ACHIEVING A COMPETITION COMPLIANCE CULTURE IN RUSSIA: ASSESSING THE UK EXPERIENCE IN COMPLIANCE PROGRAMMES TO DETER CARTELS

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Cartels, which are considered as the most harmful anticompetitive practice, continue to exist in many sectors of the global economy in spite of the severe sanctions regularly imposed on the cartelists by the competition authorities worldwide. This suggests that the approach to antitrust enforcement requires rethinking, and the necessity to move beyond the traditional enforcement approach, to creating a pro-compliance culture in companies. The paper suggests that robust compliance programmes, voluntarily implemented by companies to prevent infringements of competition law could be considered as one of the major elements of cartel deterrence. The paper reviews the pioneering experience of UK competition authorities in rewarding infringing companies for their efforts to comply with competition law – by reducing fines for committed violations, such as participation in cartels. The paper analyses the UK approach through the prism of its possible application in Russia, where antimonopoly laws continue to actively respond to the development of the best international competition practice, including cartel deterrence. The relative position of officials in the Russian antimonopoly body, the FAS, with respect to advocating antimonopoly compliance in Russia is presented in this work through an interview conducted by the author of this paper. The work formulates a three-step plan, embracing particular measures to develop competition compliance culture in Russia.

Keywords: competition law; competition authorities; deterrence of cartels; competition compliance culture; compliance programmes; competition and markets authority; Federal Antimonopoly Service of Russia.

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Do compliance programs work to prevent cartels?
Only to the extent we as a society want them to.

Joseph E. Murphy & Donna Boehme[1]

1. Introduction

The aim of this paper is to review the pioneering experience of UK competition authorities in rewarding infringing companies – for efforts to comply with competition law – by reducing fines for committed violations, such as participation in cartels. The UK approach will be analysed through the prism of its possible application in Russia, where antimonopoly laws have, during the last decade, been sequentially renewed in accordance with European competition law, and, at present, continue to actively respond to the development of the best international competition practice, including cartel deterrence. The relative position of officials in the Russian antimonopoly body[2] with respect to advocating antimonopoly compliance in Russia will be presented in the paper[3] through empirical research and a face-to-face interview conducted by the author of the paper [hereinafter Interview].

Cartels are generally considered to be 'the most socially harmful anticompetitive practice'[4] through their adverse effect on the global economy and public interest.[5] Cartels are defined as agreements between competing companies, aimed at coordinating their competitive behaviour on the market through practices such as price fixing, the sharing of markets or customer allocation, the limiting of supply or production, whether through bid rigging or otherwise.[6] Being illegal and secretive, 'hard core' cartels have become 'a feature of the corporate landscape'[7] in diverse areas of the world economy.[8]

It has been over a decade since competition authorities of the two major jurisdictions with their most successful competition laws – the United States and the European Union – combined their efforts to make anti-cartel enforcement a 'number one antitrust priority and in persuading other jurisdictions around the

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1 Joseph E. Murphy & Donna Boehme, *Fear No Evil: A Compliance and Ethics Professionals' Response to Dr. Stephan* 11, SSRN (Nov. 28, 2011), <http://ssrn.com/abstract=1965733> (accessed May 16, 2015).

2 The Federal Antimonopoly Service of Russia [hereinafter FAS].

3 *See infra*, Sec. 5.3.

4 Eleanor J. Morgan, *Controlling Cartels: Implications of the EU Policy Reforms*, 27(1) European Management Journal 1 (2009). doi:10.1016/j.emj.2008.04.006

5 *Id.*

6 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 17, at ¶ 1.

7 Morgan, *supra* n. 4, at 1.

8 *Id.*

world to join their common crusade against cartels.'[9] The United Kingdom introduced reforms 'reflecting an attitude of "zero tolerance" towards cartels,'[10] including criminal prosecution for offending individuals.[11] Similarly, Russia attempted more stringent and restrictive policies with respect to cartels, including a leniency programme[12] and turnover fines[13] for the cartelists.

Two key elements of cartel deterrence are the imposition of sanctions, including considerable turnover fines, and a leniency policy. All these instruments are applied, with some variations, in the USA and the EU, the UK, Russia and other countries.

Between 2000 and 2010, the US and the EU competition authorities imposed over $4.6 billion and €13 billion respectively in penalties against cartels, with more than 200 executives engaged in cartels sentenced to prison in the US and ninety criminal cases filed during 2011, 'the highest number filed in the last two decades.'[14]

Nevertheless, it has been argued that 'the increasing global emphasis on anti-cartel enforcement and harsh sanctions'[15] could have been much more successful in deterring cartel practices. Cartels continue to exist in many sectors of the global economy.[16] This suggests that the approach to antitrust enforcement requires rethinking, and the necessity to move beyond the traditional enforcement approach, to creating a pro-compliance culture in companies.[17]

As such, robust compliance programmes, voluntarily implemented by companies to prevent infringements of competition law could be considered as a major supplemental element of cartel deterrence.

