines of EUR 24.6 million on three large producers of sandwiches sold in supermarkets in March 2021. They had co-ordinated their offers to large supermarket chains over a period of six years, ending a price war and entering into a “non-aggression-pact”. From its inception, the cartel was **co-ordinated at the highest management level** for all three producers.

European Commission – canned vegetables cartel

In 2019, the European Commission found three suppliers of canned vegetables guilty of price fixing, market sharing and customer allocation in the EEA for more than 13 years and imposed total fines of EUR 31.7 million. The decision states: *The ‘top-level’ meetings took place generally at least once a year between the management executives of the addressees to discuss and agree on the general orientation of the conduct, the overall level of price increases, the market shares and volumes of each addressee, including the compensation due if some of them would not respect the agreed volumes* (emphases added).

United States – canned tuna cartel

In 2020, the **former CEO** of one of the companies involved in the price fixing of canned tuna was sentenced to 40 months in jail for leading the conspiracy of three canned tuna producers. **Three other executives pleaded guilty** as well, among them a vice-president of sales. During the proceedings, implicated individuals included senior-level managers with titles like CEO, CFO, COO, Chairman, Controller, Regional Sales Manager, Vice President of Operations, Senior Vice President of Sales, CEO of US Operations, Head of Human Resources, or Vice President of Retail Sales.

Sources: <https://www.autoritedelaconcurrence.fr/fr/communiqués-de-presse/lautorite-de-la-concurrence-sanctionne-pour-entente-les-3-principaux>;
https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2021-03/21d09.pdf;
https://ec.europa.eu/competition/antitrust/cases/dec_docs/40127/40127_2661_3.pdf;
<https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna>;
<https://globalcompetitionreview.com/exec-plead-guilty-first-charges-in-tuna-probe>;
<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/02/Tuna-Tales-The-Antitrust-Tsunami.pdf>.

While it is easy to find case examples for senior management involvement (Box 5.2), the actual empirical evidence for the management level involved in competition law infringements is patchy at best. Older studies such as (Lande and Connor, 2012, pp. 12-13^[48]) show that out of 151 individuals charged with prison sentences in the US between 1990 and 2008, 64 were either head of the company or senior level management, and 77 were mid-level management, of which 35 had sales or marketing responsibility. (Combe and Monnier, 2020^[49]) point out that high ranking company employees are the offenders in detected cases. (Stephan, 2011^[50]), analyses a sample of 40 cartels, where mostly sales or marketing managers were directly involved in the cartel, and at times also the general management.¹⁰² (Wils, 2013, p. 8^[7]) states that evidence from antitrust infringements shows that most involve senior management. Similarly, (Klawiter, 2019^[51]) states that over the past 25 years, the majority of international cartels was operated by the senior management of the companies, which was to be explained by the size and significance of the agreements.

Box 5.3. What makes cartels attractive for senior employees?

Various publications look at the incentives for managers to engage in cartel conduct.

Explanations offered include:

Remuneration mechanisms based on performance indicators, share values and stock options (Combe and Monnier, 2020, p. 42^[49]), (Thépot, 2019^[43])

Benefits outweigh cost for managers, who will often have left the company by the time an infringement is detected and prosecuted (Combe and Monnier, 2020, p. 42^[49])

Managers are not being held internally accountable – a study shows that managers of cartel firms have higher job security, receive higher cash bonuses, and extract more ex post compensation through timely exercise of stock options (González, Schmid and Yermack, 2017^[52])

Ignorance about illegality of the conduct, economic crises which can serve as justification or will trigger irrational behaviour, and arrogance promoted by the culture of cartel meetings, and trust-building socialising and bonding (Stephan, 2020^[53])

Involvement of senior management in corporate crime being rather the norm than the exception, as suggested by the competition literature, is supported by OECD foreign bribery data. Senior management is most frequently involved in bribery committed by a company, namely in 75% of the cases being subject of a recent study (OECD, 2020, p. 8^[54]).¹⁰³ A 2014 OECD report shows that senior management was involved in over 50% of the foreign bribery cases between 1999 and 2014 (OECD, 2014, p. 23^[55]).¹⁰⁴

For agency compliance policies, persistent involvement of senior management in cartels signals that the agencies' compliance efforts may still not be sufficiently effective, and this finding would be in line with presented study results (see section 3.1). It also indicates severe shortcomings in a company's compliance policy, and could be taken as a strong indicator for an ineffective corporate compliance policy, as is the case for the jurisdictions referenced at the start of this section.

Enforcement remedies could be sought in sanctions for individuals, such as higher fines, imprisonment or director disqualification, for example, but this discussion is beyond the scope of this paper. An emerging discussion, which could feed into future agency and business compliance strategies, puts a spotlight on gender balance in company management and its compliance implications (Box 5.4). A study by PWC shows that managers who engage in fraud are generally middle-aged men, with higher education and 3-5 years of experience.¹⁰⁵

Box 5.4. Improving gender balance to improve compliance

The debate on how **gender imbalances** can impact competition enforcement and **business compliance** is recent and ongoing. First indications suggest that more equal gender representation could make a positive difference for competition compliance.

Several studies have tried to understand the influence of gender differences on numerous economic aspects (see (Akerlof and Kranton, 2000^[56]); (Becker, 1957^[57])), and studies across different fields concluded that, **on average, women tend to be more compliant** with rules and procedures than men (for example, respect for infection control precautions (Ward, 2004^[58]), measures to contain COVID-19 (Galasso et al., 2020^[59]), tax compliance (D’Attoma, Volintiru and Steinmo, 2017^[60])). (Feldman and Lobel, 2010^[61]) conducted an empirical study to examine a range of mechanisms that are employed by legal systems to encourage whistleblowing. The results show clearly that **women are more likely to whistleblow** to law enforcement on corporate misconduct or financial fraud, as well as on environmental misconduct. The studies might have important implications for competition policy insofar as **policies that encourage or require gender balance** on boards and senior leadership positions might have **pro-competitive effects and foster compliance with competition law**. An analysis of the Connor database of private international cartels provides some support for the hypotheses that **women tend to collude less**. In particular, it was found that less than 5 per cent of the executives prosecuted for involvement in international cartels between 2010 and 2016 were women (OECD, 2018, p. 27^[62]). However, this could also be explained by lack of opportunity or more intelligent approaches to misconduct.

In 2018, the OECD began to investigate whether a gender lens might help deliver a more effective competition policy, as well as whether a more effective competition policy can help address gender inequality ((Pike and Santacreu-Vasut, 2019^[63]); (OECD, 2018^[62])). Pike (Pike, 2018^[64]) suggests that the adoption of a gender-sensitive approach might help understand differences in firms’ compliance with competition law.

To address the research gap on gender-inclusive competition policy, the OECD, with the support of the Canadian Government and in particular the Canadian Competition Bureau has selected seven research proposals that will generate new evidence to inform the debate and help develop guidance on how to make competition policy more gender inclusive.¹⁰⁶

Note: All current and future materials related to the OECD’s work on gender inclusive competition policy can be accessed here <https://www.oecd.org/daf/competition/gender-inclusive-competition-policy.htm>.

