ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2017

10th Edition

A practical cross-border insight into cartels and leniency

Published by Global Legal Group, in association with CDR, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
November 2016

ISBN 978-1-911367-25-3
ISSN 1756-1027

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Cartels & Leniency.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of cartels and leniency.

It is divided into two main sections:

Two general chapters. These chapters are designed to provide readers with an overview of key cartels and leniency issues, particularly from the perspective of a European transaction.

Country question and answer chapters. These provide a broad overview of common issues in cartels and leniency laws and regulations in 28 jurisdictions.

All chapters are written by leading competition lawyers and industry specialists and we are extremely grateful for their excellent contributions.

We are also pleased to once again include a Wall Chart, which contains a summary table of key features relating to cartels and leniency laws and regulations in each of the 28 jurisdictions.

Special thanks are reserved for the contributing editors Simon Holmes and Philipp Girardet of King & Wood Mallesons LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Compliance Programmes and Antitrust Fines

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I. Introduction

The question of whether the existence or establishment of an antitrust compliance programme should be rewarded in the administrative fine calculation has been discussed for years. In the past years, a number of major jurisdictions, including the UK and Brazil, have introduced new policies that allow the antitrust regulator to take into account antitrust compliance programmes as a mitigating circumstance in the calculation of the fine.

In the United States, in 2015, the U.S. Department of Justice ("DOJ"), in two plea agreements with defendants, reduced the administrative fine based mainly on the defendant having established a "*rigorous antitrust compliance program*".

In marked contrast, the EU Commission continues to reject any direct reward in the form of fine reductions for a company's efforts to implement or improve an antitrust compliance programme. The EU Commission's position is probably summarised best in a quote from former Competition Commissioner Joaquín Almunia in 2010:

> "*To those who ask us to lower our fines where companies have a compliance programme, I say this: if we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed?*" (Speech/10/586 at Businesseurope & US Chamber of Commerce Competition Conference http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm.)

We provide below a brief overview of the relevance (or lack thereof) of compliance programmes in setting the antitrust fine in selected jurisdictions.

II. European Union

In its decisional practice, the EU Commission has not granted a fine reduction based on the existence of a compliance programme at the time of the infringement. However, in a number of decisions in the early 1980s to the early 1990s, the EU Commission did grant fine reductions to companies that had established antitrust compliance programmes after the EU Commission commenced its investigation (*e.g.*, Case 30.070 National Panasonic (1982): "*Regard must, however, also be taken of the fact that MET has taken urgent steps to regulate the overall marketing policies of its subsidiaries in the EEC ... This constructive attitude adopted by the management of MET since at least September 1981, has been taken into account in assessing the amount of the fine. The undertakings concerned have adopted a comprehensive practical detailed and carefully considered antitrust compliance programme, with appropriate legal advice. Such action must be considered a positive step which contributes to an awareness at all levels of the group of the daily impact of competition policy*").

Since the introduction of the first leniency notice in 1996, however, the EU Commission has granted fine reductions for "compliance" and cooperation only under the conditions set out in the EU Commission's leniency notice and the notice on the conduct of settlement procedures. In its "*Compliance Brochure*" (published in 2012, http://ec.europa.eu/competition/antitrust/compliance/index_en.html), the EU Commission unambiguously notes that "*[a]lthough all compliance efforts are welcomed, the mere existence of a compliance programme is not enough to counter the finding of an infringement of competition rules – companies and their employees must, in fact, comply. If a company which has put a compliance programme in place is nevertheless found to have committed an infringement of EU competition rules, the question of whether there is any positive impact on the level of fines frequently arises. The answer is: No. Compliance programmes should not be perceived by companies as an abstract and formalistic tool for supporting the argument that any fine to be imposed should be reduced if the company is 'caught'. The purpose of a compliance programme should be to avoid an infringement in the first place*".

The EU Commission's position is based on the following considerations: While a company is not *directly* rewarded for a compliance programme through fine reductions, the company is rewarded *indirectly* because an effective compliance programme allows a company to prevent or at least detect and stop an antitrust infringement at an early stage, which – in addition – may allow the company to provide sufficient information to and cooperate with the EU Commission under the leniency notice, thereby potentially reducing the company's exposure. These considerations are reflected in the EU Commission's Compliance Brochure which explains that "*[t]he detection mechanisms provided by an effective compliance strategy can also help to get the best out of the Commission's leniency programme. Aimed at enabling the detection of secret agreements between competitors – some of the most egregious infringements of competition law – it offers a unique opportunity, for companies willing to cooperate with the Commission (or with the national competition authorities), to receive immunity from fines or to get a fine reduced*".