Competition compliance programmes are described as a 'set of measures adopted within a company . . . to educate and instruct its personnel about the antitrust prohibitions.'[18] They have been implemented by many major companies

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9 Joseph Murphy & William Kolasky, *The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior*, 26(2) Antitrust 61 (2012), available at <http://summerconvention.utahbar.org/2014/materials/H2_Cartel%20Compliance%20Programs.pdf> (accessed May 16, 2015).

10 David Henry, *Leniency Programmes: An Anaemic Carrot for Cartels in France, Germany and the UK?*, 26(1) E.C.L.R., sec. 2 (2005).

11 *Id*.

12 The leniency policy aims to provide cartelists with an incentive to report the cartel to the competition authority in return for being rewarded full immunity from sanctions.

13 Turnover fines are calculated as a paticular percentage of the offender's annual turnover in the relevant market, and as a rule are very high.

14 Murphy & Kolasky, *supra* n. 9, at 61.

15 *Id.*

16 *Id.*

17 Anne Riley & D. Daniel Sokol, *Rethinking Compliance* 6, SSRN (Aug. 25, 2014), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2475959> (accessed May 16, 2015).

18 Wouter P.J. Wils, *Antitrust Compliance Programmes and Optimal Antitrust Enforcement*, 1(1) Journal of Antitrust Enforcement 52 n. 1 (2013), available at <http://antitrust.oxfordjournals.org/content/1/1/52.full.pdf+html> (accessed May 16, 2015). doi:10.1093/jaenfo/jns006

in the world, especially by US trade corporations,[19] but a strong compliance culture is by no means uniformly found.[20]

As the implementation of effective compliance programmes requires companies to put significant effort and resources into this process, the issue as to whether the competition authorities should provide incentives for such companies by reducing fines in case of their failure to prevent the infringement, has become a key topic for academic and practitioner discussions. This Paper addresses the relative arguments in Ch. 2 as a general background in order to identify the concept and the key issues relating to the implementation of compliance programmes.

Unlike the majority of competition authorities (including the US, the EU, Russia), UK competition authorities[21] have put efficient emphasis on encouraging companies to implement compliance programmes by regularly granting reduction in fines to companies they consider have taken 'adequate steps'[22] towards ensuring competition law compliance, but nevertheless failing to avoid breaking the law.[23] The brief overview of the relevant EU and UK competition law will be given in Ch. 3, and legal grounds for a reduction in fines, their enforcement and the practical steps undertaken by the CMA to assist businesses in tackling competition compliance issues will be discussed in Ch. 4 below.

In the light of the growing significance of competition compliance culture in preventing antitrust violations, the UK's experience in the recognition of benefits of compliance programmes may represent a particular interest for the FAS, which only recently voiced its intention 'to develop and implement a set of measures with regards to the advocacy of the antimonopoly compliance'[24] within the next ten years.

This paper will ask whether Russian competition law is mature enough to adopt the UK approach, and what the level of existing compliance mechanisms in Russia are.

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19 Antitrust Compliance: Perspectives and Resources for Corporate Counselors viii, secs. M1–M9 (ABA Pub. 2005).

20 D. Daniel Sokol, *Cartels, Corporate Compliance and What Practitioners Really Think about Enforcement*, 78(1) Antitrust Law Journal 236 (2012), available at <http://papers.ssrn.com/abstract_id=2079336> (accessed May 16, 2015).

21 Competition and Markets Authority [hereinafter CMA] has taken the responsibility of the former competition bodies in the UK – the Office of Fair Trading [hereinafter OFT] and Competition Commission (CC) since April 1, 2014, as a result of major competition reforms, introduced by the Enterprise and Regulatory Reform Act of April 25, 2014.

22 OFT's Guidance as to the Appropriate Amount of a Penalty (OFT 2012), at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf> (accessed May 16, 2015) [hereinafter Penalty Guidance].

23 Wils, *supra* n. 18, at 55.

24 Strategy Development of the Competition and Antimonopoly Regulation in the Russian Federation in 2013–24 [Стратегия развития конкуренции и антимонопольного регулирования в РФ на период 2013–2024 гг. [[*Strategiya razvitiya konkurentsii i antimonopol'nogo regulirovaniya v RF na period 2013–2024 gg.*]] ¶ 2.8.1, at <http://www.fas.gov.ru/netcat_files/File/Str_razv_konk_i_antimonop_reg_13-14.pdf> (accessed May 16, 2015) [hereinafter Strategy].

These questions along with the position of the FAS' officials towards the promotion of competition compliance culture in Russia will be reviewed in Ch. 5.

The literature review focuses on the key issues surrounding the implementation by competition authorities of the EU, UK and Russia of competition compliance culture and in deterring anticompetitive behaviour, in particular, through the following objectives:

– an exploration of academic and competition authority views and enforcement practices related to the compliance programmes;

– an evaluation of models, characteristics and the legal framework relevant to recognition by competition authorities of robust compliance programmes;

– an examination of competition legislation of the EU, UK and Russia with particular focus on the prohibition of anticompetitive agreements and enforcement mechanisms.