For compliance advocacy purposes, competition agencies may want to rethink or add to their strategies, if they want to reach those that matter most for the effectiveness of compliance policies – senior managers. Possible strategies to consider, apart from the existing senior management commitment requirements under the various agency policies, could be

- Include requirements for regular and targeted training for senior management, including top level, in corporate compliance programmes
- Provide basic competition law training in business schools
- Ensure third party monitoring and internal audit include top level management files and communication
- Enable peer learning – this could be facilitated through promotion of third-party compliance measures (see 5.5), or having managers responsible for anti-competitive conduct and convicted for an offence reporting their experience to other executives

- Reporting/whistle-blowing channels that allow the implication of senior management and reporting to authorities without getting the senior management involved and alerted, and preventing retaliation risks
- As far as permissible within existing legal frameworks, public naming and shaming of responsible managers to increase reputational risk.

5.3. Compliance incentives

Agency compliance guidance often includes references to and requirements for adequate compliance incentives and discipline, and they are mostly directly related to rewarding and incentivising compliant or punishing deviant behaviour. What is only rarely considered are indirect (dis)incentives to comply, as can be established by ambitious performance goals and performance based salary schemes. To put it very simply: even the best corporate compliance programme will not be worth the paper it is written on, when employees cannot reach their performance targets without being at least seriously tempted to resorting to illegal, anti-competitive means.

The US guidance references this issue in one sentence under element eight, compliance and incentive discipline: *Has the company considered the implications on antitrust compliance of its incentives, compensation structure, and rewards?* (U.S. Department of Justice, 2019, p. 11^[3]). Chile's guidance mentions that employees' incentives and salaries must be compatible with the legal framework for competition (Fiscalia Nacional Economica, 2012, p. 11^[23]). However, such statements by competition agencies are rare and the topic may warrant more attention, when agencies want to engage in determining the effectiveness of compliance efforts. While performance based salaries and incentive schemes should not be discouraged, as they can greatly increase staff and company performance, they should also not encourage or even create a need or strong temptation for anti-competitive conduct to make them attainable.

The G20/OECD Principles of Corporate Governance foresee that key executive and board remuneration should be aligned with the longer term interests of the company and its shareholders, including sanction and clawback provisions for cases of serious misconduct (OECD, 2015, p. 50^[65]). This emphasis on longer term interest can inform competition compliance considerations, as there are various ways in which salaries can reflect shorter or longer term performance indicators, which are more or less prone to anti-competitive conduct.

(Herold, 2016^[66]) argues that an appropriate design of incentive pay should complement other compliance measures. Economic thinking, insights from agency theory and from cartels suggest that managers' incentives to engage in collusion will be influenced by bonus-related mandatory profit thresholds and bonus caps. As participation of high ranking company officials often coincides with incentive based and variable remuneration schemes, such schemes have the potential to trigger high-risk, fraudulent behaviour by managers according to various studies (Combe and Monnier, 2020^[49]). According to (Aghadashli and Legros, 2020^[67]), high or low bonuses can be red flags for corporate responsibility, as they can mirror company owners' willingness to induce explicit competitor communication by their managers. (Viros, 2020, p. 35^[68]) considers that the way an employee's pay package is structured can provide the key to deciphering existing incentives for anti-competitive conduct, even though it may not tell the whole story.

It will certainly not be easy for competition agencies to create operational criteria for compliance compatible remuneration schemes, and they need to keep in mind the performance enhancing benefits of incentive based salaries. It may nevertheless be possible to identify blatantly inappropriate schemes when examining pre-existing compliance programmes and to oblige companies to take remuneration schemes into consideration as part of their compliance policies. They are best placed to assess if what they are asking is possible without violation of competition laws, and failure to do so would again signal a lack of management engagement and support for the corporate compliance policy. In order to create a more solid basis for such

an assessment and to identify red flags, agencies could pay attention to the existence of such incentives in ongoing cartel investigations or review old cases.

5.4. Auditing and monitoring of business processes

Including audit and monitoring requirements in the assessment of effective compliance programmes is a rather standard element, used by many competition authorities, but it mostly relates to the compliance programme as such, its review and the confirmation that processes are in place or trainings are conducted. However, monitoring and auditing requirements can go further and apply directly to business transactions and processes that are identified as a competition compliance risk, or to communications monitoring. The European Commission asks for auditing and monitoring as prevention and detection tools, in particular when a firm is active on tendering markets (European Commission, 2013, p. 18^[4]), similarly to the US, which asks for the use of screens and communication monitoring tools (U.S. Department of Justice, 2019, p. 10^[3]). Chile and Peru also refer to screening and use of software to, for example, monitor conversations with competitors.¹⁰⁷

While the competition discussion on algorithms often focuses on the compliance challenges they present (Box 5.5), they can also be a tool for more effective compliance.

Box 5.5. Algorithms as a compliance risk

The biggest challenges to compliance exist when algorithms interact without human interference and without being explicitly programmed in this way, and arrive at collusive or otherwise anti-competitive outcomes (OECD, 2017, pp. 33-42^[68]). However, high-level expectations of competition authorities have been articulated early on and clearly. As expressed by the European Commission's Executive Vice-President and Commissioner for Competition Margrethe Vestager in 2017 "... *I think we need to make it very clear that companies can't escape responsibility for collusion by hiding behind a computer program. What businesses can – and must – do is to ensure antitrust compliance by design. That means pricing algorithms need to be built in a way that doesn't allow them to collude...., they need to respond to an offer of collusion by saying "I'm sorry, I'm afraid I can't do that."* Similarly, and related to corporate compliance, the US Department of Justice's Deputy Assistant Attorney General Richard A. Powers said "..., *given the level of discussion around this topic over the last few years, a company would have a hard time persuading us that it had an effective compliance program if it didn't account for the types of risks associated with pricing algorithms and similar tools, and this failure contributed, in part, to the criminal anticompetitive conduct at issue.*"

(Deng, 2019^[69]) has developed a number of **criteria** which can be used to ensure that **algorithms comply by design**. They should obviously not be designed with the goal to enable or facilitate collusion, and they should not be intentionally exposed to competitors. Additionally, algorithms should not open a secret back door to other algorithms that would allow cheap talk and signalling behaviour between the algorithms, nor should they be programmed to switch between collusive and non-collusive pricing decisions conditional upon a competitor's reactions to signals (Deng, 2019, p. 4^[69]). Good compliance practice could require experimental testing to see if pricing algorithms would lead to tacit collusion.

However, competition authorities have so far not issued specific guidance on their expectations relating to what constitutes effective AI or algorithmic compliance in their guidance on compliance programmes as such. The OECD AI Principles can be a good starting point for businesses seeking to use AI and algorithms responsibly in their business processes. They underline that the use of AI should be transparent, continually risk-assessed, and allow for full accountability.

Note: OECD AI Principles - <https://www.oecd.org/going-digital/ai/principles/>; OECD Council Recommendation on Artificial Intelligence.

Algorithms can support businesses in their monitoring, prevention and detection efforts, which can benefit from widely available know-how on screening for anti-competitive behaviours. Particularly for cartels, there is rich literature and agency experience on screening for markets susceptible to collusion as well as for behaviours and market outcomes that could indicate collusive market behaviour.¹⁰⁸ Provided sufficient data is available, such screens can be applied by businesses internally. (Schwalbe, 2016^[69]) also identifies screens to identify abusive behaviour, both structural and behavioural. In addition to structural, price or performance based screens, companies can use Artificial Intelligence (AI) to monitor company communication for suspicious signs, such as keywords in competitor communication, which can lead to an early flagging of potentially problematic behaviour (Deng, 2019, p. 4^[70]).

