Utrecht Law Review
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This article is published in a peer-reviewed section of the Utrecht Law Review

Compliance Programmes in Competition Law: Improving the Approach of Competition Authorities

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1. Introduction

> *'There are few branches of trade in this or any country which are not represented by associations which seek to prevent unprofitable competition.'*[1]

This might look like a grim way of introducing an article about the role of compliance programmes in competition law, and to be fair, it is. However, this quote – dating from 1887 – was as true then as it is today. Competition authorities discover multiple cartels on a yearly basis, throughout various markets or 'branches of trade'. And even though we educate our future lawyers on the basics of competition law, many businessmen/women seem to be unaware of the prohibitions it contains, and might feel that preventing unprofitable competition is merely part of the game.[2]

How competition authorities should change such an attitude towards competition law is strongly debated in literature, and the suggested approaches vary as much as the fields of academia that have contributed to this discussion.[3] In this article, the focus will be on one suggestion in particular: the use of compliance programmes, which is presented as an addition to (and not a replacement for) another important approach to enforcement: deterrence. This article explores the way in which competition authorities deal with compliance programmes, specifically in the light of the question whether this approach would, at least in theory, be capable of changing companies' attitudes towards competition law. The aim of the article is to explore whether competition authorities could do more to unlock the potential of compliance programmes.

1.1. Compliance programmes: FAQ

However, in presenting the aim of this paper this prematurely distracts from the questions at hand: what are compliance programmes, and how could they serve as an enforcement tool in competition law? Even though this article focuses on the domain of competition law, compliance programmes are in no way

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1 *Montreal Journal of Commerce*, 1887.

2 Researched by D.D. Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement', 2012 *Antitrust Law Journal* 78, no. 1, pp. 201-240, available at <http://scholarship.law.ufl.edu/facultypub/298> (last visited 7 November 2014).

3 The best way to enforce the law (not necessarily competition law) has been debated in, for instance, economics, behavioural sciences and social sciences.

specific to this field. In fact, businesses usually have to comply with a wide range of rules and prohibitions, for which the use of compliance programmes is not unusual (think, for instance, of environmental law, safety regulations or food and health regulations). In its most basic form, a compliance programme is a way for a company to publically announce that it intends to follow all of these rules, and they have to be taken into account in day-to-day business. Often, but not always, compliance programmes are coupled with the company's corporate governance code or another code of conduct. Compliance programmes are examples of 'voluntary governance', whereby companies or organizations express their commitment to certain rules and to the values or objectives on which they are based. Such programmes generally also include a set of actions intended to assist companies in building a genuine culture of compliance with those rules, but also in detecting likely acts of misconduct, in remedying them and in preventing any repetition.[4]

Because compliance programmes are often publicly available, they serve an important external signalling function by stating that a company is aware of the law, and intends to comply with it. However, compliance programmes also create an educational responsibility in the internal structure of the company. By having a compliance programme in place, companies basically state that their employees are aware of the applicable rules and regulations, and that they take care to abide by them. This creates an obligation for companies, at least in theory, to educate all personnel about the laws to which they have committed themselves. For that reason, compliance programmes often contain an approach to the training and education of current employees, and they are usually provided to new employees at the outset.

Presumably, most corporate compliance programmes contain a reference to competition law, and to its two basic rules in particular: not to engage in anti-competitive agreements and not to resort to abusive conduct when a firm is dominant in the market.[5] These are rather broad prohibitions, and go hand-in-hand with an impressive body of case law, making it complicated to determine when an agreement could be regarded as anti-competitive, or when market behaviour could qualify as abusive. Committing oneself to complying with these rules is one thing, transferring their full meaning is another. Competition law compliance programmes therefore need some special attention, and it is easy to see that competition authorities could play a role within these programmes. From the foregoing it follows that this role should, at least partly, consist of explaining competition rules to businesses. However, as this is part of a competition authority's more general task of giving guidance on competition rules, this role is mostly disregarded in this article.[6] The other possible roles – promoting the adoption of compliance programmes and monitoring their application – are featured in this article, as they ensure that competition rules receive the special attention that they need.

1.2. Outline and delineation

This article aims to explore whether competition authorities could do more to unlock the potential of competition law compliance programmes with a view to increasing the company's commitment to the rules. However, the point can be raised whether competition authorities should even focus on increasing commitment, and why a focus on deterrence as an enforcement strategy is not sufficient. These preliminary points are discussed, though briefly, in Section 2. In this section, the potential role of compliance programmes is explained as well. Section 3 discusses the current approach to compliance programmes in practice by looking at the approach of competition authorities (the procedure) and the elements prescribed in a programme (the substance). These issues are relevant in Section 4 as well, in which some of the leading opinions in literature are depicted on these points. The most striking features

4 Autorité de la Concurrence, 'Document-cadre du 10 fevrier 2012 sur les programmes de conformité aux règles de concurrence' (hereinafter: Framework Document Compliance), Para. 8. Translation is the official translation by the Autorité, available at <http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf> (last visited 7 November 2014).

5 Arts. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

6 Apart from the concluding paragraphs mentioning the importance of press coverage for competition law actions. Competition authorities give guidance about competition rules in general. See for instance the brochures on competition law by the European Commission, accessible at <http://ec.europa.eu/competition/antitrust/publications_en.html> (last visited 7 November 2014). It is less common to give guidance in individual cases, since the competition rules are based on a system of self-assessment, rather than pre-approval by the competition authorities. In exceptional cases, competition authorities might give an opinion on a specific case. However, these opinions are not intended as a 'licence' for a certain behaviour.

of this discussion are bundled in Section 5, which explores whether the current approach of competition authorities, as seen in the light of the advantages that compliance programmes may have to serve enforcement purposes, could be improved or altered in any way.

The national practice as discussed in this article focuses on the approaches of the Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt*) and the French *Autorité de la Concurrence*. The differences between these authorities in their procedural approach is striking, though their views on what constitutes a good compliance programme are rather similar. The research is limited to their approach in the last decade (2004-2014), also with a view to the entry into force of Regulation 1/2003.[7] Lastly, it must be mentioned that this article is based on the research for the author's forthcoming thesis, in which the use of compliance programmes in competition law will play a role as well.[8]

2. Deterrence, commitment and compliance

Competition authorities enforce the law in order to secure compliance with competition rules, or in a broader context, in order to secure the goals which competition law pursues. People, and therefore also companies, can be led by various motivations to comply with the law. Generally, compliance can flow from a fear of detection and subsequent punishment or from a sense of normative obligation. These two kinds of motivations have been labelled the negative or affirmative basis for compliance.[9] In order to realize compliance, enforcement agencies must appeal to these bases by increasing the fear of detection and punishment, by focusing on stirring a sense of obligation, or by a combination of the two.

2.1. Enforcement & deterrence

The enforcement of competition law takes place through a structure of detection, investigation and sanctioning. In more detail, a competition authority detects a potential infringement – generally as a result of complaints or leniency, or by means of other indicators that a market is not working well – and investigates its scope. If an infringement is indeed established, a fine can be imposed. These fines can run up to fairly large amounts. Illustrative in this respect is the European Commission's Cathode Ray Tubes cartel, in which the cartelists incurred a fine of no less than €1.47 billion combined, or the Yen Derivatives cartel in which an aggregate fine of €1.71 billion was imposed.[10]

The concept of imposing high fines for competition law wrongdoings is based on the theory of deterrence. This entails that companies are dissuaded from committing and infringement based on the credible threat of detection and incurring a sanction. The underlying rationale of deterrence is that the decision to violate the law is based on a cost-benefit analysis.[11] Assuming that companies are rational actors,[12] their decision to comply with the law will depend on whether the benefits of compliance exceed the costs of non-compliance. To put it the other way around, a violation will occur if the benefits of violating the law exceed the costs. The factors determining these costs and benefits are the probability of detection and the severity of the sanction. Generally speaking, in order to increase the deterrent effect of enforcement, either the detection rate must improve, or the fines should increase.

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7 Which significantly altered the enforcement of European competition law from a central to a decentralized system with competence for the national authorities. Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

8 Forthcoming in the spring of 2016. This comment is made due to the nature of some of the research (semi-structured interviews, see below) for which a more extensive methodological explanation will be provided in the thesis.

9 P.J. May, 'Compliance Motivations: Affirmative and Negative Bases', 2004 *Law & Society Review* 38, no. 1.

10 European Commission, press release Cathode Ray Tubes: <http://europa.eu/rapid/press-release_IP-12-1317_en.htm>, and European Commission, press release Yen Derivatives: <http://europa.eu/rapid/press-release_IP-13-1208_en.htm> (last visited 7 November 2014), although this decision concerned the Commission's settlement procedure.

11 There is extensive literature on this subject, see for instance A.M. Polinsky & S. Shavell, 'The economic theory of public enforcement law', *NBER Working Paper*, No. 6993, 1999. However, it is also argued that such a cost-benefit analysis is not always made, see for instance B.A. Jacobs, 'Deterrence and deterrability', 2010 *Criminology* 48, no. 2, pp. 417-442.