The Paper will conclude by formulating a three-step plan, embracing particular measures that may be considered rational steps for the FAS to take to ensure antimonopoly compliance in Russia within the framework of its recently adopted Strategy. The outline plan suggested in Ch. 6 may be regarded as the next step in the development of Russian competition law in terms of strengthening competition enforcement and deterring cartels in accordance with the best international practices, specifically the UK.

2. Background Information: Competition Compliance Culture

Discussions by academics, practitioners, state officials, lawyers and business on effective compliance programmes essentially frame the research questions herein. The key matters under discussion are highlighted above. The purpose of this Chapter is to present a background overview of competition compliance to further use it in the analysis of the CMA's competition compliance policy[25] and also in the discussion with the FAS officials to form a Questionnaire for the Interview.[26]

2.1. A View on the Robust Compliance Programme

'The proper role of an antitrust compliance program should be to ensure compliance with the law and to promote ethical behaviour by and between companies as part of good corporate governance.'[27] According to Geradin, 'compliance programmes represent a form of competition advocacy.'[28]

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[25] *See infra*, Ch. 4.

[26] *See infra*, Appendix.

[27] Riley & Sokol, *supra* n. 17, at 1.

[28] Damien Geradin, *Antitrust Compliance Programmes and Optimal Antitrust Enforcement: A Reply to Wouter Wils*, 1(2) Journal of Antitrust Enforcement (2013), available at <http://papers.ssrn.com/abstract_id=2241452> (accessed May 16, 2015) 7. doi:10.1093/jaenfo/jnt004

Wils argues that 'compliance programmes only have value [for society] to the extent that they have positive effects for the enforcement of the antitrust prohibitions . . .'[29] Kolasky states that '[a] sound antitrust compliance programme'[30] has two key objects: prevention of the infringement and detection of wrongdoing at its early stage.[31]

It is of note that Wils argues that it would not be possible for competition authorities and courts to reliably investigate at reasonable cost if the company's compliance programme is 'part of a culture and practice of real compliance'[32] or just a 'symbolic or cosmetic compliance.'[33] In his view, there is much uncertainty in identifying the characteristics of a credible compliance programme that can ensure the real compliance.[34]

This position appears to be arguable. Thus, Geradin claims that no programme can guarantee an absence of the violation.[35] She expresses the view that it would be possible for competition authorities to determine whether the compliance programme is credible or a 'pure sham'[36] because the investigated company would have to provide 'all available evidence,'[37] including the access to the company's documents, to prove that the programme is real and 'the management of the company made its best efforts to limit … the risk of infringement.'[38] Also, the competition authorities could adopt special guidance to identify all the necessary characteristics of the compliance programme to be taken into account during its evaluation.[39]

Geradin's position is obviously supported by the experience of the CMA, which has powers and resources to regularly assess the compliance measures undertaken by the investigated companies, based, *inter alia*, on the criteria set out in a special guidance, as described in Secs. 4.2–4.4 of the Paper.

2.2. The Key Elements of an Effective Compliance Programme

The principal characteristics of a credible compliance programme and their expansion are the subject of broad academic discussion.

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29 Wils, *supra* n. 18, at 60.

30 William J. Kolasky, *Antitrust Compliance Programs: The Government Perspective* 14, Department of Justice (Jul. 12, 2002), <http://www.justice.gov/atr/public/speeches/224389.pdf> (accessed May 17, 2015).

31 *Id.*

32 Wils, *supra* n. 18, at 66.

33 *Id.* at 67.

34 *Id.*

35 Geradin, *supra* n. 28, at 10.

36 *Id.* at 11.

37 *Id.*

38 *Id.*

39 *Id.* at 20.

Certain authors refer to the lists of elements of effective compliance programmes, prepared by the Canadian Competition Bureau and the US Sentencing Commission, which may contain from five to twelve elements.[40] Murphy and Boehme point out that 'all the necessary elements of an effective program need to work together to create a meaningful approach to preventing and detecting misconduct . . .'[41]

Murphy and Kolasky elaborated the list to twenty features,[42] pointing out that an *effective compliance programme* needs to contain each of these 'fundamental standards,'[43] subject to variation of details:

– a periodical *risk assessment* of cartel conduct occurring;

– 'clearly articulated'[44] *standards* and policies to prevent cartels (codes of conduct);

– implemented *controls* to make violations difficult;

– '*empowered CECO*,'[45] a senior chief ethics and compliance officer;

– allocation of *resources and infrastructure* for the programme;

– '*board oversight;*'[46]

– '*senior management support*;'[47]

– implementation of '*diligent personnel practices*'[48] to prevent delegation of powers to employees 'who may engage in cartels based on prior anti-competitive conduct;'[49]

– promotion of '*practical training*'[50] and '*result-oriented communication*;'[51]

– institution of '*auditing and monitoring* processes;'[52]

– implementation of effective '*reporting systems*'[53] for employees to report on cartel behaviour; and others.[54]

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40 Murphy & Boehme, *supra* n. 1, at 5; *see also* Kolasky, *supra* n. 30, at 9; 2014 USSC Guidelines Manual ch. 8, at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_8.pdf> (accessed May 17, 2015).