(Johnson and Sokol, 2020^[71]) underline that when risks for algorithmic collusion exist, the detection methods within a company must address such specific compliance risks, and screening approaches should be implemented. A focus should be put on known high-risk activities and markets, such as government procurement.¹⁰⁹ Such internal screening is not new or uncommon, as it is already used in other regulatory fields, such as fraud, corruption,¹¹⁰ and commodities or securities trading to identify indicators or anomalies that can suggest market manipulation. As expressed by US Department of Justice Deputy Assistant Attorney General Matthew S. Miner in relation to fraud investigations, “... companies have better and more immediate access to their own data. For that reason, if misconduct does occur, our prosecutors are going to inquire about what the company has done to analyze or track its own data resources – both at the time of the misconduct, as well as at the time we are considering a potential resolution.”¹¹¹

The example of AB InBEV (Box 5.6) shows that screening techniques initially used for anti-corruption due diligence purposes in a merger process can be meaningfully extended to a wider and regular internal compliance screening, with positive pay-offs. Data driven compliance can help businesses to become proactive in their compliance efforts, instead of leaving data investigations to slower and mostly reactive auditing functions, contributing to better business transparency and higher performance (Galvin and Walden, 2020^[72]).

Box 5.6. AB InBEV’s use of AI to fight corruption and fraud

AB InBEV has developed its own data analysis tool and machine-learning technology, BrewRight. The tool uses data from more than 50 markets of AB InBEV activity and applies risk-based algorithms to identify bribery risks proactively. It was initially developed to identify corruption risks in the due diligence process relating to the purchase of SABMiller in 2015.

The tool combines data from accounting systems with core compliance systems into a single data model. Algorithms identify and map various ethics, compliance, fraud and waste risks. According to Matt Galvin, global Vice President of ethics and compliance, the system increases transparency of compliance risks and the benefits of the compliance function, adding value to the business. If faced with the choice of hiring a data scientist or a compliance lawyer to run a compliance programme, he would nowadays choose the data scientist.

To enable the use of the application of BrewRIGHT on a wider scale, AB InBev together with Microsoft, intends to set up the first anti-corruption data analytics consortium, based on the BrewRIGHT platform. The plan is to improve corruption detection and protection, while ensuring the anonymity of underlying company data.

Sources: <https://www.ab-inbev.com/news-media/innovation/how-brewright-is-rooting-out-corruption-at-ab-inbev-and-beyond/>; <https://www.businessinsider.fr/us/ab-inbev-brewing-artificial-intelligence-to-spot-fraud/>; <https://www.lexology.com/pro/original/ab-inbev-using-ai-combat-corruption>.

It seems that competition agencies could take a more pro-active approach to corporate screening and monitoring efforts, and encourage or require them in their compliance related enforcement and other activities. The benefits of an active, company-internal search for suspicious signs for compliance are twofold: one is that it enables early detection and reporting of harmful practices to competition authorities, two is a deterrent effect on employees who know that it will be more difficult to hide illegal behaviour. For these reasons, a lack of the implementation of such tools, in particular in high-risk activities such as tendering, could imply insufficient effectiveness of a compliance programme. This component will increase in relevance with ongoing digitalisation of businesses processes and markets.

5.5. Third-party compliance

Competition agencies' compliance guidance usually does not include provisions on third-party compliance. Third-party compliance relates to any efforts of a company to promote compliant behaviour in its business partners, for example sub-contractors, suppliers, joint venture partners, or consultants. It is a well-established principle in the anti-corruption sphere (Box 5.7), in particular due to liability risks for corruption acts committed by business partners.¹¹² The US DoJ criminal division's guidance on the evaluation of corporate compliance programmes (U.S. Department of Justice, 2020, p. 7_[73])¹¹³ addresses this point. While designed primarily to address corruption concerns, the suggested steps and measures, such as risk assessments, trainings, audits and red flags for third-party compliance risks could be useful in the competition context as well.

Box 5.7. OECD guidance on third-party compliance

From the OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance:

Companies should consider, *inter alia*, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery:

...6. ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, *to third parties* such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, *inter alia*, the following essential elements:

properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;

informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery; and

seeking a reciprocal commitment from business partners.

The majority of respondents to a recent OECD survey (OECD, 2020, p. 42_[27]) would regularly carry out pre-contractual due diligence, include anti-corruption language in contracts, inform partners of their duty to comply with anti-corruption laws, and have a confidential whistle-blower mechanism. Other measures taken are audits, anti-corruption trainings or requiring certification of compliance.

Source: (OECD, 2010_[74]).

The World Bank's Integrity Compliance Guidelines (World Bank Group, n.d.^[75]), which provide practical guidance to entities debarred through the World Bank's sanctions system, dedicate a full part to business partner due diligence. They cover misconduct of all types, including collusive practices. Companies aiming to implement a compliance system are asked to encourage their business partners to prevent, detect, investigate and remediate misconduct. A prominent example for a very far-reaching compliance initiative imposed on an undertaking for corruption offences is the Siemens Collective Action initiative.¹¹⁴ In 2009, the World Bank had reached a settlement with Siemens for corruption by a Siemens subsidiary in a World Bank-financed project in Russia. Siemens had committed to pay USD 100 million over 15 years to support anti-corruption work.¹¹⁵ Currently, the initiative is in its last (golden stretch) funding round, and prospective projects include competition components.

Companies already voluntarily practice such third-party competition compliance measures, for example Deutsche Bahn,¹¹⁶ Valeo,¹¹⁷ Roche,¹¹⁸ Siemens,¹¹⁹ Oracle,¹²⁰ or LafargeHolcim,¹²¹ to just name a few. They are different in scope, and range from information or trainings to contractual obligations and auditing rights.

Agencies, when imposing compliance policy obligations on companies, could consider including obligations on them to promote business partner competition compliance. Depending on the size of the company, the requirements can vary between simple information to in-depth training or auditing. This could help disseminate the knowledge of antitrust requirements, and businesses may have better and more credible ways of communicating them to other businesses than competition agencies. Peer learning and pressure can have high impact.

Another element of third-party compliance obligations, which can be applied when assessing the effectiveness of existing programmes as well as in the design of future compliance commitments, is merger due diligence.¹²² Mergers pose a special challenge to any existing corporate compliance regime and culture, as another company's culture or the lack thereof need to be assessed and aligned, and existing compliance risks and ongoing or past violations of the laws need to be identified and addressed. Such assessments present a unique chance to systematically review business processes and documents with fresh, outside eyes, and to apply appropriate antitrust screens. Cartels have been discovered and reported to competition agencies through merger due diligence processes in the past. Agencies could consider requesting businesses to include merger due diligence provisions targeting antitrust violations as part of their competition compliance policies. Such requirements should include a commitment to report any suspicions to the relevant competition authorities (see section 5.1), and a lack of doing so would indicate that a compliance policy was not effective.

6. Conclusions

Competition compliance is a multi-layered and multi-faceted topic. As is true for the design of corporate compliance programmes, there is no one-size-fits-all approach to compliance in agency enforcement and advocacy. Approaches need to be adjusted to the maturity of the jurisdiction and its competition culture, the structure of a country's industry, and the enforcement and advocacy tools available to a competition agency, and its resources.

A compliance discussion with competition authorities that focuses only on compliance programmes having a mitigating effect on sanctions largely misses the point and risks being too narrow or even detrimental to enforcement. In general, when competition compliance has become part of a corporate culture and is lived and breathed by all in the company, from top level management to lower level staff, the benefits will extend well beyond a rather minor reduction of the fine or any other small advantage in case of a violation and prosecution.