12 Which is an assumption often made in economic literature describing deterrence theory. However, see differently the work of R.H. Thaler & C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness*, 2009 or D. Ariely, *Predictably Irrational: the Hidden Forces that Shape Our Decisions*, 2008, though there are many more influential authors on behavioural sciences and its effect on economic assumptions.

In past years, competition authorities have attempted to increase the deterrent effect of their actions by increasing the maximum amount of the fine.[13] Apart from that, criminal and civil liability increase the perceived cost of infringement, as it leads to the conviction – and possibly incarceration – of cartelists and civil follow-on or stand-alone claims respectively. On the other part of the equation, the detection rate has surged since the introduction of national and European leniency programmes, which are intended to destabilize cartels through self-reporting. Other possibilities to increase the amount of cartels detected, such as *qui tam* provisions, informant rewards and structural market screens, have been debated in the literature, but have yet to be implemented in many jurisdictions.[14]

2.2. Enforcement & commitment

Despite the focus on increasing deterrence, competition law infringements still take place: durable cartels are found and fined every year, as well as long-standing abusive behaviour. Moreover, in many industries certain behaviour amounting to a competition law infringement is not perceived as 'breaking the law', but as business culture.[15] Another problem might be that studies have shown that those who have been caught and sanctioned seem to be more likely to violate the law again.[16] Somehow, despite its undeniable possible effects on companies and individuals who do make a deliberate cost-benefit analysis, increasing the deterrent effect of enforcement alone is not enough to induce compliance.[17]

Instead of increasing deterrence by sanctioning illicit behaviour after it has taken place, competition authorities might attempt to increase the understanding of and the commitment to the rules beforehand. This approach, which is sometimes referred to as the increase of normative commitment,[18] is based on the assumption that compliance may stem at least as much from a personal commitment to law-abiding behaviour as from a fear of punishment.[19] However, it is difficult to imagine how competition authorities could increase normative commitment or change companies' objectives on their own. 'Imposed commitment' is almost a *contradictio in terminis*, and immediately indicates the necessity of involving companies in the process. In other words, if competition authorities do wish to appeal to the normative commitment of companies, these companies will have to participate in this actively. Therefore, appealing to a positive basis for compliance requires crossing the public-private domain and involving businesses in promoting compliance with competition rules.

2.3. The potential of compliance programmes

One of the ways in which companies can contribute to the level of compliance in their organizations is by designing and implementing compliance programmes. This is not a new or ground-breaking realization, certainly not in the field of competition law.[20] Competition authorities are aware of the possibilities of compliance programmes, and the authorities' most desirable role therein has been debated extensively

13 See for another signalling of this trend van E. van Hasselt & H. Urius, 'The Deterrent Effect of EU Competition Law: Higher Fines and Extended Targets', *National Law Review,* blogpost 14 June 2014, available at <http://www.natlawreview.com/article/deterrent-effect-eu-competition-law-higher-fines-and-extended-targets> (last visited 7 November 2014). They refer to the intention of the Dutch Minister to raise the ceiling for fines. Minister H.G.J. Kamp, 'Kamerbrief over Boetebeleid Autoriteit Consument en Markt', 27 August 2013, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/08/27/kamerbrief-over-boetebeleid-autoriteit-consument-en-markt.html> (last visited 7 November 2014).

14 See for a discussion of *qui tam* provisions W.E. Kovacic, 'Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting', 1996 Loy. *L.A. L. Rev*. 29, pp. 1799-1858, p. 1804. An analysis of the possibilities of informant rewards and market screens is done by J. Polanski, 'Informant Reward Schemes in Competition Enforcement', available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457450> (last visited 7 November 2014).

15 Sokol 2012, supra note 2.

16 This is the 'positive punishment effect' as is mentioned in Jacobs 2010, supra note 11, p. 419.

17 However, it has also been argued that it might have affirmative effects as well, because a deterrent enforcement policy could reaffirm the commitment to compliance. W.P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice', 2006 *World Competition* 29, no. 2, pp. 183-208 referring to J. Adanaes, 'The moral or educative influence of criminal law', 1971 *Journal of Social Issues* 27, no. 2, pp. 17-31.

18 J.G. Van Erp, 'Motieven voor naleving van regelgeving', in T. Barkhuysen et al. (eds.), *Recht realiseren. Bijdragen rond het thema adequate naleving van rechtsregels*, 2005, p. 16.

19 J. Jackson, 'Why do people comply with the law? Legitimacy and the influence of legal institutions', to be published in *British Journal of Criminology*, but more importantly: T.R. Tyler, *Why people obey the law: Procedural justice, legitimacy, and compliance*, 2006.

20 Actually, some of the debate on compliance programmes in competition law took place in the late 1950s, early 1960s, and is still relevant even today. See for instance C.V. Anderson, 'Effective Antitrust Compliance Programs and Procedures', 1962-1963 *Bus. Law*. 18, p. 739, or G. Geis, 'White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961', in M.B. Clinard & R. Quinney (eds.), *Criminal Behavior Systems: A Typology*, 1967, pp. 139-151.

in the literature. And for good reason, because compliance programmes are potentially a way in which market parties and competition authorities could work together in order to secure compliance across the board.[21]

For businesses, the benefits of compliance lie in the mitigation of the risks and costs of non-compliance. If a compliance programme functions well, infringements can be detected and halted at an early stage, thus preventing further damage to the company and to the market. From a more positive viewpoint, compliance programmes aid companies in being seen as 'ethical businesses', which can increase positive branding.[22] For competition authorities, compliance programmews can be seen as a method of disseminating a compliance culture, to keep tabs on the market, and to somewhat share the burden of detecting infringements.[23]

3. National enforcement perspective on compliance

Whether the way in which compliance programmes are treated in practice is capable of increasing a normative commitment to competition rules within companies is a difficult – if not impossible – question to answer. Therefore, the following sections focus on a number of circumstances that are believed to either facilitate or stand in the way of a successful compliance programme. Again, whether the approaches taken by the different authorities actually lead to more commitment to the rules is difficult to measure. However, it must be possible to determine obstacles in the authorities' current approaches, as well as suggestions that might promote the commitment to competition rules.[24]

3.1. General approach to compliance programmes

Considering that the use of compliance programmes has been heavily debated over the years, the Dutch Authority for Consumers and Markets (ACM) and the French *Autorité de la Concurrence* (*Autorité*) have not avoided the opportunity to make known their views on compliance programmes. However, the level of guidance given on compliance programmes differs between both authorities, as does the subsequent appraisal. In this last respect, attention is paid to the question of rewarding compliance efforts by granting fine reductions in formal procedures. The relation between compliance and other instruments – besides fines – is discussed briefly as well.

3.1.1. The Netherlands

The ACM has no legal obligation to engage in or actively promote businesses' compliance programmes. There is no model of what compliance programmes should look like, and no regulation on what the ACM is supposed to do with them. Still, the ACM views it as part of its task to promote the use of compliance programmes in general, and sometimes even in specific cases.[25] It derives this competence from its vision on enforcement ('using all instruments and approaches necessary to solve a problem') and its mission statement ('creating opportunities and choices for businesses and consumers').[26] In general, ACM views compliance programmes as potentially beneficial, even though it views its role in these programmes quite narrowly.

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21 However, as Section 4.1 below describes, a more sceptical approach towards compliance programmes is equally possible.

22 These drivers of compliance are mentioned by the European Commission, and by the Office of Fair Trading (OFT). European Commission, D-G Comp, 'Compliance Matters: What Companies Can Do to Better Respect EU Competition Rules', KD-32-11-985-EN-C, 2012. Office of Fair Trading, S. Preece (Deputy Director Competition Policy), 'OFT Competition Law Compliance Initiatives and Resources', 6 March 2012.

23 Assuming that infringements are indeed detected. Whether this is an appropriate stance for competition authorities is debatable.

24 In addition to national documents, previous cases and speeches by key people within the authorities, the following sections (on the national perspective and the incentives) have been based on a series of semi-structured interviews held at the competition authorities under review (ACM and *Autorité de la Concurrence*). These interviews took place between February and June 2014.

25 Speech by Chris Fonteijn on 24 January 2014 at the International Chamber of Commerce, available in Dutch at <https://www.acm.nl/nl/publicaties/publicatie/12571/Toespraak-Chris-Fonteijn-bij-International-Chamber-of-Commerce-over-compliance/> (last visited 7 November 2014). This speech is commented upon by R. Elkerbout, 'Robuuste Compliance Programma's Verdienen Meer Dan Een Lippendienst van de ACM', 2014 *Tijdschrift Mededingingsrecht in de praktijk*, no. 3.

26 The ACM advocates a problem-solving strategy, based on the work of Malcolm Sparrow. ACM, 'Strategie Autoriteit Consument en Markt', 20 September 2013, available in Dutch at <https://www.acm.nl/nl/publicaties/publicatie/11991/Strategie-Autoriteit-Consument-en-Markt/> (last visited 7 November 2014).