41 Murphy & Boehme, *supra* n. 1, at 5.

42 Murphy & Kolasky, *supra* n. 9, at 62.

43 *Id*.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

If implemented, the above complex of measures would represent an 'effective and aggressive anti-cartel compliance program,'[55] which is, according to Murphy and Kolasky, one of the key weapons in the battle with cartels.[56]

The key fundamental standards in general may be regarded as the basis for a 'four-step risk-based framework'[57] implemented by the CMA to promote a culture of competition law compliance, which will be discussed in Secs. 4.3–4.4 below.

2.3. Reduction in Fines: Is It Justifiable?

Although many prominent scholars and practitioners advocate providing discounted fines for companies that have taken serious steps to implement compliance programmes, but have nevertheless failed to prevent infringement, others, including the majority of competition authorities, have contrary opinions.

For instance, Wils gives 'sound policy reasons'[58] why the EU and the US competition authorities 'do not, and should not, grant reduction in fines'[59] to companies having pre-existing compliance programmes.[60] He argues that a reduction in fines creates 'perverse incentives'[61] that provide 'a cheap insurance policy against antitrust liability.'[62]

Similarly, Mr. Joaquín Almunia,[63] voiced the European Commission's position in 2010:

> [W]hy should I reward a compliance programme that has failed? The benefit of a compliance programme is that your company reduces the risk that it is involved in a cartel in the first place. That is where you earn your reward.[64]

However, many academics and practitioners hold the position, asserted by Geradin that robust compliance programmes, which are 'well designed and implemented,'[65] should be rewarded because 'they can contribute to significantly reduce antitrust infringements.'[66]

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55 Murphy & Kolasky, *supra* n. 9, at 64.

56 *Id.*

57 *Promoting Compliance with Competition Law* ¶ 5, at 186, OECD (Aug. 30, 2012), <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf> (accessed May 17, 2015).

58 Geradin, *supra* n. 28, at 1.

59 *Id.*

60 *Id.*

61 Wils, *supra* n. 18, at 68.

62 *Id.*

63 The Vice President responsible for competition policy of the European Commission.

64 Joaquín Almunia, *Compliance and Competition Policy* 5–6, European Commission (Oct. 25, 2010), <http://europa.eu/rapid/press-release_SPEECH-10-586_en.pdf> (accessed May 17, 2015).

65 Geradin, *supra* n. 28, at 14.

66 *Id.*

Stephan notes that the approach of the EU and US competition authorities is flawed since it is 'characterized by very little engagement with the business community . . . to promote enforcement'[67] and may not be 'deterrence-enhancing.'[68] Similar, Murphy and Kolasky recognise that the above competition authorities 'have not put sufficient emphasis on encouraging companies to implement strong antitrust compliance programs to prevent cartel behavior.'[69]

In light of the above, Stephan welcomed the UK's diverse and progressive approach in 'recognising the importance of compliance and acknowledging that the existence of an infringement should not render a firm's entire compliance programme a failure.'[70] Therefore, the position of the CMA to reduce fines to infringing companies based on their compliance efforts is in line with the recent approach of many scholars, which is based on the analysis of development of compliance practice and cartel enforcement.

2.4. Impediments to Implementing Effective Programmes

Stephan asserts that compliance programmes may be 'ineffective at preventing cartel behaviour in the absence of criminal sanctions against individuals'[71] responsible for cartels,[72] as empirical evidence shows these infringements are 'deliberate, meticulously concealed and organised at a senior level.'[73] This is similar to Wils's view that the US experience in both imposing fines on companies and imprisoning individuals 'has a stronger deterrent and normative effect'[74] in comparison to the EU where criminal sanctions for individuals are absent.[75] Murphy and Boehme also state that the European Commission 'needs to step up and make hard core collusion criminal.'[76]

While criminal sanctions may not be imposed at European Community level, the UK competition law provides for criminal offences, which though not applied

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67 Andreas Stephan, *Why the U.K.'s New Approach to Competition Compliance Makes for Good Enforcement*, 2012(1) CPI Antitrust Chronicle 3, available at <http://core.kmi.open.ac.uk/download/pdf/8821351.pdf> (accessed May 17, 2015) [hereinafter Stephan, *Approach to Competition Compliance*].

68 *Id.*

69 Murphy & Kolasky, *supra* n. 9, at 61.

70 Stephan, *Approach to Competition Compliance*, *supra* n. 67, at 5.

71 Andreas Stephan, *Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels* 2 (ESRC Centre for Competition Policy & Norwich Law School, University of East Anglia, CCP Working Paper 09-09, July 2009), <https://www.uea.ac.uk/polopoly_fs/1.122147!ccp09-9wp.pdf> (accessed May 17, 2015) [hereinafter Stephan, *Antitrust Compliance Programmes*].

72 *Id.*

73 *Id.* at 13.