In order to ensure that they are using their scarce resources wisely and most effectively, competition agencies may want to take their own advice to businesses to heart – take a risk-based approach, continually monitor impact and effectiveness, and reassess policies in the light of the observations made and in response to foreseeable developments and challenges to competition compliance.

In doing so, competition agencies should be demanding to ensure that they promote or reward only truly effective compliance programmes. Elements to be considered, as they are likely to be indicative of a company's commitment to compliance, are

- Requirements relating to internal detection and subsequent external reporting of competition offences
- A focus on management involvement in infringements
- The alignment of compliance and remuneration structures and incentives
- Effective and risk based internal auditing and monitoring of business processes, including the use of digital screening tools, and a requirement for “compliance by design” for AI
- Compliance responsibility extending to third parties.

In determining its approach, any agency will have to make a trade-off between investing resources in enforcement or in preventive action, and the outcome of the calculation depends on the effectiveness of either measure for deterrence or prevention of future misconduct or its early detection and termination. The agency decision making ultimately suffers from a lack of empirical insights into causal relationships between enforcement, sanctions, compliance initiatives and deterrence and prevention of competition law violations. More research and ex-post evaluation of compliance initiatives could inform the discussion.

An additional and related obstacle in the way of more and better agency engagement with compliance might be found in a principal-agent problem that competition agencies face themselves. The success of a competition agency's work is usually measured in terms of its enforcement - the number of cases it detected, or concluded successfully, and the level of fines it imposed. Advocacy, including compliance-related outreach, has no direct and measurable impact on these numbers, which could lead to sub-optimal agency compliance efforts.

However, agencies have demonstrated an increased awareness of and engagement with the prevention of competition law violations, and the design and support of corporate compliance policies and programmes, and they are likely to do so in the future. To improve the effectiveness of such efforts, they can look for some low hanging fruit, as identified in this paper, and ideally share their insights and results with other agencies.

Annex A. Agency guidance

Many jurisdictions have published guidance on competition compliance in the last 10 years, which can serve as a valuable resource to businesses and their lawyers in the respective jurisdictions. The list shows the published guidance documents in chronological order. It is not a complete list of agency compliance guidance, and only references the agency guidance that was consulted for this paper.

- 2012 Chile “Competition Compliance Programs” (Fiscalia Nacional Economica, 2012^[23])
- 2012 Japan “Survey on Corporate Compliance Efforts with the Antimonopoly Act (Summary)” (JFTC, 2012^[76])¹²³
- 2013 European Commission “Compliance matters” (European Commission, 2013^[4])
- 2013 Malaysia “Competition Act 2010 Compliance Guidelines” (MyCC, 2013^[77])
- 2015 Canada “Corporate Compliance Programs” (Competition Bureau Canada, 2015^[2])
- 2016 Austria “Kartellrecht und Compliance” (Bundeswettbewerbsbehörde; Wirtschaftskammer Österreich, 2016^[78])
- 2016 Belgium „Les règles de concurrence” (Belgian Competition Authority, 2016^[15])
- 2016 “Antitrust Guidance for Human Resource Professionals” (US Department of Justice; US Federal Trade Commission, 2016^[79])
- 2016 Brazil “Guideline Competition Compliance Programmes” (CADE, 2016^[20])
- 2016 Korea “Rules on Operation of Fair Trade Compliance Programs, Offering of Incentives” (KFTC, 2016^[80])
- 2017 India “Compliance Manual for Enterprises” (CCI, 2017^[81])
- 2017 Romania “Guidance on Compliance With Competition Rules” (Romanian Competition Council, 2017^[21])
- 2018 ASEAN “Competition Compliance Toolkit for Businesses in ASEAN” (ASEAN Secretariat, 2018^[18])
- 2018 Italy “Guidelines on Antitrust Compliance” (AGCM, 2018^[82])
- 2019 Romania Guidelines for trade associations (Romanian Competition Council, 2019^[12])
- 2019 Mexico “Recommendations for complying with the Federal Economic Competition Law” (COFECE, 2019^[83])
- 2019 US Department of Justice “Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations” (U.S. Department of Justice, 2019^[3])
- 2020 UK “Competition law risk: a short guide” (UK CMA, 2020^[84])
- 2020 Spain “Antitrust Compliance Programme Guidelines” (CNMC, 2020^[22])
- 2020 Russia “Methodical recommendations on the establishment and organization of the Federal Executive Authorities’ internal compliance system of the Antimonopoly law”¹²⁴
- 2020 China “Antitrust Compliance Guidelines for Operators” (SAMR, 2020^[85])
- 2020 Peru “Guidelines on Competition Compliance Programs” (Indecopi, 2020^[9])

- 2020 France “Better understanding competition rules Guide for SMEs” (Autorité de la Concurrence, 2020^[14])
- 2020 Hong Kong “Leniency Policy for Undertakings Engaged in Cartel Conduct” (Hong Kong Competition Commission, 2020^[86])
- 2021 France “Les organismes professionnels” (Autorité de la Concurrence, 2021^[11])

Endnotes

¹ See for example, (Ginsburg and Wright, 2010_[130]), (Hofstetter and Ludescher, 2010_[131]), (Abrantes-Metz and Sokol, 2013, p. 15_[44]), (Geradin, 2013_[100]), and more recent (Thépot, 2019_[43]), (Heckenberger, 2020_[95]), (Seeliger and Gürer, 2020_[133]).

² See in particular (Riley and Bloom, 2011_[132]), (Riley, 2019_[42]).

³ (OECD, 2011_[1]) references guidance only from three jurisdictions: the UK, Canada and Australia.

⁴ See for example: European Commission (European Commission, 2013_[4]), Malaysia (MyCC, 2013_[77]), Canada (update) (Competition Bureau Canada, 2015_[2]), Brazil (CADE, 2016_[20]), Korea (KFTC, 2016_[80]), Competition Commission of India (CCI, 2017_[81]), Romania (Romanian Competition Council, 2017_[21]), Italy (AGCM, 2018_[82]), Mexico (COFECE, 2019_[83]), US (U.S. Department of Justice, 2019_[3]), Chile (Indecopi, 2020_[9]), China (SAMR, 2020_[85]), Peru (Indecopi, 2020_[9]), Spain (CNMC, 2020_[22]), UK (update) (UK CMA, 2020_[84]).

⁵ The list of agency guidance is not exhaustive and includes only the guidance that was accessed to inform this background note.

⁶ See <https://www.accc.gov.au/business/industry-associations-professional-services/industry-associations>.

⁷ See <https://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program>.

⁸ See Concurrences compliance awards website, <https://compliance.concurrences.com/en/compliance/2021-en/agencies-initiatives-en/>.

⁹ See <https://competitionandmarkets.blog.gov.uk/>.

¹⁰ See for example <https://www.gov.uk/government/publications/restricting-resale-prices-an-open-letter-to-suppliers-and-retailers-in-the-musical-instruments-sector>; <https://www.gov.uk/government/publications/medical-practitioners-advice-on-competition-law>, <https://www.gov.uk/government/publications/advice-for-company-directors-on-avoiding-cartel-infringements>, <https://www.gov.uk/government/publications/price-fixing-guidance-for-online-sellers>.

¹¹ Intervention by Isabelle de Silva, Concurrences Webinar, 12 January 2021, Fireside Chat, <https://www.concurrences.com/en/conferences/2021-antitrust-compliance-awards-1-why-antitrust-compliance-competition-en>, accessed 12 February 2021; example for compliance message: <https://www.autoritedelaconurrence.fr/en/press-release/autorite-de-la-concurrence-hands-out-fine-dammann-freres-tea-imposing-sales-prices>.