This is illustrated by the fact that the ACM does not often mention whether compliance has played a role in its decisions, and that it used to be quite hesitant about giving guidance on the contents of what it believes to be a good compliance programme. Naturally, a competition authority should be aware of not handing out 'stamps of approval' in advance, possibly exonerating companies which have 'trusted the authority's guidance on the matter'. Therefore the ACM's predecessor, the Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit, NMa*), did underline the importance of compliance in some of its publications and annual reports, but not extensively. However, ever since the ACM started focusing on its full array of instruments under its new strategy, the Dutch authority seems to have become somewhat more forward on the subject. In an interesting speech, the Dutch chairman Chris Fonteijn has shed more light upon the matter, referring to international toolkits to illustrate the idea of a *bona fide* compliance programme.[27] This is further discussed below.

When compliance does seem to play a part in the ACM's decisions, it is mentioned most often in commitment decisions. In these decisions (in which no infringement is found, but companies offer commitments to remedy harmful behaviour[28]) compliance programmes could be offered as commitments, possibly increasing the future preventive effect of the decision. In the Netherlands, where ten commitment decisions have been taken since the introduction of the instrument in 2008, only three decisions contain specific compliance requirements.[29] In the other commitment decisions, mostly behavioural remedies were offered. In the cases containing a compliance programme the minimum requirements were already mentioned in the decisions. Also, in these cases the existing compliance programmes are still in place.[30] None of the companies involved in the other seven cases have given public attention to the question whether they have established a compliance programme.

Compliance programmes are not just of importance in the course of a commitment procedure; their existence can be a factor in determining a fine in a regular procedure as well. A widespread discussion in this respect concerns the question whether they should constitute a mitigating or an aggravating factor in the imposition of a sanction.[31] The ACM is neutral in this decision: a company should neither be rewarded nor punished for having a compliance programme in place. To support this view, the ACM holds that there are other mechanisms in the fining procedure which are more suitable for dealing with the benefits of a well-functioning compliance programme. For the early reporters (those who find an infringement and report it to the ACM voluntarily) there is leniency. For others, who have detected an infringement and have ended it quickly, there are benefits to be reaped from reporting a short-lived infringement instead of a long-lasting one. Nevertheless, the ACM's Fining Guidelines do not completely exclude a compliance programme from the realm of fine mitigation or aggravation. When a company uses a compliance programme for window-dressing purposes only, an increased fine is possible – at least in theory.[32] However, when a compliance programme is a basis for proactive participation with the procedure, fine mitigation must be possible as well.[33]

3.1.2. France

Also in France, there is no explicit legal basis for the promotion or evaluation of compliance programmes or for making them binding, but this is seen as a competence that the *Autorité* derives from its mission statement.[34] Especially because of the policy goals of preventing and educating, the *Autorité* feels that

27 Speech by Fonteijn 2014, supra note 25.

28 Art. 49a Dutch Competition Act (*Mededingingswet*) and Art. 9 Regulation 1/2003.

29 ACM Case 7191, *Landelijke Huisartsenvereniging* 2012; ACM Case 7138,*Thuiszorg Midden-Brabant* 2011; ACM Case 13.0612.53, *Mobiele Operators*, 2014.

30 However, the companies involved in the *Thuiszorg Midden-Brabant* case opted to refer to the compliance programme of their joint association: Actiz. This association decided to introduce a general compliance programme as a response to the ACM's (then NMa's) activities in the sector.

31 See for this discussion, and an elaboration of the two arguments mentioned in this same section, OECD, Directorate for Financial and Enterprise Affairs – Competition Committee, *Promoting compliance with competition law*, 30 August 2012, DAF/COMP(2011)20, p. 15.

32 This is not merely theory, as the predecessor of the ACM's telecom branch (OPTA) had on one occasion increased a fine imposed on KPN, which had a Memorandum of Compliance in place. In an interim procedure, this reasoning was untouched (District Court (*Rechtbank*) of Rotterdam 24 October 2013, ECLI:NL:RBROT:2013:8216). In competition law, such a fine increase has not yet been imposed.

33 ACM Fining Guidelines, Arts. 3.13 and 3.15 (Beleidsregels voor Boete en Clementie, *Staatscourant* 24 April 2013, no. 11214).

34 This statement includes the objective of safeguarding the functioning of the French competitive economy, implying a policy of preventing, detecting, correcting and sanctioning, and in which educational activities are essential., See Framework Document Compliance, supra

it has an implicit competence to promote compliance and to disseminate a compliance culture. The introduction of compliance programmes is seen as a particularly suitable way of doing so.

In 2012, the *Autorité* published a framework document on compliance programmes in order to help companies to set up a credible and verifiable compliance programme, which the *Autorité* can take into account when handling infringements. The framework document offers an overview of the *Autorité's* decisional practice and provides specific guidance for companies. In principle, this document is binding upon the *Autorité*, but it can deviate from it when this is justified.[35] The content of this framework document is outlined more extensively below, when the indicators of a successful compliance programme are discussed. It is however striking, especially in the light of the initial reluctance of the Dutch ACM to do so, that the *Autorité* has chosen to give extensive guidance on the content of compliance programmes. This might be because compliance programmes play an important role in a formal procedure: if companies can receive a reduced fine for a thorough compliance programme, good governance might require the authority to make known its views on what constitutes such a programme.

To explain the role of fine reductions in formal procedures, the *Autorité* started accepting compliance programmes as commitments in the course of a settlement procedure. The French settlement procedure (or non-contestation procedure) differs from the European Commission's settlement procedure in various ways, but the most striking difference in this respect is that the *Autorité* can make binding commitments offered by the companies in the course of a settlement, in return for a fine discount that might be up to 10%.[36] However, it has to be remarked that the *Autorité* has become somewhat more sceptical in reviewing compliance programmes that concentrate on educational aspects only. Already in 2005, it stated that such a compliance programme was not very substantial, but this was not reflected in the fine discount.[37] In 2007 the *Autorité* was more straightforward and held that 'such commitments, even if they are not devoid of importance, are nevertheless not likely to make improvements, substantial and verifiable, to the operation of competitive markets affected by the practices.'[38] Similar arguments have been repeated in other cases as well, resulting the *Autorité* disregarding the compliance programme and applying a 10% discount for just the non-contestation.[39]

It appears from decisional practice that all published compliance programmes have been introduced in the course of such a settlement, for which reason it could be said that the development of the approach to compliance programmes in France has occurred along the lines of the development of the non-contestation procedure. However, with regard to the role of compliance programmes in regular fining procedures the *Autorité* takes a neutral stance towards the weighing of compliance programmes: it is neither seen as a mitigating nor an aggravating factor, as the existence of a compliance programme does not alter the reality of the infringement itself.[40] Having a compliance programme in place, however, does yield a special responsibility after the discovery of an infringement of competition law. The infringement must be immediately brought to an end, and in the case of a cartel the company must apply for leniency.[41]

3.2. Indicators of a successful compliance programme

As described above, the French *Autorité* is more forward in pronouncing elements of a (perceived) successful compliance programme. In a recent speech, however, the chairman of the Dutch ACM has referred to the International Chamber of Commerce's Compliance Toolkit and the United Kingdom's

note 4, Para. 14, but also see its mission statement on <www.autoritedelaconcurrence.fr>.

35 Framework Document Compliance, supra note 4, Para. 6. This document emerged after a round of consultations (in terms of information, transparency and dialogue) and a round-table conference on 20 December 2011.

36 See more extensively E.S. Lachnit, 'Alternative enforcement of competition law – Balancing legal requirements in practice', available at <http://renforce.rebo.uu.nl/wp-content/uploads/2013/11/RENFORCE-Working-Paper-Settlements.pdf> (last visited 7 November 2014). The legal basis for this non-contestation procedure is Art. L.464-2 Paragraph III of the Code de Commerce. The discount is found in the Framework Document Compliance, supra note 4, Para. 31.

37 Autorité de la Concurrence, decision 05-D-07 of 19 December 2005 (*Disney Videotapes*).

38 Autorité de la Concurrence, decision 07-D-26 of 26 July 2007 (*High Voltage Cables*), Para. 149.

39 Autorité de la Concurrence, decision 07-D-48 of 18 December 2007 (*Internal Removal*), Autorité de la Concurrence, decision 08-D-12 of 21 May 2008 (*Okoumé Plywood*) and Autorité de la Concurrence, decision 09-D-19 of 10 June 2009 (*Relocation of Military Personnel*).

40 Court of Justice of the European Union, Case C-189/02, *Danske Rorindustrie e.a. v Commission*. Also: Framework Document Compliance, supra note 4, Paras. 23-26.

41 Framework Document Compliance, supra note 4, Paras. 27-28.

'Wheel of Compliance' as an example of what a robust compliance programme should look like. It will become clear from the following that the ACM's and the *Autorité's* respective views on the content of compliance programmes are not far apart.