74 Wils, *supra* n.18, at 72.

75 *Id.*

76 Murphy & Boehme, *supra* n. 1, at 10.

frequently due to certain legislative impediments, nevertheless, may be considered as a credible threat to individual cartelists to make the compliance programmes more effective.[77]

2.5. The Importance of Government Support

It is of a particular note that certain authors highlight the important role of government in the promotion of development of effective compliance programmes.[78] Combined efforts of the 'Government, industry, academia and others'[79] are necessary to promote effective compliance.[80] Riley and Sokol claim that antitrust authorities should support and encourage antitrust compliance programmes in the same way as other enforcement authorities do (*i.e.* in relation to the Foreign Corrupt Practices Act) and 'to engage more fully with academics, compliance and ethics professionals, and the business community in such efforts to create a more effective antitrust system and better compliance in practice.'[81]

The particular experience of the UK competition authorities represents an example of notable government support and encouragement to businesses of implementing competition law compliance culture with the state. 'This approach recognizes the importance of building a competition culture within the British economy, beyond simply enforcing the law.'[82]

3. The EU and UK Approach: Rewarding Compliance

3.1. The European Commission and the CMA: Enforcement of Cartel Prohibitions

3.1.1. The EU Law, Penalties

The powers of the European Commission [hereinafter Commission] to enforce Art. 101 of the TFEU,[83] a supranational legislation prohibiting anticompetitive agreements that affect the trade between the Member States, are set out in Council Regulation No. 1/2003.[84]

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77 Stephan, *Antitrust Compliance Programmes*, *supra* n. 71, at 14–15.

78 Murphy & Boehme, *supra* n. 1, at 11.

79 *Id.*

80 *Id.*

81 Riley & Sokol, *supra* n. 17, at 45–46.

82 Stephan, *Approach to Competition Compliance*, *supra* n. 67, at 4.

83 Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 13 [hereinafter TFEU].

84 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, Art. 23(2)(a), 2003 O.J. (L 1) 1, 17.

The Fining Guidelines state that the Commission may impose a fine on an undertaking that has participated in a 'hard core' cartel agreement to the amount of up to 10% of the offender's annual worldwide turnover.[85] In fixing the level of the fine, the Commission 'must have regard both to the gravity and to the duration of the infringement,'[86] where the gravity of the infringement is determined on a case-by-case basis.[87] The basic amount of the fine determined by the Commission may be adjusted depending on the presence of aggravating or mitigating factors.[88] The Commission has a great discretion in determining the amount of fines by weighting all the circumstances and ensuring 'that fines have a sufficiently deterrent effect.'[89]

3.1.2. The UK Law: A Brief Overview

On a national level, the CMA has been invested with powers to apply and enforce Art. 101 of the TFEU in the UK since May 2004, while before this date it was only a prerogative of the Commission.[90]

The UK competition law was introduced by the Competition Act[91] and the Enterprise Act,[92] which both fundamentally changed the domestic competition law of the UK.[93]

The Chapter I prohibitions of the Competition Act correspond to Art. 101 of the TFEU, but refer to anti-competitive practices which affect trade within the United Kingdom.[94]

The Enterprise Act supplements the Competition Act, by introducing a criminal cartel offence,[95] which can lead to the imprisonment of individuals for up to five years and / or a fine of an unlimited amount; it also provides for company director disqualification and facilitates private actions.[96] The Enterprise Act also creates Competition Appeal Tribunal [hereinafter CAT] that has appellate and judicial review

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85 Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No. 1/2003 ¶ 2, 2006 O.J. (C 210) 2, 2 [hereinafter Fining Guidelines].

86 *Id.*

87 Richard Whish & David Bailey, Competition Law 277 (7th ed., Oxford University Press 2012).

88 Fining Guidelines, *supra* n. 85, ¶ 28, at 4.

89 *Id.* ¶ 30, at 4.

90 Council Regulation No. 1/2003 of 16 December 2002, *supra* n. 84.

91 Competition Act, 1998, c. 41 (Eng.) [hereinafter Competition Act].

92 Enterprise Act, 2002, c. 40 (Eng.) [hereinafter Enterprise Act].

93 Whish & Bailey, *supra* n. 87, at 58.

94 Competition Act, *supra* n. 91, Ch. I; Penalty Guidance, *supra* n. 22, para. 1.2.

95 Enterprise Act, *supra* n. 92, sec. 188.

96 Whish & Bailey, *supra* n. 87, at 60.

functions.[97] Thus, the UK competition law provides for all types of liability for cartel infringement: administrative sanctions – imposition of penalties, criminal liability and private actions.