¹² Malaysia accepts an appropriate compliance programme as a mitigating factor when calculating fines (MyCC, 2014_[113]). Similarly, the Competition Commission of India (CCI, 2017_[81]), see for example Hyundai RPM case <http://www.cci.gov.in/search/node/hmil>, and <http://competitionlawblog.kluwercompetitionlaw.com/2017/06/26/competition-commission-india-develops-jurisprudence-resale-price-maintenance/>, and <https://www.lexology.com/library/detail.aspx?g=bf1f53c3-1146-4d72-81b4z-cda4e323f855>, and Singapore - <https://www.ccs.gov.sg/faq/compliance-with-competition-law>. Japan does not offer a reduction of fines for compliance measures, but will effectively consider them when issuing cease and desist orders, or when a court orders a criminal fine or jail sanction, <https://www.lexology.com/library/detail.aspx?g=dd66f759-ed47-41b8-aec2-e6dc3416a652>.

¹³ Where the companies can prove the existence of a strong compliance programme, this can lead to a reduction of the fine or to a favourable calculation of the reduction obtained in a settlement procedure (CADE, 2016^[20]).

¹⁴ If a strong and effective compliance programme exists, the FNE may take it into consideration in relation to the fine when filing a complaint before the TDLC (Fiscalia Nacional Economica, 2012, p. 20^[23]). In 2019, the FNE has issued guidelines on the criteria it will use when determining the fine that it will request the court to impose, including the effects of a compliance programme. It incorporates a 2018 TDLC ruling that accepted an existing compliance programme as a mitigating factor with a subsequent fine reduction of 15%. The requirements are a pre-existing programme, which was serious and effective and applicable to the individuals involved in the infringement, including preventive measures specifically related to the infringement. The burden of proof is on the parties (Lexology, 2020, pp. 27-28^[25]).

¹⁵ Indecopi will grant a reduction of the fine of 5 – 10% if all requirements laid out in its guidelines are met (Indecopi, 2020^[9]).

¹⁶ For Germany, the 2021 amendment to the German competition law now foresees explicitly that the Bundeskartellamt, when setting the fines for an infringement, shall consider as relevant circumstances “adequate and effective precautions taken prior to the infringement to prevent and detect infringements”, and “the company's efforts to detect the infringement and to compensate the damage as well as precautions taken after the infringement to prevent and detect infringements”, § 81 d ARC, paras 4 and 5, unofficial translation provided by D’KART <https://www.d-kart.de/wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf>. Hungary has communicated such a policy in 2018, https://www.gvh.hu/en/press_room/press_releases/press_releases_2018/according_to_the_gvh_s_new_notifications_on_fines_signif. Romania has published its 2017 Guide on Compliance (Romanian Competition Council, 2017^[21]), which allows for a fine reduction of up to 10% for the implementation of an effective compliance programme. Spain’s CNMC explains in its 2020 guidelines how it will assess compliance programmes (CNMC, 2020^[22]). For UK, according to the CMA’s guidance on penalties (UK CMA, 2018^[19]), a company’s compliance activities can lead to a discount of up to 10% of the fines if it can show that adequate steps were taken with a view to ensuring compliance.

¹⁷ The Canadian Competition Bureau will give favourable consideration mostly for pre-existing credible and effective programmes when deciding how to proceed against companies and in making its recommendations to the Public Prosecution Service of Canada (Competition Bureau Canada, 2015^[2]), including the level of the fine (this is also part of the Immunity and Leniency Program, para 138, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html#sec03-2-3>), and the extent of the potential remedies to seek. The existence of a programme can also influence the choice whether to pursue a civil or criminal track, or may favour settlements with consent agreements in civil matters, and this is unchanged compared to the situation in 2011.

¹⁸ The numbers are almost even in both categories (OECD, 2020, p. 18^[115]), additional Secretariat research.

¹⁹ Intervention by Simon Constantine on the DoJ Public Roundtable on Antitrust Criminal Compliance, 9 April 2018, <https://www.justice.gov/atr/page/file/1065446/download>. Cases such as ‘airport facilities’ demonstrate how the policy is applied, see [Case 50523](#), conduct in the transport sector (facilities at airports). Evidence submitted related to the roll out of an updated competition law compliance policy, the implementation of an enhanced internal sign-off procedure and steps to introduce enhanced face-to-face competition law training tailored to different areas of business on a risk basis.

²⁰ Korea had already gained significant experience with compliance programmes in 2011 (OECD, 2011, pp. 121-130[2]), and in order to incentivise compliance it would grant a reduction of fines for existing compliance programmes. After finding that a number of compliance programmes were introduced mostly to benefit from reduced sanctions, Korea introduced a compliance programme evaluation programme, carried out by the Korea Fair Trade Mediation Agency, a government-funded agency under the KFTC. A reduction in fines and other sanctions would only be available for programmes rated A or higher. The 2016 version of the compliance rules (KFTC, 2016[9]), however, do not foresee a reduction in fines anymore (this does not seem to have changed with the 2019 amendment of the rules https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=20423).

²¹ The Competition Bureau will give favourable consideration mostly for pre-existing credible and effective programmes when deciding how to proceed against companies and in making its recommendations to the Public Prosecution Service of Canada, including the level of the fine, and the extent of the potential remedies to seek. The existence of a programme can also influence the choice whether to pursue a civil or criminal track, or may favour settlements with consent agreements in civil matters. See statements by John Pecman, then Commissioner of Competition, on the DoJ Public Roundtable on Antitrust Criminal Compliance, 9 April 2018, <https://www.justice.gov/atr/page/file/1065446/download>.

²² In 2019, the Chilean FNE has issued a guideline on the criteria it will use when determining the fine that it will request the court to impose, including the effects of a compliance programme. This part incorporates a 2018 TDLC ruling that accepted an existing compliance programme as a mitigating factor with a subsequent fine reduction of 15%. One of the requirements is a pre-existing programme (Lexology, 2020, pp. 27-28[25]). However, the Chilean Supreme Court has rebuked the approach, arguing that in the specific case the infringement had proven that the programme had not worked, see Decision of Supreme Court of Chile, 8 April 2020, Fiscalía Nacional Económica en contra de Cencosud S.A. y otras; and also <https://www.concurrences.com/en/bulletin/news-issues/april-2020/the-chilean-supreme-court-upholds-a-landmark-decision-by-the-competition>; accessed 22 February 2021.

²³ Indecopi will grant a reduction of the fine of 5 – 10% for existing programmes, if all requirements laid out in its guidelines are met, and for existing programmes this requires that senior management was not involved and that the infringement was reported to Indecopi (Indecopi, 2020[9]).

²⁴ Speech by Artem Molchanov, FAS Russia, <http://en.fas.gov.ru/press-center/news/detail.html?id=55000>; <https://ceelegalmatters.com/briefings/14967-russia-a-step-on-the-road-to-improved-antitrust-compliance>.

²⁵ The 2021 amendment to the German competition law foresees explicitly that the Bundeskartellamt, when setting the fines for an infringement, shall consider as relevant circumstances “adequate and effective precautions taken prior to the infringement to prevent and detect infringements”, and “the company’s efforts to detect the infringement and to compensate the damage as well as precautions taken after the infringement to prevent and detect infringements”; § 81 d ARC, paras 4 and 5, unofficial translation provided by D’KART <https://www.d-kart.de/wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf>.

²⁶ See (AGCM, 2018[82]).