3.2.1. The Netherlands

The formal stance taken by the ACM is that compliance programmes have to be tailored to each company individually. First and foremost, a company wishing to ensure compliance must make sure that there is a decent risk management within its internal structure. According to the Wheel of Compliance, this comprises comprehensive risk identification, a thorough risk assessment, measures to ensure risk mitigation and a continuous review of this process.[42] Apart from that, it is mentioned that compliance programmes require the full commitment of management in order to be effective. However, it is not just management that needs to be involved, all employees who could come into contact with competition law have to participate actively in the compliance programme and they must receive permanent education. For that reason, the company must provide a clear explanation of what constitutes illegal behaviour, along with practical examples that illustrate this behaviour in the various branches of the company. The employees receiving this training must declare their compliance on a regular basis, not just when signing a declaration of integrity at the beginning of the introduction of the programme. Finally, the compliance programme must contain a protocol for the handling of infringements, and must be updated on a regular basis.

Figure 1 Seven indicators of a successful compliance programme

Indicators of Compliance		
	1. Commitment of management	
	2. Explaining the rules	
	3. Participation & education	
	4. Declaration of compliance	
	5. Risk management	Identification Assessment Mitigation Review
	6. Protocol for infringements	
	7. Updating	

Even though this was one of the first occasions that the ACM had made a public, general statement about what it deems important in compliance programmes, the ACM has published its views on compliance programmes in a number of specific cases. Two of the most fully-fledged compliance programmes are those of the Dutch trade association for pharmacy (KNMP) and the Memorandum of Compliance between the Dutch telecom operator KPN and the ACM's predecessor in telecom regulation, OPTA.[43] These compliance programmes contain provisions similar to the elements mentioned above, and are considered to be examples of what a compliance programme should look like. It seems that of these two examples the Memorandum of Compliance between KPN and ACM is the most detailed and far-

42 ICC Antitrust and Compliance Toolkit, available at <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/> (last visited 7 November 2014). OFT Wheel of Compliance, not available as such, but published at <http://www.mcguirewoods.com/news-resources/publications/international/competition-law-mar2012.pdf> (last visited 7 November 2014).

43 Memorandum of Compliance between KPN and ACM, renewed version of June 2014, available in Dutch at: <https://www.acm.nl/nl/publicaties/publicatie/13072/Vernieuwd-Compliance-Handvest-KPN-en-ACM/> (last visited 7 November 2014) (hereinafter: Memorandum of Compliance KPN/ACM), and the Compliance Programme of KNMP (current version), available in Dutch at: <http://www.knmp.nl/downloads/organisatie-regelgeving/organisatie-regelgeving-wet-en-regelgeving/knmp-compliance-programma.pdf> (last visited 7 November 2014) (hereinafter: KNMP Compliance Programme).

reaching. This Memorandum contains a number of additional elements, such as the introduction of a whistleblowing system, efforts to achieve a change of culture within KPN and the obligation to perform an internal or external audit annually.[44]

3.2.2. France

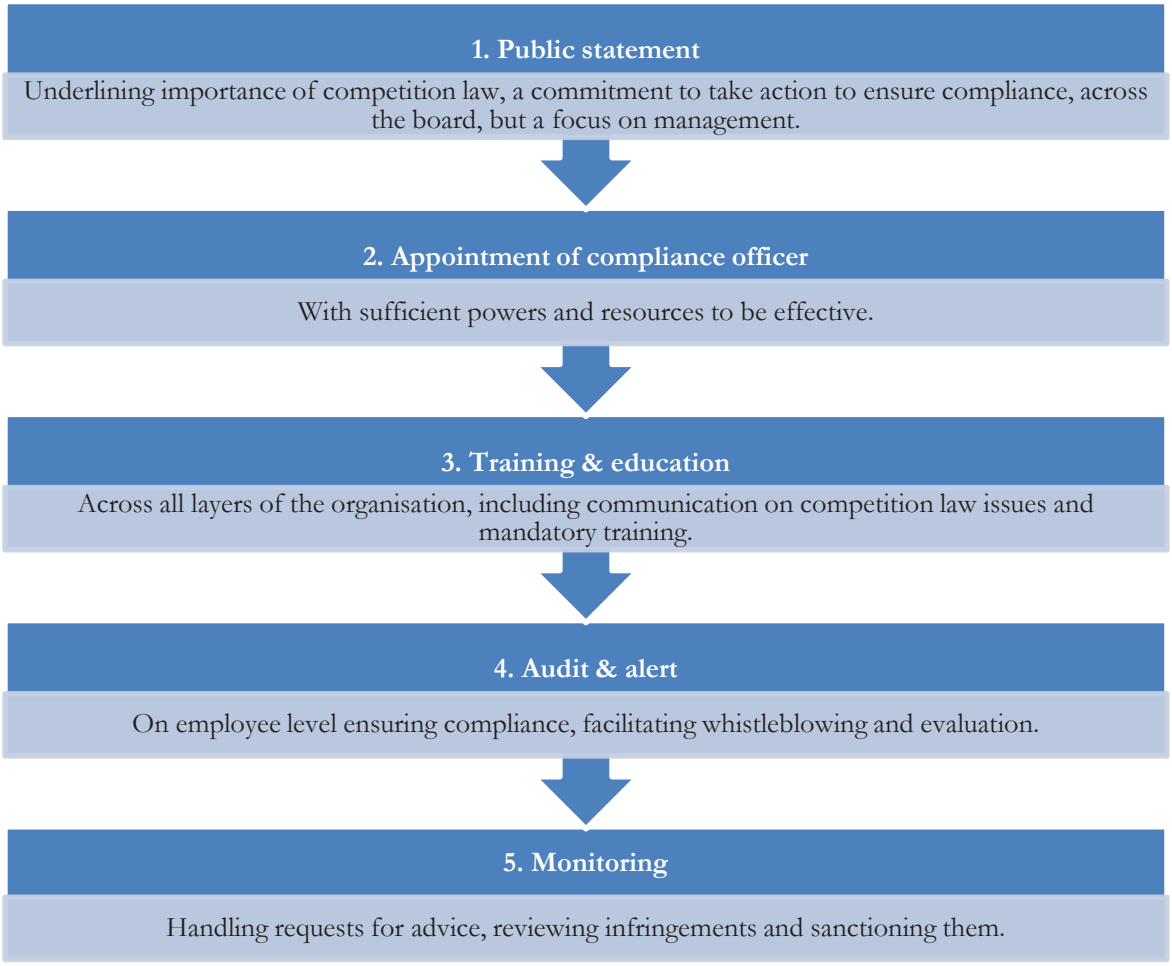
According to the *Autorité*, compliance programmes have a double objective: to diminish the risks of infringements on the one hand, and to form mechanisms to detect infringements that could not be prevented on the other. It is only with a combination of these two objectives that compliance programmes are believed to be effective.[45] In order to attain this effectiveness, the *Autorité* is quite specific in describing the contents of a compliance programme. First of all, it must create a culture of real and determined respect for competition rules amongst all levels of the hierarchy; it must consist of measures to provide information and training and to increase awareness, combined with supervisory, control and punishment systems; and lastly, it must fit the size of the company and the nature of its activities, along with its organizational structure, mode of governance and business culture.[46]

Obviously it is quite difficult to determine, based on these broad requirements, whether a compliance programme will be effective for a specific company, in a specific situation. For that reason, the *Autorité* has developed and communicated a number of indicators (both ex ante and ex post) to review a compliance programme's effectiveness. The more detailed of the two are the ex-ante indicators, designed to represent a number of features that compliance programmes would ideally contain in order to be effective. First of all, the introduction of a compliance programme must go hand in hand with a clear, firm and public position adopted by the company's management bodies and, more broadly, by all managers and corporate officers. Secondly, a compliance officer must be appointed and, thirdly, effective information, training and awareness measures must be put in place. The compliance programme must furthermore include the design of effective control, audit and whistleblowing systems, along with an effective oversight and monitoring system, in which the treatment of information gained and the sanctions to be imposed have to be determined beforehand.[47] These features, also dubbed the 'five-step programme', are not just extensively elaborated upon in the *Autorité's* framework document on compliance, but also have an exemplary function in the OECD report on competition law compliance.[48]

Ex-post indicators are used after an infringement has taken place, despite the existence of a compliance programme. They are therefore sub-optimal as indicators of the effectiveness of compliance programmes, which have by then proven to be faulty. However, if a compliance programme, in case of an infringement, contributes to the fact that the company is able to detect this at an early stage within its own organization, and the company is able to apply the right consequences to the infringement because of it, the programme is nevertheless considered to be effective.[49]

44 Memorandum of Compliance KPN/ACM, supra note 43, pillars of compliance on pp. 2-3.
45 Framework Document Compliance, supra note 4, Para. 11.
46 Framework Document Compliance, supra note 4, Paras. 11, 16 and 19.
47 Here in a very short form, but described very extensively in the Framework Document Compliance, supra note 4, Para. 22.
48 OECD, Directorate for Financial and Enterprise Affairs – Competition Committee, *Promoting compliance with competition law*, 30 August 2012, DAF/COMP(2011)20.
49 Framework Document Compliance, supra note 4, Para. 18.