Following the above, the CMA has powers to enforce EU and UK law prohibiting cartels and is authorised to carry out on-the-spot investigations, to adopt decisions and to impose penalties on undertakings that have violated the competition law.[98]

3.1.3. The UK Law: Penalties

Further to the EU rules, the amount of penalties which may be imposed by the CMA on undertakings participating in cartels, may not exceed 10% of an undertaking's worldwide turnover in the business year preceding the CMA's decision.[99]

The Penalty Guidance sets out the basis on which the CMA calculates the fines.[100] The Penalty Guidance provides a six-step approach to determine the level of penalty, which, by analogy with the EU rules, starts from the calculation of a starting point (basic amount), which then adjusted in accordance with particular criteria in subsequent steps, such as the duration of an infringement, aggravating or mitigating circumstances and other factors, including the need for deterrence and proportionality.[101]

It is of note that in the UK, fines may be reduced by the CMA for mitigating factors, which, alongside certain factors mirroring EU Fining Guidelines, also include 'adequate steps having been taken with a view to ensuring compliance.'[102]

As discussed in this Chapter, the CMA has broad powers to enforce competition law, prohibiting cartel agreements (both supranational and domestic legislation) and to determine the amount of penalties imposed on the offenders. While in general the norms of the Competition Act and Penalty Guidance mirror the respective EU rules, the UK is significantly different in the formulation of mitigating circumstances, which embrace compliance efforts, and is a key legal mechanism ensuring the rewarding of companies for their compliance efforts.

3.2. The European Commission and the CMA: Rewarding Compliance Programmes

The Commission is not obliged to take into account the compliance programme of a company when defining the level of fines.[103]

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97 Enterprise Act, *supra* n. 92, Pt. 2.

98 Whish & Bailey, *supra* n. 87, at 59.

99 Competition Act, *supra* n. 91, sec. 36(8).

100 Penalty Guidance, *supra* n. 22, para. 1.4.

101 *Id*., para. 2.1.

102 *Id*., para. 2.15.

103 Whish & Bailey, *supra* n. 87, at 279.

In the 1980[s], the Commission, in certain circumstances, reduced the level of a fine imposed on a company after recognising a compliance programme as a mitigating factor, but has adopted a harder approach in recent cases, stating that attempts at compliance do not change the reality of the infringement.[104] This change of policy and the new position of the Commission was upheld by the European Court of Justice.[105]

This approach has been questioned, with academics and practitioners claiming that it 'arguably overlooks the positive incentive effect of rewarding good faith attempts at compliance.'[106]

While EU law and the enforcement practice of the Commission is followed by the majority of Member States' competition authorities, the UK competition authority 'significantly diverged in its approach to business compliance'[107] regularly rewarding firms with robust compliance programmes by reducing the fines; up to 10% in certain circumstances.[108]

The next Chapter will review in more detail the respective mechanisms and principles embedded in national competition law by the CMA with the purpose of instilling the competition culture within the state.

4. The UK Approach: Rewarding Compliance

The legacy of CMA's predecessor – the OFT, in particular in terms of embedding compliance programmes into the competition law in the UK, is of a particular interest. This Chapter will discuss complex measures undertaken by the OFT in this respect. Although the publications, decisions and actions discussed in this Chapter were developed under the name of the OFT, the name of its legal successor – the CMA will be used.

4.1. CMA's Guidance: Instilling the Competition Culture

The CMA considers that 'most businesses wish to comply with competition law'[109] and aims to support them, and has issued a number of publications to help businesses to achieve this goal and promote the competition culture.

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104 Oliver Geiss, *Belgium: Countering Competition Risks: Towards a Culture of Compliance*, Mondaq (Jan. 3, 2012), <http://www.mondaq.com/x/154068/Antitrust+Competition/Countering+Competition+Risks+Towards+A+Culture+Of> (accessed May 17, 2015).

105 Case T-13/03, *Nintendo v. Commission*, ¶¶ 74, 211, 2009 E.C.R. II-947, [2009] 5 C.M.L.R. 1421 (2009); *see also* Geiss, *supra* n. 104.

106 Geiss, *supra* n. 104; *see also* Stephan, *Approach to Competition Compliance*, *supra* n. 67; Murphy & Boehme, *supra* n. 1; Sokol, *supra* n. 20.

107 Stephan, *Approach to Competition Compliance*, *supra* n. 67, at 2.

108 Wils, *supra* n. 18, at 55.

109 *Promoting Compliance with Competition Law*, *supra* n. 57, ¶ 11, at 191.

In 2005, the CMA issued a quick guide, 'How Your Business Can Achieve Compliance' (OFT 424), which promotes compliance programmes as a necessary mechanism, sets out certain general characteristics for an effective compliance programme and states that the existence of a compliance programme in an infringing business might be taken into account as mitigating circumstances when calculating the fines.[110]

This guide was further elaborated into a new guidance in 2011: 'How Your Business Can Achieve Compliance with Competition Law,'[111] which explains, *inter alia*, the view of the CMA on 'a business' compliance efforts when setting the level of any penalty for competition law infringement.'[112]

A special word should be said about the CMA's report 'Drivers of Compliance and Non-Compliance with Competition Law'[113] published in May 2010. This research was undertaken with involvement of Deloitte 'in order to gain a better understanding of the practical challenges faced by the business seeking to achieve a competition law compliance culture.'[114] The report was based on the results of qualitative research as to what motivates business to comply with competition law and shows examples of compliance activities of the business.