²⁷ See (CNMC, 2020, p. 6[22]); for Canada – until 2018, see statements by John Pecman, then Commissioner of Competition, on the DoJ Public Roundtable on Antitrust Criminal Compliance, 9 April 2018, <https://www.justice.gov/atr/page/file/1065446/download>; for US, relating to credit for a defendant’s “pre-existing” antitrust compliance programme under the Guidelines’ three-point reduction provision, see speech by Makan Delrahim, “Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs”, 11 July 2019, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0>.

²⁸ Presentation by Alessandra Tonazzi, AGCM, at ICN Cartel Working Group Webinar “Compliance in Cartel Cases II”, 7 April 2021, see also (Rustichelli, 2021^[110]).

²⁹ Italy commits to maximum reductions, 15% in case of an effective, pre-existing programme that led to the detection and reporting of the infringement to the AGCM before proceedings were initiated; 10% in case of not manifestly inadequate programmes, even if they did not lead to detection and reporting; and 5% for both newly introduced programmes and manifestly inadequate programmes which are revised following the AGCM’s intervention. Manifest inadequacy will be assumed when the programme was not implemented or senior management was involved in the infringement. In exceptional circumstances, when a compliance programme was used to facilitate or conceal an infringement, it may also be considered as an aggravating circumstance (AGCM, 2018^[82]).

³⁰ <https://www.lexology.com/library/detail.aspx?q=b092ec53-9966-469c-b584-8a63b004c1aa>.

³¹ For example, Malaysian Competition Commission (MyCC, 2013^[77]), Peru (Indecopi, 2020^[9]), Italy (AGCM, 2018^[82]).

³² See speech by Makan Delrahim, “Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs”, 11 July 2019, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0>.

³³ For example, CCI compliance manual 2017 (CCI, 2017^[6]), which was issued with the motivation to foster a compliant competition culture: “Being a new law, stakeholders have to be inspired to inculcate a culture of competition in their businesses and ensure that it permeates at all levels in the respective organizations” (CCI, 2017, p. 5^[6]). Also ASEAN guidance (ASEAN Secretariat, 2018^[18]).

³⁴ On the previous policy, see Competition Bureau Canada, Corporate Compliance Programs 2010, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html>.

³⁵ See statements by John Pecman, then Commissioner of Competition, on the DoJ Public Roundtable on Antitrust Criminal Compliance, 9 April 2018, <https://www.justice.gov/atr/page/file/1065446/download>.

³⁶ See <https://globalcompetitionreview.com/russia-set-credit-compliance-programmes>, quoting Igor Artemiev.

³⁷ The policy is supported by the European Courts (for example, Joined Cases T-101/05 and T-111/05, BASF and UCB, paragraph 52, and Case T-138/07, Schindler Holding, paragraph 282, upheld in Case C-501/11 P), and was reiterated recently by the EC’s Director-General of for Competition: rewarding compliance programmes would amount to rewarding failed programmes, set wrong incentives, namely for programmes that exist merely on paper, discriminate and penalise in particular SME, and there was no “one size fits all” compliance programme that could remedy every competition concern, see intervention by Olivier Guersent, Concurrences Webinar, 12 January 2021, Fireside Chat, <https://www.concurrences.com/en/conferences/2021-antitrust-compliance-awards-1-why-antitrust-compliance-competition-en>; accessed 12 February 2021 .

³⁸ In 2012, France had adopted a policy that would allow a fine reduction of up to 10% for the commitment to introduce or significantly improve an existing programme in the framework of the settlement procedure, on top of the 10% settlement reduction. This was to recognise that compliance programmes are risk prevention and reduction tools. See press release Autorité de la Concurrence, 10 February 2012: Corporate compliance programmes and antitrust settlements; <https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/10-february-2012-corporate-compliance-programmes-and-antitrust-settlements>; accessed 17 February 2021.

³⁹ [Décision n° 17-D-20 du 18 octobre 2017](#), para 464.

⁴⁰ <http://www.oecd.org/regreform/sectors/41255395.pdf>.

⁴¹ CADE expects the programmes to be in line with its guidelines, and foresees annual monitoring reports. See for example [Settlement Proceeding n° 08700.004341/2016-44](#), and [Settlement Proceeding n° 08700.007776/2016-41](#).

⁴² See 2.15.f and 4.1.e of the Competition Commission's Leniency Policy (Hong Kong Competition Commission, 2020^[86]).

⁴³ <https://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program>.

⁴⁴ The PCC can include the introduction or improvement of compliance programmes in commitments in abuse of dominance proceedings, see PCC [Case No. E-2019-001](#).

⁴⁵ The Chilean Competition Tribunal (TDLC) imposes the adoption or improvement of compliance programmes as penalty measures, and typically requires that they are in line with the 2012 FNE guidelines, that a compliance committee is established, a full time compliance officer is appointed, compliance trainings for senior management and other staff take place as appropriate, and frequent audits are held, including calls and emails (Latin Lawyer, 2020, p. 227[8]). Peru often imposes a requirement on the parties to a violation to introduce or improve their compliance programme (Indecopi, 2020, pp. 39-41[14]).

⁴⁶ For example case M/S Crown Theatres v Kerala Film Exhibitors Federation, Case No. 16/2014; <https://www.lexology.com/library/detail.aspx?g=b53d736c-a118-43c0-839d-3a0164da3066>.

⁴⁷ See <https://www.agcm.it/competenze/rating-di-legalita/> and <https://globalcompetitionreview.com/italy-begins-assessing-compliance-rating-scheme>.

⁴⁸ The 2016 version of the compliance rules (KFTC, 2016[9]) do not foresee a reduction in fines anymore.

⁴⁹ See https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=20423 and <https://www.lexology.com/library/detail.aspx?g=daa26d44-2ab0-4d01-a6c3-081cc5fe34f6>.

⁵⁰ Some implementation practice and case law exist on the application of self-cleaning provisions by contracting authorities, see (Dentons, 2021^[137]).

⁵¹ Federal Law No. 33-FZ of March 1, 2020 "On Introducing Amendments to the Federal Law on Protection of Competition, <http://en.fas.gov.ru/documents/documentdetails.html?id=15353>.

⁵² For example, AB InBev obtained such a confirmation <http://en.fas.gov.ru/press-center/news/detail.html?id=54979>.

⁵³ Canada created a dedicated compliance unit to verify the credibility and effectiveness of compliance programmes of companies who claim a credit (Competition Bureau Canada, 2015, p. 12[5]).

⁵⁴ The DoJ established the Office of Decree Enforcement and Compliance in 2020, which will advise the Antitrust Division in cases where parties seek credit for their compliance programmes at the charging stage, <https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil>; accessed 12 February 2021.

⁵⁵ Chile's FNE introduced a new Enforcement and Compliance Unit in 2019, which, next to overall compliance with enforcement decisions, will monitor compliance obligations imposed on companies as part of the penalty, See Chile - Annual Report on Competition Policy Developments in Chile 2019, [https://one.oecd.org/document/DAF/COMP/AR\(2020\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2020)5/en/pdf), p 5.

⁵⁶ The German Bundeskartellamt's new unit for the implementation of the Competition Register will, as part of their tasks, evaluate corporate compliance programmes when assessing self-cleaning measures.

⁵⁷ Definition from (OECD, 2019, p. 17_[134]): “Non-trial resolutions, commonly known as “settlements”, refer to a wide array of mechanisms developed and used to resolve criminal matters without a full court proceeding, including foreign bribery cases, based on an agreement with an individual or a company and a prosecuting or another authority. Where appropriate, non-trial resolutions can also be available and used in administrative or civil proceedings.”