Figure 2 Five-step approach to compliance



As a final note it has to be remarked that the use of whistleblowing systems in French compliance programmes is a feature that first made its appearance in 2007, and which was considered an innovation in France.[50] It seems that compliance programmes including the implementation of a whistleblowing system can count on a 5% additional discount if offered in a settlement procedure.[51]

3.3. Public attention to compliance programmes

Because the starting points of the two authorities differ somewhat, the attention given to compliance programmes in publications varies as well. Because the Dutch ACM has not, in the past, issued formal guidance on compliance, publications about compliance programmes in which the ACM was involved have been scarce. The French *Autorité*, on the other hand, has been quite forward in publishing the compliance programmes which it has accepted as commitments. However, this is not so much based on compliance policy, but on the duty to be transparent about its reasoning in formal decisions. As discussed above, compliance programmes in France have been developed along the lines of the formal non-contestation procedure in antitrust cases.

The ACM is not as active in communicating about its role in compliance as the *Autorité* is (see below). Nevertheless, it is safe to say that compliance programmes are usually mentioned as an element in the use of other instruments, such as a fine or a commitment decision. The ACM seldom presses

50 Autorité de la Concurrence, decision 07-D-21 of 26 June 2007 (*Professional Laundry*), Paras. 62 and 132.

51 See, most clearly, Autorité de la Concurrence, decision 11-D-02 of 26 January 2011 (*Restoration Historical Buildings*), in which the companies received a 10%, 15% and 25% discount for their compliance programmes.

the use of compliance programmes in another, stand-alone context.[52] As already mentioned above, compliance has played a role in 3 out of 10 commitment decisions. Apart from that, the ACM has mentioned discussing compliance efforts with companies on 9 other occasions, usually in the course of a regular fining procedure.[53]

In France, the *Autorité* has published 37 non-contestation decisions since 2004. In 26 of these decisions the *Autorité* has accepted compliance programmes from one or more companies as a commitment. Apart from that, the *Autorité* has a separate section of its website dedicated to compliance, and offers guidance by means of a framework document, available in French and in English.[54]

4. Compliance programmes in the literature

The analysis of national practice shows that there are different approaches to compliance, and that the approaches of the Netherlands and France differ slightly on a number of specific issues. First of all, in France compliance programmes have developed along the lines of the non-contestation procedure. For that reason, and from a transparency perspective, the French *Autorité* published guidelines on the contents and treatment of compliance programmes in 2012. The Dutch ACM has not provided such guidance until quite recently. Secondly, competition authorities could disagree on the question whether compliance programmes should be rewarded in fining procedures. The ACM and the *Autorité*, however, both take a neutral stance, stating that compliance should neither be a mitigating nor an aggravating factor in the amount of the fines imposed. Still, in the non-contestation procedure, a commitment to establish or improve a compliance programme might lead to an additional 10% fine discount in France, and the Dutch fining guidelines theoretically allow for compliance programmes to be taken into account in determining fines. Lastly, the opinion on what constitutes a 'good compliance programme' differs slightly between the two authorities. Even though the *Autorité* is more outspoken in its guidance, it seems that the ACM advocates more elements within the compliance programme, mainly in the domain of risk management.

Naturally, all of these previous topics are discussed extensively in the literature as well. In order to determine to what extent the approaches of the national competition authorities might be improved, this discussion is depicted below in a concise manner. This overview is in no way complete, but is intended to give an impression of the opinions that are out there, in order to see on which points the promotion of compliance programmes – if any are needed – could be enhanced.

4.1. Compliance programmes – do we need them?

It would be unfitting, however, to embark on a further analysis of compliance programmes without devoting attention to the more sceptical viewpoints in the literature, which state that compliance programmes in competition law might not be as useful as this article suggests. Even though one could probably think of more points of critique, this article focuses on the inherent differences between competition law infringements and other infringements and on the negative side-effects of compliance programmes.

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52 One of the reasons behind this might be that compliance is perceived by the ACM as the standard situation. It is what companies should do in the first place, and is therefore not typically something that a competition authority would press upon companies without any reason to believe that there is non-compliance. Secondly, the compliance programmes mentioned by the ACM in publications would be those programmes introduced in a high profile or long-lasting case. In these cases, competition concerns are usually not removed by only introducing a compliance programme. An exception is the Memorandum of Compliance KPN/ACM, supra note 43.

53 Memorandum of Compliance KPN/ACM, supra note 43, KNMP Compliance Programme, supra note 43, *Verbond voor Verzekeraars* (press release 30 December 2010, available in Dutch at <https://www.acm.nl/nl/publicaties/publicatie/5471/NMa-meer-ruimte-voor-concurrentie-tussen-verzekeraars/> (last visited 7 November 2014)), *Veras* (mentioned in the Annual Report 2012, available in Dutch at <http://nmajaarverslag2012.acm.nl/jaarverslag/mededinging/activiteiten-in-2012/nma-beboet-rotterdamse-sloopbedrijven-wegens-verboden-afspraken/> (last visited 7 November 2014)), *Greenchoice* (press release 8/1/2013, available in Dutch at <https://www.acm.nl/nl/publicaties/publicatie/11008/NMa-wijst-bijna-alle-bezwaren-Greenchoice-af/> (last visited 7 November 2014)), *Uitgevers* (mentioned in the Annual Report 2007, p. 30), *Nederlandse Vereniging van Makelaars* (mentioned in the Annual Report 2007, pp. 28-29), *Garnalenvissers* (mentioned in the Annual Report 2005, p. 70) and *Nederlandse Vereniging van Banken* (mentioned in the Annual Report 2005, p. 74).

54 See the Autorité's website at <http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=421> (last visited 7 November 2014).

In competition law, individuals commit infringements, but the companies pay the fines. Even though this might seem like a good reason for companies to monitor their employees' behaviour – something competition agencies benefit from as well –, there is no alignment of interests between the companies and the enforcement agencies on this point: the companies benefit from the infringements. Different from, for instance, embezzlement or corruption, the companies do not initially suffer from their employees' bad behaviour.[55] This could be a reason why company-based compliance programmes might not work as effectively as suggested.

Other reasons why compliance programmes might be ineffective is that cartelists – usually senior managers or those who enjoy more discretion and authority in the company – typically know what they are doing and go to great lengths to prevent discovery.[56] A compliance programme based on the education of employees and the self-discovery of infringements might therefore be ineffective.[57] In fact, many infringements have been committed in spite of the existence of a compliance programme.[58]

Finally, but very importantly, compliance programmes might have two unintended side-effects: the learning effect and the monitoring effect. The learning effect stems from the educational focus of compliance programmes. Employees unaware of competition problems might become aware of the opportunities that cartel behaviour has to offer. Instead of focusing on the prevention of infringements, they might be tempted to infringe the law themselves.[59] The monitoring effect is more serious – and probably more likely.[60] It entails that those responsible for monitoring compliance within the company are also particularly well placed to hide non-compliance. In other words, if one would know where to look for signs that things are going wrong, one would also know how to hide them or to erase them.[61]

These critical remarks on the effectiveness of compliance programmes cannot be swept under the carpet. However, some of the solutions advocated below might address these concerns, or at least outweigh them. Where possible, a reference will be made to these criticisms.

4.2. Substantive issues: content & culture

If compliance programmes are to address the concerns mentioned above, they must be of a substantial nature and cannot be mere checklists or a safety document meant for window-dressing. Even though the competition authorities have already provided extensive lists of what they consider to be important elements of compliance programmes, the lists in the literature are even longer. These elements are discussed below, though quite concisely. Next, three elements that are – to some extent at least – underexposed in the competition authorities' guidance are discussed: full commitment, culture and incentives, and the role of the compliance officer.

4.2.1. Elements of compliance programmes

Compliance programmes differ vastly from one another. Theoretically, it would be possible to call it a compliance programme if a CEO would list the competition rules on a sheet of paper, would declare the company's commitment to these rules and would present them to his employees during a one-hour PowerPoint presentation. This kind of compliance programme would, to nobody's surprise, be ineffective,

55 See in more detail W.P.J. Wils, 'Antitrust Compliance Programs and Optimal Antitrust Enforcement', 2013 *Journal of Antitrust Enforcement* 1, no. 1, p. 9. Geradin has rebutted this objection in his reply to Wils by stating that this characteristic is in no way particular to competition law. For instance in the field of corruption, the company benefits as well, but compliance programmes are created and upheld nevertheless. D. Geradin, 'Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils', 2013 *Journal of Antitrust Enforcement* 1, no. 1, pp. 4-5.

56 A. Stephan, 'Hear No Evil, See No Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels', CCP Working Paper 09-09, 2009, pp. 6-10. But see also C.R. Leslie, 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents', 2008 *Maryland Law Review* 49, p. 1621.