The EU Courts have consistently sanctioned the EU Commission's policy, emphasising that "*even though the measures to ensure compliance with competition law are important, they cannot affect the reality of the infringement committed. Thus, the adoption of a compliance programme by the undertaking concerned does not oblige the Commission to grant a reduction in the fine on that account*" (see, *e.g.*, Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission*, para. 52).

III. United States

In the United States, the determination of corporate fines is subject to the US Sentencing Guidelines (2015 Guidelines Manual, effective 1 November 2015, http://www.ussc.gov/guidelines/2015-guidelines-manual), which include a possible fine reduction if the company had in place an "*effective compliance and ethics program*" at the time of the infringement. However, the reduction is precluded if "*high-level personnel* or *substantial authority personnel*" participated in the infringement. At the same time, the DOJ established a firm policy that credit should not be given at the charging stage for a compliance programme and that amnesty is only available to the first corporation to make full disclosure to the government (*e.g.*, US Attorney's Manual 9-28.400 Special Policy Concerns, Comment B, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm).

In 2015, the DOJ decided to give a discretionary discount based on the implementation of an effective compliance programme going forward after the violation. In two plea agreements, the DOJ reduced the administrative fine based mainly on the defendant having established a "*rigorous antitrust compliance program*" relating to the proceedings against Barclays PLC and Kayaba Industry Co. Ltd.

In the first case, Barclays participated in a cartel on the foreign currency exchange spot market. On 19 May 2015, the DOJ recommended a lesser fine to the district court in a plea agreement considering, among other factors, the substantial improvements to the defendant's compliance and remediation programme to prevent the recurrence of the charged offence. In the second case, the DOJ alleged that Kayaba, a Tokyo-based manufacturer of shock absorbers used in motorcycles and automobiles, participated in a price-fixing conspiracy with two other companies from the mid-1990s. The DOJ reached a plea agreement imposing a reduced fine reflecting the substantial improvements to the defendant's compliance and remediation programme. In its sentencing memorandum, the DOJ explains the fine reduction as follows:

> "*Simultaneously, a comprehensive and innovative compliance policy was conceived and implemented. That policy, at the direction of the Defendant's senior management, sought to change the culture of the company to prevent recurrence of the offense. KYB's compliance policy has the hallmarks of an effective compliance policy including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy.*"

In a speech of June 2015, the DOJ's Deputy Assistant Attorney General Antitrust Division further explained that:

> "*Only compliance efforts […] that reflect in some way genuine efforts to change a company's culture, will receive consideration in calculating a company's fine. Paper compliance programs do not bring about culture change. Senior executives who lead by example and hold themselves and others accountable bring about culture change. Senior executives who create a zero tolerance compliance environment bring about culture change. And companies that make responsible personnel decisions about culpable employees – those who will be carved out of the company's plea agreement and do not accept responsibility – bring about culture change. That is what we will be looking for.*" (Deputy Assistant Attorney General for Criminal Enforcement Brent Snyder at the Sixth Annual Chicago Forum on International Antitrust Chicago, IL United States~ Monday, 8 June 2015, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.)

IV. Canada

In Canada, the Canadian Competition Bureau (CCB) published a bulletin in June 2015 noting that:

> "*The existence of a* [compliance] *program, however, will not necessarily result in a favorable recommendation to the PPSC* [Prosecution Service of Canada]. *When the Bureau is satisfied that a compliance programme in place at the time the offence occurred was credible and effective, in keeping with the approach set out in this bulletin, the Bureau will treat the programme as a mitigating factor when making recommendations to the PPSC in conjunction with an application under the Bureau's Leniency Program. […] A compliance programme will be considered credible and effective when the company can demonstrate that it was reasonably designed, implemented and enforced in the circumstances. The burden of establishing this is always on the company.*" (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html#s3_2_1.)

The Competition Bureau included as an appendix to the bulletin a Corporate Compliance Programme Framework setting out the essential components of a "*credible and effective*" compliance programme. The Competition Bureau stresses that the Framework constitutes general guidance only and that the Bureau will not deem a compliance programme deficient or non-credible if a company deviates from the Framework, where the deviation is reasonable in the circumstances.

The Competition Bureau further explains in the bulletin that if it determines that an alternative form of resolution of an investigation is appropriate to resolve a matter, and a credible and effective programme is not already in place, the Bureau may require the implementation of such a programme as part of the resolution. Where a programme is already in place, the Bureau may require the company to review its programme to promote compliance with competition law and possibly to revise or enhance its programme. In this case, the company may be required to demonstrate that its programme is likely to prevent infringements of competition law. The proposed or revised programme has to fit the requirements of a credible and effective programme per the Bureau's guidance.