Another guidance, 'Company Directors and Competition Law,'[115] was issued in 2011 to set out the key issues that company directors should be aware of, such as main competition law risks, how they may be minimised to prevent infringements of competition law and potential sanctions to be imposed on directors.[116]

The complex of measures undertaken by the CMA, evidenced by the number of published guidances, the in-depth research conducted to identify drivers for businesses to comply with the competition law and the spreading of awareness of competition law by placing interactive materials and films on its website, clearly 'demonstrate a pro-business commitment to helping and incentivizing firms to prevent infringements rather than simply waiting to dish out punishment once an infringement has taken place.'[117] In those cases where these measures could not help to prevent infringement, the CMA will consider a reduction in fines.

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110 Drivers of Compliance and Non-Compliance with Competition Law: An OFT Report para. 2.15 (OFT 2010), at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf> (accessed May 17, 2015) [hereinafter OFT Report].

111 How Your Business Can Achieve Compliance with Competition Law: Guidance (OFT 2011), at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf> (accessed May 17, 2015) [hereinafter Compliance Guidance].

112 *Id.* para. 1.3.

113 OFT Report, *supra* n. 110.

114 *Id.* para. 1.3.

115 Company Directors and Competition Law: OFT Guidance (OFT 2011), at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284410/oft1340.pdf> (accessed May 17, 2015).

116 *Promoting Compliance with Competition Law*, *supra* n. 57, ¶ 7, at 187.

117 Stephan, *Approach to Competition Compliance*, *supra* n. 67, at 4.

4.2. CMA's Approach: Conditions for Rewarding Compliance Efforts

In their Compliance Guidance, the CMA states that, at its complete discretion and depending upon the circumstances, it may reduce a fine imposed on a company for a competition law infringement, by up to 10% where it is satisfied that 'adequate steps have been taken'[118] towards ensuring competition law compliance.[119]

What is important is that the CMA clarifies that any discount, if justified, can be granted on the basis of compliance efforts taking place either prior to the infringement or 'implemented quickly following the business first becoming aware of the potential competition infringement.'[120]

The CMA says that its 'starting point in relation to penalty setting . . . is neutral: there are no automatic discounts or increases in the level of financial penalty . . .'[121] However, it will carefully consider whether the evidence presented as to a company's compliance activities merits a discount from the fine of up to 10%.[122]

The assessment of whether a reduction in the amount of fine is justified is to be done by CMA on a case-by-case basis and '[e]ach case will be assessed on its own merits.'[123] The CMA clarifies that the mere existence of a competition compliance programme will not be regarded as an aggravating factor to increase the fine, subject to certain circumstances.[124] The mere existence of compliance activities will not be regarded as mitigating factors.[125]

The CMA asserts that a 'one size fits all'[126] approach is not appropriate for competition law compliance where actions to achieve a compliance culture will vary 'by size of business and also by the nature of the risks identified.'[127]

It is worth saying that though the CMA adopted the policy to reduce fines to companies that showed diligent compliance efforts, it also highlighted the substantial level of its discretionary power when deciding on discounts, such as taking a decision on a case-by-case basis, assessment of adequate steps and looking at a particular case on its own merits amongst others. The particular steps of the evaluation will be discussed in the next Sections.

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118 Compliance Guidance, *supra* n. 111, para. 1.6, ch. 7.

119 *Id.*

120 *Id.* para. 7.2.

121 *Id.* para. 7.1.

122 Penalty Guidance, *supra* n. 22, at 12 n. 26.

123 Compliance Guidance, *supra* n. 111, para. 7.3.

124 *Id.* para. 7.5.

125 Penalty Guidance, *supra* n. 22, at 12 n. 26.

126 Compliance Guidance, *supra* n. 111, para. 1.2.

127 *Id.*

4.3. CMA: Assessment of Adequate Steps to Ensure Compliance

The CMA has expressed its willingness to provide discounts to companies which can demonstrate that they have taken 'adequate steps'[128] to ensure the compliance with competition law. This begs the question as to which particular actions may be considered by the CMA as adequate steps performed by the companies. In other words, as discussed earlier, which particular characteristics of a formal compliance programme could ensure the effective compliance with competition law in the view of the CMA to justify a reduction in fines?[129]

The CMA provides an answer in the Compliance Guidance where it states that '[t]aking "adequate steps" for these purposes may include having implemented *the four-step process described in this guidance or*, in the OFT's view, *reasonably equivalent measures*'[130] (emphasis added). The CMA clarifies that reasonably equivalent measures may include a risk-based competition law compliance programme.[131]

The four-step process is as follows:

- *Core – Commitment to Compliance (from the top down).* An essential part of the process is 'achieving a clear and unambiguous commitment to competition law throughout the organisation;'[132]
- *Step 1 – Risk identification.* The first step to be taken by a business is 'to identify the key competition law risks.'[133] These risks might be specific to the business' operations and depend upon the nature and size of the business in question;[134]
- *Step 2 – Risk assessment.* The second step assumes an assessment by the company of a level of risks identified in Step 1;[135]
- *Step 3 – Risk mitigation.* The third step to be performed by the company is to properly mitigate its identified risks by implementing suitable training activities, procedures and policies to prevent these risks from occurring within the company;[136]
- *Step 4 – Review.* The fourth step purports that the company regularly reviews all stages of the process, which is not static and should be adapted to any changes.[137]

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128 Compliance Guidance, *supra* n. 111, para. 1.6.