57 This is rebutted by the survey carried out by Sokol, which has shown that in many businesses there is a lack of awareness of competition law. Even where employees were aware of the rules, they were sometimes disregarded, because the consequences were perceived to be minimal. Sokol 2012, supra note 2, p. 28.

58 Wils 2013, supra note 55, p. 14.

59 See in more detail M.P. Schinkel, 'Nalevingsprogramma's', 2011 *Markt & Mededinging*, no. 6, p. 2.

60 Geradin compares the learning effect argument with the argument that drugs education in schools incites young children to experiment with drugs, instead of being aware of the dangers of taking drugs. Geradin 2013, supra note 55, p. 7.

61 This particular effect is addressed by Martijn Han in an econometric experiment. C. Angelucci & M.A. Han, 'Monitoring Managers Through Corporate Compliance Programs', Amsterdam Center for Law & Economics Working Paper No. 2010-14.

and would constitute that dreaded window-dressing. However, these are not the kinds of compliance programmes advocated by many experts in the field. Compliance is not determined by declaring a commitment to a piece of paper alone, it is 'the multiple and complexly interacting factors of structure, culture and agency that determine real compliance.'[62] For that reason, a compliance programme has to be tailored to the specific company, and must include the full range of management techniques to prevent and detect misconduct.[63]

One of the most sophisticated examples of a compliance programme is found in the work of Murphy and Kolasky.[64] They advocate a list of no less than twenty elements that should be included in a compliance programme, which go beyond the more standard elements of a training manual, audits and the involvement of management.[65] Strikingly, there is a special focus on the organizational structure of a company and its capability of disseminating a real compliance culture. For instance, the role of the compliance officer is very articulated, and a system is advocated in which firms are aware of how much authority and discretion is given to people in key positions, and in what way this authority is delegated. It seems that the more complex the organization, the more prone it is to illegal behaviour, because it is easy to hide behind structures. Internal governance does matter, and this should be underlined in a compliance programme.[66] Naturally, a real compliance culture requires a commitment from employees, most particularly from those in management positions. Lastly, the list pays attention to incentives set by companies that might cause cartelistic behaviour. These elements of compliance programmes (the role of the compliance officer, commitment, culture and incentives) are discussed separately below.

It is clear that compliance programmes that include the majority of these elements are far more extensive, aggressive and probably more successful than the Powerpoint-based compliance programmes mentioned earlier. However, extensive compliance programmes do require a great deal of investment on the part of the company. Organizational structures must be changed in order to promote compliance (think, for instance, of the questions of discretion and delegation, or the pivotal role of the compliance officer), and more attention must be paid to processes that must have played a smaller role in this context before (the protection of whistleblowers, the bonus structure). It is safe to say that these extensive compliance programmes are more suitable for larger firms, because of the financial burdens involved. Nevertheless, through guidance on more extensive programmes, smaller companies can become aware of the dangers of non-compliance and some of the business structures and incentives that provoke it.

4.2.2. Role of the compliance officer

One of the elements of a successful compliance programme is the creation of a pivotal role for the compliance officer: the person – or persons – responsible for overseeing and managing compliance with competition rules. First of all, a compliance officer must have a central role within the organization. It has to be someone – or a group of people – who is visible to all employees, and who has knowledge not just of the law, but also of the technical aspects of the work, of the market and of the functioning of the organization. A compliance officer does not operate in a vacuum, but must keep track of economic, social and political trends that might influence behaviour within the company.[67] Briefly stated: a compliance officer must be visible and informed. To meet this requirement, a compliance officer must have sufficient resources and independence to move around the company.

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62 Quote from Wils 2013, supra note 55, p. 19.

63 J.E. Murphy & D. Boehme, 'Fear No Evil: a Compliance and Ethics Professionals' Response to Dr. Stephan', 2009, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965733> (last visited 7 November 2014), pp. 4-5.

64 J. Murphy & W. Kolasky, 'The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior', 2012 *Antitrust* 26, no. 2, pp. 1-2. The full list includes the following elements: risk assessment, integrated approach, standards, controls, empowered chief ethics and compliance officer, resources and infrastructure, board oversight, senior management support, personnel practices, training and communication, third parties, audit and monitor, measure effectiveness, reporting systems, protection from retaliation, discipline, incentives, response to violations, diligence and industry practice, documentation.

65 These are considered to be the pillars of a compliance programme by the American Bar Association. ABA Section of Antitrust Law, 'Antitrust Compliance: Perspectives and Resources for Corporate Counselors', 2005, pp. 64-69.

66 R.M. Abrantes-Metz & D.D. Sokol, 'Antitrust Corporate Governance & Compliance', University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No. 13-18, 2013, p. 4.

67 Anderson 1963, supra note 20, p. 4.

Apart from overseeing compliance, a compliance officer is also responsible for handling complaints and tip-offs. For that reason, it is important that the compliance officer is a person who can be trusted by the employees. Studies show that the main reason why misconduct or grey-area behaviour is not reported is mistrust in the person in charge of handling this report and subsequent retaliation, even more so than a lack of financial reward or company loyalty.[68] Companies must be aware of this, and be very careful concerning the impartiality and reputation of the compliance officer.

4.2.3. Commitment & culture

In many companies, the compliance office seems to be a different world, apart from day-to-day business. It is not uncommon for a compliance officer to draft some sort of statement for the CEO to sign.[69] It cannot be surprising that such an approach to compliance is not very effective, because it gives no sign of a strong compliance culture. If compliance culture is weak, there is no incentive for employees to comply themselves, let alone to report suspect behaviour.[70] Compliance culture must be spread across the board and, accordingly, the commitment of senior management is of the utmost importance.

Of course, true commitment cannot be coerced. Therefore it is important to pay attention to the circumstances in which senior management are more likely to abandon their commitment to the rules. It seems that this could be the case when financial reports are often revised, when the board of directors do not closely monitor management, and when the board of directors and the external auditor are not regularly replaced.[71] Consequently, merely saying that management are committed to the compliance programme is not enough; processes monitoring this commitment must be in place as well and these processes must take account of the circumstances mentioned above.

With antitrust violations it is an additional difficulty that cartel behaviour is accepted as normal business practice in many industries.[72] Compliance programmes should pay attention to this problem, and if they do, they can have an important external learning effect as well. Some authors have raised the 'part of normal business' argument in order to illustrate that compliance programmes will not be effective,[73] but the argument can also be made that an aggressive compliance programme can be used to attack this kind of business culture. In that case, a real commitment on the part of the entire firm is indispensable.

4.2.4. Incentives

Antitrust violations are typically committed by people with substantial authority, who are primarily motivated by company interest or by incentives set by companies.[74] Mechanisms such as profit-linked bonus schemes fuel the temptation for collusion,[75] because employees tend to focus on the threats and rewards within the organization, instead of focusing on external threats.[76] It seems that the incentives set by companies might be one of the main reasons why infringements of the law occur, and why compliance programmes – despite best efforts – might remain ineffective. This is understandable. If a company explains the importance of compliance, but sets impossible sales targets or promises bonuses for extreme results, the company sends mixed messages to its employees. Given that companies are mostly insular, and the responsibility for infringements is dispersed, it is to be expected that the benefits of reaching a

68 Murphy & Boehme 2009, supra note 63, p. 8. Another reason why people could be reluctant to report to the compliance officer is the lack of legal professional privilege (LPP) in the European Union. The Court of Justice has decided that LPP is not applicable to in-house counsel (Case C-550/07 P, *Akzo v Commission*), which means that complainants can rightfully fear for their privacy. However, a study shows that many employees are unaware of this distinction, see Murphy & Kolasky 2012, supra note 64, p. 16.

69 Murphy & Kolasky 2012, supra note 64, p. 1.

70 Abrantes-Metz & Sokol 2013, supra note 66, p. 11.

71 Abrantes-Metz & Sokol 2013, supra note 66, pp. 7-8. Yet, it appears from this same article that middle management seem to take compliance programmes more seriously than senior management.

72 Stephan 2009, supra note 56, p. 11. It seems that in many industries the illegality of cartel behaviour is dismissed or is not perceived as something which is really serious. Abrantes-Metz & Sokol 2013, supra note 66, p. 8.

73 See Section 4.1 above.

74 Wils 2013, supra note 55, pp. 8-9.

75 Stephan 2009, supra note 56, p. 2.

76 Murphy & Boehme 2009, supra note 63, p. 10.

target or receiving a bonus will outweigh the negative consequences of a competition law infringement.[77] When setting up a compliance programme, companies must be aware of this, and downscale their targets and bonuses accordingly. This does not mean that financial incentives for better performance are all bad, but they should be handed out with care and not be too high.[78]

4.3. Procedural issues: guidance and fining

The foregoing shows that compliance programmes should focus more on commitment and culture, and that businesses should be aware of the incentives within their organization. Also, a compliance officer should be appointed with care in order to implement a compliance programme successfully. This illustrates how companies could deal with compliance, but does not give an insight into how competition authorities should deal with compliance programmes. In this respect, two questions are highlighted in this section: whether competition authorities should do more to promote compliance programmes or to give guidance about their content and implementation, and whether competition authorities should grant a fine reduction for a compliance programme that contains the elements listed above.