V. Brazil

In January 2016, the Brazilian competition authority, the *Conselho Administrativo de Defesa Econômica* ("CADE") published guidelines relating to compliance programmes specifying, *inter alia*, that "*the existence of a strong compliance program, with damage control measures […] may be considered evidence of good faith on the part of the infringing company and of the reduction of the negative economic effects derived from the unlawful practice. Thus it is possible for the Tribunal to consider the compliance programme as (i) evidence of good faith and a mitigating factor when stipulating the fine, resulting in its reduction or as (ii) criterion to be considered when calculating the pecuniary contribution to be paid by the company, in case a settlement agreement is signed, which could take the discount percentage to the maximum allowed. In addition, programmes with those characteristics tend to reduce the risk of recidivism, which doubles the applicable fine imposed by CADE*".

The referenced maximum fine reduction is stipulated in a separate statute of 2011 pursuant to which "*[t]he Court shall, upon the judgment of the administrative proceeding, once the compliance with the agreement is verified: in the other cases, reduce the*

applicable penalties from one (1) to two thirds (2/3), observing what is set forth in Art. 45 of this Law, also considering the classification of the penalty the effective cooperation provided and transgressor's good faith in the compliance with the lenience agreement".

In its guidance, CADE also provides detail on the criteria required for a "*strong compliance program*", which can lead to a reduction of a fine. CADE further points out that the detection of an infringement on the basis of a compliance programme is an additional benefit which increases the possibility for the company to negotiate agreements with CADE, including leniency agreements, which may lead to a further substantial reduction of sanctions and, in some cases, criminal immunity for individuals.

VI. United Kingdom

In the UK, the former Office of Fair Trading ("OFT"), now Competition and Markets Authority ("CMA"), adopted guidance documents that address the relevance of compliance programmes for purposes of the fine calculation (see "OFT's guidance as to the appropriate amount of a penalty" (OFT423), 1 September 2012 https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation; and "How your business can achieve compliance with competition law" (OFT1341), 1 June 2011 https://www.gov.uk/government/publications/how-your-business-can-achieve-compliance-with-competition-law). In these documents, the CMA emphasises that the key benefit of compliance for a company is the increased chance of prevention of infringements of the competition laws in the first place. The CMA guidance makes clear that there are no "*automatic*" reductions in the fine in the event that the company has undertaken compliance activities. In contrast, the CMA explains that the fine may be increased where the compliance programme had been used to facilitate the infringement, to mislead the CMA as to the existence or nature of the infringement, or had been used in an attempt to conceal the infringement.

However, the CMA's guidance also outlines situations of a possible fine reduction where "*adequate steps having been taken with a view to ensuring compliance with the Chapter I and Chapter II prohibitions of the Competition Act 1998 and Article 101 and 102 TFEU*" (OFT423, para. 2.15). The "*adequate steps*" may include the implementation of a four-step process described in the guidance, based on (i) risk identification, (ii) risk assessment, (iii) risk mitigation, and (iv) review, or "*reasonably equivalent measures*".

The CMA guidance clarifies that each case will be assessed on its own merits and that a company seeking a reduction of the fine is expected to adduce evidence that adequate steps having been taken in relation to achieving a clear and unambiguous commitment to competition law throughout the organisation and the content of the four-step process. The company is expected to demonstrate that the steps taken were appropriate to the size of the business concerned and its overall level of competition law risk.

If the CMA determines that adequate steps have been taken and that a fine reduction is justified, it will consider reducing the amount of fine by up to 10%. One relevant factor for the assessment relates to the steps taken by the business following discovery of the infringement (*e.g.*, OFT1341, para. 7.4).

By way of example, in May 2015, the CMA decreased a fine for two of three defendants by 5% because the CMA had been provided with evidence that after the infringement, senior managers had been trained in competition compliance and that a competition manual had been set up, and was being applied (Case CE/9827/13 *Property sales and lettings investigation*, Decision dated 8 May 2015, para. 6.43). In a decision of March 2014, the former OFT initially considered that a reduction of the fine by 5% was appropriate. Subsequently, the OFT reconsidered the fine calculation on the basis of evidence that: (i) the company's competition law compliance across the whole group would be overseen and regularly assessed by one of its board members; (ii) comprehensive competition law training provided by specialists was being undertaken by all relevant staff; and (iii) all relevant contracts with trading partners and compliance policies were to be reviewed. In the light of these improved compliance measures, the OFT increased the fine reduction to 10% (Case CE/9627/12 *Investigation into the supply of healthcare products*, Decision dated 20 March 2014, para. 7.30).