⁵⁸ See case Cr. No. 16-643 (RJD) (T. 18, U.S.C., §§ 371 and 3551 et-.), <https://www.justice.gov/opa/press-release/file/919911/download>.

⁵⁹ See <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

⁶⁰ (OECD, 2020, p. 13_[97]), citing (Shaffer, Nesbitt and Waller, 2015, p. 29_[117]). Over 20 countries have criminalised cartels between 2000 and 2015. Criminal jurisdictions include over half of the EU Member States, although the Netherlands, Luxembourg and Austria (the latter except for bid rigging) have decriminalised competition law. Almost half of the jurisdictions (26) covered in the CompStats database can impose criminal sanctions on individuals. An additional 10 jurisdictions can impose criminal sanctions only when the offense concerns bid rigging. Substantial fines and/or jail time for individuals is prescribed in the laws of, among others, Australia, Brazil, Canada, Greece, Ireland, Israel, Japan, Mexico, South Africa, and the United States (OECD, 2020, p. 15_[4]).

⁶¹ A recent study by (Chang and Sokol, 2020_[124]) shows that agency advocacy efforts, which have undoubtedly increased, can have a stronger impact on the adoption of compliance programmes than enforcement measures. The study examined the effects of advocacy and enforcement action by the Taiwanese Fair Trade Commission (TFTC) on the adoption of compliance programmes by Taiwanese firms. It shows that advocacy measures, such as compliance guidance and outreach, seem to have a larger impact on the adoption of compliance programmes than enforcement measures. When it comes to enforcement, higher fines are more effective than other types of prosecution in incentivising compliance programmes. The authors recommend strongly that agencies should give higher weight to compliance related advocacy measures.

⁶² Increase since 2005 confirmed in study by (Götz, Herold and Paha, 2016, p. 41_[34]).

⁶³ See <https://www.gov.uk/government/publications/uk-businesses-understanding-of-competition-law>.

⁶⁴ At the same time, a significant number also attributed other regulatory functions, or confused Cofece's mandate with that of other regulators.

⁶⁵ 86 large companies participated in the study, and respondents were either (chief) executive or division managers, compliance officers or general counsel.

⁶⁶ The data provided come from the OECD Database on General Competition Statistics (OECD CompStats), which currently covers data from competition agencies in 56 jurisdictions, of which 37 are OECD countries (36 OECD countries and the EU), 15 are Participants in the OECD Competition Committee, and two jurisdictions are Associates to the OECD Competition Committee. The database currently covers the period 2015-2019.

⁶⁷ The CompStats numbers used cover five years, 2015-2019, and detection methods have not changed significantly in this period. The move of more jurisdictions to digital screening methods may change this but does not yet reflect detection reality.

⁶⁸ The pandemic in 2020/21 will contribute to a continuation of this trend.

⁶⁹ As cartel investigations usually take a couple of years, the observed decline in leniency and dawn raids should show effect within the next few years.

⁷⁰ See PARR, 24 March 2021, Increasing damages, compliance programmes slow EC cartel enforcement – Analytics, <https://app.parr-global.com/intelligence/view/intelcms-qbwbrb>.

⁷¹ Ibid., referencing two examples, where senior managers were held personally liable for cartel damages by their firms, Heiploeg and ThyssenKrupp.

⁷² See also (Archimbaud, 2020_[128]). The European Commission also confirms a significant upward trend (European Commission, 2020_[129]).

⁷³ Interestingly, the survey does not even provide for the option of increased compliance as a possible answer.

⁷⁴ State Law No. 7.753/2017, <https://gov-rj.jusbrasil.com.br/legislacao/511266335/lei-7753-17-rio-de-janeiro-rj>.

and District Law No. 6.112/2018, www.legisweb.com.br/legislacao/?id=356400.

⁷⁵ For a description, see (Jones and da Silva Pereira Neto, 2020, pp. 3-4_[136]).

⁷⁶ For Rio de Janeiro, the contract value should be above than BRL 1.5 million for public works and engineering services and BRL 650 000 for goods and services, with a contract duration of more than 180 days. For Distrito Federal, the contract value should be above than BRL 5 million.

⁷⁷ <https://www.agcm.it/competenze/rating-di-legalita/dettaglio?id=268c1269-d85d-4259-bce1-0ffa53414b23&parent=Normativa&parentUrl=/competenze/rating-di-legalita/normativa>.

⁷⁸ See <https://globalcompetitionreview.com/italy-begins-assessing-compliance-rating-scheme>.

⁷⁹ <https://www.agcm.it/competenze/rating-di-legalita/dettaglio?id=d3b26190-e8dd-41ad-87e7-e106c69ecd86&parent=Normativa&parentUrl=/competenze/rating-di-legalita/normativa>.

⁸⁰ 2017 German Act on the Competition Register for Public Procurement, which provides procurement bodies with information relevant to the exclusion of bidders in tender procedures for economic offences, one of which are competition offences. The “registry authority shall evaluate the self-cleaning measures adopted by the undertaking, taking into account the seriousness and special circumstances of the criminal offence or misconduct”, it shall also issue guidelines on the application of the provision (section 8 of the [Competition Register Act](#)). The Bundeskartellamt is the responsible authority for the registry, which is expected to start operations in 2021. No guidance was issued yet.

⁸¹ 2021 amendment to the German competition law; § 81 d ARC, paras 4 and 5, unofficial translations provided by D’KART, <https://www.d-kart.de/wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf>. It is unclear if there is a causal relationship between the procurement related self-cleaning measures and the new fining provisions in the competition law. The German legislator’s choice may have also been influenced by a Federal Court of Justice’s tax ruling pointing out that effective compliance management can be a relevant factor when calculating a fine; BGH, Urt. v. 09.05.2017, Case 1 StR 265/16, <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=78723&pos=0&anz=1>.

⁸² See for example <https://globalcompetitionreview.com/court-rulings-dont-require-immediate-shift-mundt-says>, <https://blog.handelsblatt.com/rechtsboard/2017/09/06/7950/>.

⁸³ The Romanian Competition Council publishes a list of convicted cartel offenders on its website, including information on leniency and settlement submissions and compliance programmes (Trusculete and Stropsa, 2020_[109]). However, in contrast to the situation in Germany, the Competition Council is not involved in the decision for readmission, which is left entirely at the discretion of the procurement bodies.

⁸⁴ The member states have discretion in terms of implementation of the self-cleaning provisions and this relates to substantive and procedural provisions, to the authority that will decide if self-cleaning measures are sufficient, and the recognition of a self-cleaning decision taken by another member state. Different member states implemented this in different ways. On the implementation and application in EU member states, see (Dentons, 2021^[137]).

⁸⁵ All available in the OECD Legal Instruments Compendium, see <http://www.oecd.org/corruption-integrity/explore/oecd-standards/>.

⁸⁶ All OECD member countries and Argentina, Brazil, Bulgaria, Costa Rica, Peru, Russia and South Africa.

⁸⁷ See <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>.

⁸⁸ See in particular, (Thépot, 2015^[96]), (Thépot, 2019^[43]), also (Geradin, 2013^[100]).