4.3.1. Guidance & promotion

One of the points of discussion is whether competition authorities should do more to promote compliance programmes or to give guidance thereon. The two authorities under review here already give guidance about the content of compliance programmes and what is considered to be an effective compliance programme. The need for such guidance has been underlined in a recent survey.[79] On the other hand, competition authorities need to avoid creating a 'checklist for compliance', because this might discourage companies from looking beyond the elements mentioned in the competition authority's guidance. The message should always be that compliance programmes have to be tailored to the company, and that not two of them are the same. This makes sense, as real compliance is dependent on a multitude of factors within a complex organization.[80] However, from the point of view of transparency, but also with a view to promoting a compliance culture across the board, it can be important for a competition authority to underline a number of important elements that could constitute a real compliance programme.

Still, the best form of promotion is the successful compliance programme of others, as a good example tends to be followed. It has been argued that corporate compliance is a form of advocacy as well, which might even be more effective than the competition authority's advocacy.[81] In order to bring about such effects, public attention to the value of compliance is needed, which means that the importance of competition law should be underlined more often. Despite this, it seems that there is too little attention for competition law and competition law compliance in the traditional media.[82] There could be a task for competition authorities here, as competition culture could be used as an enforcement tool by increasing moral outrage about infringements and by publicly shaming non-compliance. Perhaps competition authorities could be more attentive to 'branding' by publishing more cartel stories.[83]

However, it is easy to see why this could be difficult for competition authorities. Cartel cases typically take many years to conclude, which means that the news is 'old' as soon as the case is ready for publication. Of course, the imposition of a fine is a novelty, but the real cartel story is often not told. This could be due to another factor: antitrust violations are often complex subject matter and it might be difficult to explain the elaborate legal reasoning to the general public.[84] Lastly, it has to be taken into account that companies

77 Murphy & Kolasky 2012, supra note 64, p. 3.

78 Abrantes-Metz & Sokol 2013, supra note 66, p. 5. There is a role for a compliance officer there. See, e.g., J. Murphy, 'Using Incentives in Your Compliance and Ethics Program', 2012, available at <http://www.corporatecompliance.org/Resources/View/smid/940/ArticleID/724.aspx> (last visited 7 November 2014).

79 Sokol 2012, supra note 2, p. 22.

80 This is mentioned by Wils 2013, supra note 55, p. 19. For him, this is a reason not to create more detailed guidance on compliance programmes, which he calls check lists.

81 Geradin 2013, supra note 55, p. 7.

82 Sokol 2012, supra note 2, pp. 17-20,

83 Sokol 2012, supra note 2, p. 17. It is argued by Abrantes-Metz & Sokol that cartel offences suffer from a lack of stigma, see Abrantes-Metz & Sokol 2013, supra note 66, p. 11.

84 However, the fact that it might be difficult does not mean that they should not try to explain this more effectively. See for instance the efforts of the Working Group on Advocacy of the International Competition Network, which has listed this as a challenge in its

have a stake in press outings. Reputational damage matters to them, and could even affect share prices.[85] This could be a reason to use the media as a leverage – which is a discussion in itself – but also a reason to avoid publishing cases too early in order to prevent naming and shaming.

4.3.2. Fine reductions

Probably the most discussed issue in the handling of compliance programmes by competition authorities is the matter of fine reductions and the question whether these should be granted to companies which have a compliance programme in place. Fine reductions come into play when an infringement has been detected in spite of a compliance programme and a fine is about to be imposed. Most European competition authorities do not grant fine reductions for compliance programmes, but a number of authorities outside of Europe do.[86] Within the European Union, the United Kingdom still grants fine reductions, and as shown above, compliance efforts are rewarded within the scheme of a non-contestation procedure in France.[87] The European Commission used to grant fine reductions, but has not done so since the 1990s.[88]

The proponents of fine reductions argue that not taking compliance efforts into account is weakening the incentive for companies to adopt these programmes, because the infringements detected through these programmes are usually heavily fined. Also, real compliance programmes take up a great deal of investments, resources and time by companies.[89] Granting a fine reduction for a genuine compliance programme might give companies that last push in deciding whether or not they should implement a compliance programme. Some argue that the fine reduction granted for compliance programmes should only be as high as is needed to stimulate companies to establish such a programme.[90]

The leading argument by those opposed to granting fine reductions for compliance programmes is that compliance with the law is the standard, and should not be rewarded separately. The benefit of a compliance programme should lie in the prevention of infringements, and not in a reward from a competition authority.[91] Compliance must rest on internal motivation, and not on external bonuses. By extension, heavy fines should provide a sufficient incentive for firms to take compliance seriously, and infringing firms should not be rewarded for failed compliance.[92] Besides, if a compliance programme leads to the detection of an infringement, there is always a possibility to apply for leniency. In that way companies might receive immunity, which is preferential to a fine reduction for compliance programmes.

Even though the leniency argument renders a large part of this discussion irrelevant – in many cases leniency may indeed be requested and granted – this article favours a fine reduction for compliance efforts, though it must be approached with care. First of all, there might be circumstances in which immunity from fines under the leniency guidelines is not possible or desirable.[93] In these cases, a fine discount might nevertheless encourage companies to report infringements or grey-area behaviour. On another level, a fine discount for a compliance programme might give businesses a sense of 'doing the right thing'. Naturally, it cannot be contradicted that compliance with the law should be the standard, but far-reaching efforts to secure this compliance across the board surely exceed this standard. Some sort of appreciation for these efforts might have a reinforcing effect. Moreover, compliance programmes are beneficial for competition authorities as well. If executed properly, they can be a source of information,

assessment of advocacy in 2009. ICN, 'Report on Assessment of ICN Members' Requirements and Recommendations on Further ICN Work on Competition Advocacy', 2009, pp. 16-17.

85 Which happened in the Dutch Construction Cartel, as explained by Abrantes-Metz & Sokol 2013, supra note 66, p. 10.

86 The United States, Canada, Australia and Brazil give fine reductions for compliance programmes (typically 10%). Schinkel 2011, supra note 59, p. 2.

87 Office of Fair Trading in OFT's 'Guidance as to the appropriate amount of a penalty' (OFT423, September 2012), at 2.15; see also 'How your business can achieve compliance with competition law' (OFT1341, June 2011), and Framework Document Compliance, supra note 4.

88 See, for instance, case 91/532/EEC: Commission Decision of 5 June 1991 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/32.879 – Viho/Toshiba), OJ L 287, 17.10.1991, p. 39 but now take into account European Commission, *Compliance matters – What companies can do better to respect EU competition rules*, 2011, available at <http://ec.europa.eu/competition/antitrust/compliance/> (last visited 7 November 2014), pp. 19-20, in which fine discounts are firmly refuted.

89 Stephan 2009, supra note 56, pp. 11-12. Abrantes-Metz & Sokol 2013, supra note 66, p. 6.

90 Geradin 2013, supra note 55, p. 3.

91 Wils calls them 'subsidies for infringements'. Wils 2013, supra note 55, p. 24.

92 W.P.J. Wils, *Efficiency and Justice in European Antitrust Enforcement*, 2008, pp. 3-6.

93 For instance, when a competition authority was already tipped-off, when a company would rather request for a commitment decision instead, or when a cartel has operated internationally, and the A-status for leniency has been conferred on another, quicker cartelist.

and allow authorities to keep tabs on the market. The main conditions under which any reduction should be granted are that compliance programmes are genuine and that companies that do find an infringement have done as much as they could to prevent it. Even though there is some scepticism about whether competition authorities are able to ascertain this, it is also believed that the extensive investigations in competition law cases give competition authorities a pretty good idea of whether a compliance programme is genuine and a company has done everything it could to prevent an infringement.[94] Naturally, the culture indicators and contradictory incentives mentioned above should be taken into account as well. Instead of refuting compliance discounts altogether, competition authorities might need to optimize their systems to distinguish window-dressing from genuine compliance.[95]

5. Unlocking the potential of compliance programmes

Discussing this vast number of elements that can be included in a compliance programme, along with their preferential treatment by competition authorities, has distracted slightly from the main issue at hand: whether competition authorities could do more to unlock the potential of competition law compliance programmes with a view to increasing the company's commitment to the rules. In that respect the literature clearly shows that there is a serious debate on whether guidance and promotion and granting fine discounts are possible ways of increasing the use of compliance programmes. However, with regard to the content of compliance programmes, the most important conclusion to be drawn from the literature is that compliance programmes should always be tailored to a specific company, taking into account a company's organizational structure and capability of disseminating a real compliance culture.