In line with the CMA/OFT's approach to compliance programmes, the Competition Appeal Tribunal held in *Kier Group and others v. OFT* (2011, http://www.catribunal.org.uk/files/2.1114;19;27;29;32;33_Construction_Judgment_11032011.pdf) that "*it is not disputed that some discount should be given for a post-infringement compliance programme. The reasons for a discount are obvious: it serves as an inducement to infringers to take appropriate steps to avoid infringing in the future, and reflects the mitigating circumstance that the infringer intends not to do so. Further, although the OFT is correct in saying that a compliance programme is not a substitute for a general or specific deterrent, the decision-maker should in our view take such a programme into account in assessing any deterrent element in the penalty. For it may well have a bearing on specific deterrence [...] When considering the size of a discount for post-infringement compliance measures, much depends on the specific circumstances of the case, as always. However, in most cases it is likely to be relatively modest in relation to the overall fine. If the preference of the decision-maker is to express the discount in percentage terms, rather than building its mitigating effect into the original penalty, a discount of about 5% under this head would be unobjectionable as a general proposition*".

VII. France

In France, the framework-document on Antitrust Compliance Programmes (Framework-Document of 10 February 2012 on Antitrust Compliance Programmes http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf) sets out the approach to compliance programmes taken by the French competition authority, the *Autorité de la concurrence* ("Autorité").

The Autorité considers that compliance programmes, in order to be effective, must seek two objectives: firstly, prevent the risk of committing infringements; and, secondly, provide the means of detecting and handling any misconduct that has taken place. Although creating and maintaining a culture of compliance is a fundamental part of compliance programmes, a set of concrete measures must complement this dimension of compliance programmes.

With respect to the impact on the fine calculation, the Autorité's guidance notes that "*there is no reason to treat a compliance programme, per se, as a mitigating circumstance. If an infringement is committed despite the existence of a compliance programme, this very circumstance does not affect the objective reality of the infringement. In particular, the fact that the company has set up a compliance programme has no bearing on the seriousness of the facts or on the importance of the economic harm they may have caused to the economy. Furthermore, although it is true that the existence of a compliance programme may be an element that differentiates the relevant company or organisation from other participants to the infringement, the Autorité considers that this fact should not be taken into consideration in itself when making an individual decision on the amount of the financial penalty to be imposed, insofar as it did not prevent the occurrence of the infringement*" (para. 31).

However, the guidance clarifies, in the event of a settlement, "*if the Autorité accepts a commitment to set up a compliance programme that meets the best practices set forth in the present framework-document or to improve an existing programme to the extent necessary to that effect, the Autorité will reduce the financial penalty of the concerned company or organisation by up to 10%*" (*Ibid*.).

In a decision of December 2015, the Autorité granted six (out of 20) defendants a fine reduction of 18% or 19% on the basis of the defendants' compliance commitments and not contesting the allegations, which was treated as a further condition to consider the compliance commitments as a mitigating factor (Decision n° 15-D-19, December 15, 2015, paras. 1363–1387).

VIII. Germany and the Netherlands

Similar to the approach taken by the EU Commission, the competition authorities in Germany and the Netherlands do not reward a compliance programme in existence at the time of the infringement or a subsequent commitment to set up and implement a compliance programme in the course of the investigation.

The German *Bundeskartellamt* emphasised, however, that, even though a compliance programme will not lead to a direct reduction of fines, an effective programme will ease the detection of an infringement and the gathering of information which indirectly can result in the reduction of fines under the leniency programme.

The guidelines set up by the Dutch Authority for Consumer & Markets ("ACM") do not mention compliance programmes. Similar to the EU Commission and the German Bundeskartellamt, the ACM promotes compliance programmes as they may prevent an infringement, may limit the duration of an infringement, and/or the discovery of an infringement and may allow the company to file a leniency application. However, to our knowledge, the ACM has not yet granted any fine reduction based on compliance programmes. On the contrary, in one case, the ACM increased the fine, because the defendant's compliance programme had proved ineffective (*ACM / KPN*, Case number: 11.0183.29; https://www.acm.nl/en/publications/publication/12570/ACM-fines-KPN-for-putting-competitors-at-a-disadvantage-in-government-tender/).

IX. Conclusion

The goal of every antitrust compliance programme should be to avoid, or at least minimise antitrust risk and liability, including in relation to private damages. Even in jurisdictions where a compliance programme is not directly rewarded in the form of fine reductions, there are very significant indirect rewards related to the prevention or early discovery of the infringement, the consequential limitation of the duration of the infringement and/or the filing of a leniency application which may result in the immunity from or at least reduction of fines. However, there is no one-size-fits-all compliance programme, and in order for a company to maximise the benefits of an antitrust compliance programme, a compliance programme would need to be customised to the company's particular risk in a given industry sector and taking into account how the company is structured internally. As the above overview of a small number of jurisdictions demonstrates, an effective compliance programme will also need to address the potentially diverging requirements in multiple jurisdictions to make sure that the programme qualifies as, e.g., a "*rigorous*", "*strong*" or "*effective*" compliance programme under the relevant national laws.

Acknowledgment

The authors wish to thank Tiffany Rider, a Counsel in Skadden Arps' Washington DC office, for her contribution to the US section of this chapter.

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