⁸⁹ Granting immunity from sanctions or sanction reductions is a vital part of the overall anti-corruption incentive system to prevent and fight corporate crime (OECD, 2019, pp. 85-94^[34]). In 12 jurisdictions, a compliance system can preclude liability, and the burden of proof that the system was or was not effective can be either on the prosecutor or on the company. Most jurisdictions will consider self-reporting and co-operation in investigations as mitigating factors (OECD, 2019, pp. 90-91^[35]). In non-trial resolution procedures for foreign bribery, 30 out of 52 systems will consider the existence of a compliance programme at the time of the offence as a mitigating factor when determining the penalty (OECD, 2020, p. 18^[32]).

⁹⁰ Today, all signatories to the Anti-Bribery Convention established corporate liability (OECD, 2019, p. 89^[35]) for corruption offences.

⁹¹ (Wils, 2013, pp. 30-31^[7]) has referred to this particular characteristic and argues that it differentiates cartel offences from other corporate crime, and that leniency programmes provide better incentives to report and to have good compliance programmes in place than fine reductions.

⁹² On average, 10% of all international cartel cases were supported by a third party (OECD, 2020, p. 39^[115]).

⁹³ The most important sources for internal detection are the internal audit function (24%), mergers and acquisition due diligence (7%), internal whistleblowers (5%), and pre-listing due diligence (4%) (OECD, 2017, p. 20^[46]).

⁹⁴ See (OECD, 2019, p. 88^[107]), based on information submitted by members of the OECD Working Group on Bribery in the context of Working Group monitoring of members' observance of their obligations under the Anti-Bribery Convention.

⁹⁵ OECD International Cartels database, https://qdd.oecd.org/subject.aspx?Subject=OECD_HIC, data available until 2018. Cartel agreements are considered to be international when at least two of the companies taking part in the infringement are headquartered in different jurisdictions, regardless of the geographic coverage of the cartel activities, see (OECD, 2020, p. 32^[115]). The number of international cartels is used as the closest comparator to foreign bribery cases, as they involve parties from two or more jurisdictions.

⁹⁶ The US guidance is based on extensive US experience in evaluating corporate compliance programmes in the wider field of corporate crime.

⁹⁷ See recommendation and report of the economics and energy committee of the German parliament, Doc 19/25868, 13 January 2021, p 122, <https://dip21.bundestag.de/dip21/btd/19/258/1925868.pdf>.

⁹⁸ Canada will consider reporting as a factor when considering consent agreements (Competition Bureau Canada, 2015, p. 8_[2]). In Italy, the maximum fine reduction of 15% in cases that are eligible for leniency is only available to companies, which reported and applied for leniency upon the internal detection of an infringement (AGCM, 2018, p. 6_[82]). Spain considers reporting and applying for leniency as evidence for a commitment to compliance, though it is not a mandatory or exclusive requirement for considering fine mitigation (CNMC, 2020, p. 13_[22]). The ACCC foresees reporting of material failures to comply as an important element for an effective compliance programme, see level 3 and 4 templates for compliance programmes, <https://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program>. Romania will take into account active reporting when assessing the effectiveness of a compliance programme (Romanian Competition Council, 2017, p. 20_[21]) (The programme is accessible only in Romanian. It is not entirely clear from the available translation if it is considered a mandatory prerequisite for the recognition of a compliance programme.).

⁹⁹ The UK has secured the disqualification of a company director in 2020, who was not directly involved in the cartel agreement but was aware and took no steps to prevent or end it; <https://www.gov.uk/government/news/court-orders-disqualification-of-estate-agent-cartel-director>.

¹⁰⁰ US Sentencing Guidelines, U.S.S.G. § 8C2.5(f)(3)(A)–(C).

¹⁰¹ When senior management was involved in the infringement, compliance programmes cannot be considered as mitigating factors, see recommendation and report of the economics and energy committee of the German parliament, Doc 19/25868, 13 January 2021, p 122-123, <https://dip21.bundestag.de/dip21/btd/19/258/1925868.pdf>.

¹⁰² See also (Stephan and Nikpay, 2014_[135]).

¹⁰³ Based on 115 foreign bribery resolutions against companies concluded between January 2014 and June 2018.

¹⁰⁴ OECD analysis of 427 foreign bribery cases concluded between February 1999 and June 2014.

¹⁰⁵ See <https://www.pwc.com/gx/en/economic-crime-survey/pdf/GlobalEconomicCrimeSurvey2016.pdf>, p. 12.

¹⁰⁶ See <https://www.oecd.org/daf/competition/gender-inclusive-competition-policy.htm>.

¹⁰⁷ (Fiscalia Nacional Economica, 2012, p. 17_[23]), (Indecopi, 2020, p. 28_[9]).

¹⁰⁸ See for example, [2013 OECD Roundtable on Ex-officio cartel investigations and the use of screens to detect cartels](#); [2018 OECD workshop on cartel screening in the digital era](#); (Abrantes-Metz and Sokol, 2013_[44]); (Schwalbe, 2016, p. 104_[69]), (Johnson and Sokol, 2020_[71]); all with references to basic literature and screens used by competition authorities.

¹⁰⁹ (Johnson and Sokol, 2020_[71]) also develop a screening approach particularly apt for online markets that focuses on evaluations and ratings in addition to price. The parallel movements of ratings and price can indicate collusion, but monitoring of rating developments in relation to price changes and entry can also indicate punishment behaviour in a cartel.

¹¹⁰ See for example (Association of Certified Fraud Examiners, 2019_[123]).

¹¹¹ Deputy Assistant Attorney General Matthew S. Miner, Remarks at the 6th Annual Government Enforcement Institute, 12 September 2019, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-delivers-remarks-6th-annual-government>.

¹¹² See (OECD, 2020, p. 42_[27]).

¹¹³ This is a different guidance than the one on antitrust compliance (U.S. Department of Justice, 2019^[3]), for DoJ prosecutors to assess the effectiveness of firms' compliance programmes in a wider criminal prosecution context.

¹¹⁴ See <https://new.siemens.com/global/en/company/sustainability/compliance/collective-action.html>.

¹¹⁵ See <https://www.worldbank.org/en/news/press-release/2009/07/02/siemens-pay-million-fight-fraud-corruption-part-world-bank-group-settlement>.

¹¹⁶ See <https://www.deutschebahn.com/en/group/compliance/geschaeftpartner/kartellrecht-1212628>, requiring contractors to implement anti-trust compliance programmes, including monitoring by Deutsche Bahn.

¹¹⁷ See <http://courses.compliancectrainingbase.com/?lang=fr> and <https://www.valeo.com/wp-content/uploads/2018/11/valeo-business-partners-code-of-conduct-en.pdf>, which include a business partner code of conduct and anti-trust training resources.

¹¹⁸ See https://www.roche.com/dam/jcr:bf934ec3-252c-4120-a129-906900976e1b/de/compliance_training_of_business_partners.pdf

¹¹⁹ See https://cportal.siemens.com/documents/4362010/5038001/CoC_Brochure_en.pdf/18042728-abc9-033d-c373-ca74fe3e4002.

¹²⁰ <https://www.oracle.com/partners/en/how-to-do-business/opn-agreements-and-policies/019520.pdf>.

¹²¹

https://www.lafargeholcim.com/sites/lafargeholcim.com/files/atoms/files/lafargeholcim_code_of_business_conduct_for_suppliers.pdf.

¹²² This is also included in the DoJ criminal division's guidance (U.S. Department of Justice, 2020, p. 9^[73]).

¹²³ While this document summarises results from a compliance survey, it also sets out the conditions the JFTC deems necessary for effective compliance programmes.

¹²⁴ See <https://compliance.concurrences.com/en/compliance/2021-en/agencies-initiatives-en/russian-competition-authority>.

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