This final section discusses the ways in which the ACM and the *Autorité* could improve their approach to compliance programmes, by looking at the three important substantive conditions derived from the literature (the role of the compliance officer, business culture and targets), as well as the two procedural issues discussed above (guidance and fine reductions). The question of to what extent the competition authorities are already focused on these points is answered and suggestions are made for future practice.

5.1. Role of the compliance officer

If a compliance officer is appointed, he should be central to the organization, and knowledgeable about its functioning. He must have sufficient resources, powers and independence to oversee compliance. Additionally, employees must trust their compliance officer, and have faith in the mechanisms for dealing with complaints and tip-offs.

Out of the two competition authorities, the *Autorité* is the only one that stresses this aspect of compliance in particular. The appointment of the compliance officer receives attention in its guidance on compliance, including his need for resources, powers and independence.[96] It is underlined that this person must have unquestionable skills and authority within the company, suggesting that the issue of trustworthiness is something that should be seriously considered. Even though the Dutch ACM is less explicit about the role of the compliance officer, it is stressed – by reference to the OFT's Wheel of Compliance – that having a protocol for infringements is important.[97] However, this protocol seems to be less focused on the privacy and protection of whistleblowers, but more on the process for handling detected infringements. This is illustrated in quite a detailed fashion in the Memorandum of Compliance between KPN and ACM, in which a scheme for decision-making is elaborated.[98]

From the foregoing, it seems that the *Autorité* has progressed further in recognizing the potentially important role of the compliance officer, and the need for his impartial positioning within the company. The ACM could stress this point more, in order to make businesses understand that appointing a compliance officer is not just a matter of shifting the burden of compliance to the legal department. Furthermore, both competition authorities could pay more attention to a fundamental underlying issue

94 Geradin 2013, supra note 55, p. 15.
95 Distinguishing bad input from bad apples, see Sokol 2012, supra note 2, p. 35.
96 Framework Document Compliance, supra note 4, Para. 22, sub 2.
97 See Section 3.2.1 above.
98 Memorandum of Compliance KPN/ACM, supra note 43, p. 8.

in the good functioning of a compliance programme: trust. Mistrust in the compliance officer or the procedures for handling complaints could be an indicator that a compliance programme is not working well, and probably will not work well in the future. This could serve as an important signalling function, and should be addressed more in the design, but also in the review of compliance programmes.

5.2. Business culture and targets

A business culture geared towards compliance is indispensable for the success of a compliance programme. Unfortunately, a number of organizational defects can play into the hands of cartelisation, such as restatements of financial reports, a meagre oversight of managers and few changes to the board and auditors. Along with that, targets and incentives play an important role in business culture, as they can encourage employees to behave in a certain way.

Except for emphasizing that management should be fully committed to a compliance programme,[99] neither of the competition authorities express concerns regarding business culture or incentives. Naturally, it is not the task of competition authorities to impose all of these elements upon companies – since it is very unlikely that such an approach will genuinely change anything as far as commitment or culture is concerned. However, a competition authority is probably the designated institution to make companies aware of any red flags in the organizational structure, and to encourage companies to review their targets and bonuses in order to ensure that these do not inspire cartelistic behaviour. If there is no pressure upon a company to think about these issues or to review its business structure, infringements are bound to occur and compliance programmes are bound to fall short. It would be advisable for competition authorities to point out these dangers and to explain them, instead of only focussing on more tangible and controllable elements of compliance.

5.3. Guidance and promotion

First of all, with respect to guidance, it has been repeatedly stressed that there is a need for guidance on compliance. Not every company is as well educated about the content of competition rules and the value of compliance, and as a result the risks of infringements are often underestimated. Secondly, in the course of discussing guidance on compliance programmes, it became clear that competition policy in general suffers from a lack of attention by the general public. This makes compliance with competition law a less pressing issue on business agendas.

With regard to the first point, the ACM gives no specific guidance on the content of compliance programmes, although it has made a reference to the guidance documents of others. This provides some insight into what the ACM considers to be important. Additional information on compliance programmes can be gained from published cases and the recent Memorandum of Compliance, although this is fragmented at best. However, with regard to bringing competition law to the attention of the general public, the ACM gives the impression that it pursues a modernized publication strategy, by using less legal terminology in press releases, by using a digital, interactive annual report with short clips, and by actively involving consumers in the setting of priorities through a digital survey. The *Autorité,* on the other hand, is more active concerning the first point, having published an explicit guidance document on compliance programmes. Additionally, all non-contestation cases have been published, including the compliance efforts promised by companies and the *Autorité's* evaluation of these commitments. On the second point, no noticeable change in publication strategy has been noticed.

For the reasons mentioned above it would be advisable for the ACM to publish more extensive guidance on compliance programmes, so that companies are aware of what it considers to be 'good' or 'thorough'. The *Autorité's* guidance can be considered adequate in that respect. Regarding general promotion and publications, competition authorities should be more outspoken about their efforts, and not just limit themselves to the publication of fines which have been imposed. Despite the difficulties with press coverage in competition cases, the overall importance of competition law should be emphasized in the media, as this could increase the urgency of competition law compliance on the corporate agenda.

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99 Speech by Fonteijn 2014, supra note 25 and the Framework Document Compliance, supra note 4, Para. 22, sub 1.

5.4. Fine reductions

The last issue discussed is that of granting fine reductions for companies that have adopted compliance programmes. In the Netherlands, the chairman of the ACM has pointed out that there is no fine reduction for improving or implementing compliance programmes. However, because of the Dutch Fining Guidelines, this remains possible in theory, leaving the opportunity open to change this in the future.[100] In practice, the opposite (a fine increase) has occurred in telecommunication regulation.[101] In France, there is no fine reduction for the existence of a compliance programme, but the commitment to improve such a progamme, or to implement one can yield a 10% discount in a non-contestation procedure. With that, the *Autorité* has found a middle ground in rewarding compliance efforts without possibly setting wrong incentives.[102]

This article favours a fine reduction for compliance efforts, although this should be approached with care, because it rewards companies that go beyond what is necessary to secure compliance, and compliance programmes as such can be beneficial to competition authorities as well. The main condition for granting such a discount is that the competition authority makes sure that it is a genuine, well thought out and aggressive compliance programme that is in place. As a consequence, competition authorities might need to optimize their system to distinguish window-dressing from genuine compliance.

From the foregoing it appears that both competition authorities are rather clear in their approach to compliance programmes and their decision not to reward them financially in a normal fining procedure. Even though this article argues an opposite solution, there as just as many voices in the literature stating that the approach of the ACM and the *Autorité* is the right one, and that companies should receive no additional reward. Whether it is absolutely necessary to adjust this approach in order to 'unlock the potential of compliance programmes' remains unclear. Both competition authorities have given guidance on the necessary elements of compliance programmes. However, both might also benefit from a more active publication strategy. Continuously praising compliance and condemning infringements could be a powerful signal to the general public that competition law compliance is important, thus creating a firmer moral basis for companies to establish a compliance programme.

6. Concluding remarks

This article aimed to explore whether competition authorities could do more to unlock the potential of competition law compliance programmes with a view to increasing the company's commitment to abide by the rules. Even though the review of practice was limited to two competition authorities, and the debate in the literature has focused on a number of specific topics, some interesting recommendations can be made. First of all, competition authorities should pay more attention to the organizational aspects which play a part in generating compliance, not only with regard to the role of the compliance officer and the employees' trust in procedures, but also regarding structural indicators and performance targets. Naturally, changes to these aspects cannot be imposed – the imposition of these changes would not even be effective – but it can be seen as the task of competition authorities to make companies aware of these aspects. It cannot hurt to think beyond the firm as a whole, and to allow firms to think about themselves and their organization in a different way. Secondly, a fine reduction for a genuine, well-functioning compliance programme has been advocated in order to reward companies for their efforts, but also because of the external effect of these programmes on business culture and the fact that the programmes could be beneficial to competition authorities as well. Finally, there is a need for more attention to be given to competition law issues and the value of compliance. Even though this is, admittedly, not entirely in the hands of competition authorities, but is dependent on the media and the receptivity of the public, competition authorities should be aware of the effects that their publications potentially have, and the way this is perceived in business. Notwithstanding these improvements, both the ACM and the *Autorité*

100 See, for instance, Elkerbout 2014, supra note 25.

101 District Court (*Rechtbank*) of Rotterdam 24 October 2013, ECLI:NL:RBROT:2013:8216. In competition law, such a fine increase has not yet been imposed.

102 Non-contestation has been called the ultimate form of proving its commitment to compliance, see Wils 2013, supra note 55, p. 33. This, however, is questionable, because there might be external reasons for a company to contest the findings of a competition authority.

are already engaged in stimulating compliance in businesses in a distinct way. It is exciting to see if – and if so, in what way – their approach will alter in the future. In any case it is clear that the commitment of companies is a necessary ingredient for a successful compliance programme, and that in this respect the public authorities and the private parties must work cooperatively in order to achieve the necessary results. ¶