129 Wils, *supra* n. 18, at 68.

130 Compliance Guidance, *supra* n. 111, para. 7.2.

131 *Id.*

132 *Id.* paras. 1.15, 7.3.

133 *Id.* paras. 1.15, 3.1.

134 *Id.* para. 1.15.

135 *Id.* para. 4.1.

136 *Id.* para. 5.1.

137 *Promoting Compliance with Competition Law*, *supra* n. 57, ¶ 5, at 186.

The CMA 'makes it clear that this risk-based process is merely suggestive'[138] and the business may implement its own compliance measures, which must ensure the effective compliance culture within the business.[139]

We can conclude that the answer to the question about particular characteristics of an effective compliance programme is highlighted in the Penalty Guidance where the CMA states that in a particular case

> evidence of adequate steps having been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation (from the top down) – together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities – will likely be treated as mitigating factor.[140]

However, there is a view that a more formalised assessment of compliance programmes by competition authority is necessary.[141] This appraisal should have a variety of concessions available in order to properly reflect the variance in compliance measures, which may be implemented by the companies.[142]

4.4. CMA Enforcement: Reduction in Fines

In the past decade, the CMA has granted compliance discounts in many of the cases where it penalised the companies for infringement of competition law.[143] Two prominent decisions in recent years include the *Construction Recruitment Forum* decision[144] where CMA imposed a fine of £39.27 million on companies engaged in price-fixing and collective boycotting, and the *Construction Bid-Rigging* decision[145] with a total fine of £129.2 million levied on 103 companies involved in unlawful cover-pricing and bid-rigging activities.[146]

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138 *Promoting Compliance with Competition Law*, *supra* n. 57, ¶ 6, at 187.

139 Compliance Guidance, *supra* n. 111, para. 1.14.

140 Penalty Guidance, *supra* n. 22, at 12 n. 26.

141 Stephan, *Approach to Competition Compliance*, *supra* n. 67, at 5.

142 *Id.*

143 From earlier cases (*Arriva/First Group*, Case CA98/9/2002) to more recent cases (*Tobacco*, Case CA98/01/2010; *Dairy Retail Price Initiatives*, Case CA98/03/2011). Wils, *supra* n. 18, at 55 n. 11.

144 *Construction Recruitment Forum*, OFT Decision CA98/01/2009, Case CE/7510-06 (September 29, 2009), available at <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/CE7510-06_Decision_290909_N1.pdf> (accessed May 17, 2015).

145 *Bid Rigging in the Construction Industry in England*, OFT Decision CA98/2/2009, Case CE/4327-04 (September 21, 2009), available at <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/business_leaflets/general/CE4327-04_Decision__public_1.pdf> (accessed May 17, 2015).

146 Whish & Bailey, *supra* n. 87, at 553.

4.4.1. Construction Recruitment Forum

In the *Construction Recruitment Forum* case, the CMA imposed penalties on seven companies engaged in the supply of recruitment services to the construction industry in the UK.[147] Three companies appealed against the amount of the penalty imposed, challenging common elements of CMA's penalty calculation under the Penalty Guidance in the CAT.[148]

It is of particular interest that the penalty amount appealed against by the companies had already been adjusted by a 5% reduction provided by the CMA on the basis that these companies adequately demonstrated 'that they have taken appropriately active measures to introduce compliance measures that are appropriate to the size of the company . . .'[149] Nevertheless, one of the appellants, *Hays plc* required a higher reduction in fines – 10%, arguing that it provided evidence 'of the full and detailed compliance programme that it subsequently put in place'[150]

Based on the above, CAT set out that it did not see any features that warranted a larger reduction in fines.[151] Moreover, CAT supported the position of the CMA 'that it is not required to carry out the detailed evaluation of an undertaking's compliance measures, which would be disproportionate'[152] to CMA's task of calculating penalties.[153] CAT upheld the position of OFT and dismissed *Hays*' appeal, stating that the CMA 'granted a modest penalty reduction appropriate to the compliance measures implemented subsequent to the investigation'[154] and stated that companies 'should be incentivised to adopt strong compliance measures before any infringement occurs.'[155]

In conclusion, appeals of all three companies were dismissed and they were provided with the 'modest'[156] reduction of fines (5%) for their compliance efforts. Nevertheless, the total fines imposed on each of these companies were significantly reduced by the CMA on account of leniency.[157]

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147 *Construction Recruitment Forum*, *supra* n. 144.

148 *Eden Brown Limited v. Office of Fair Trading*, [2011] C.A.T. 8, available at <http://www.catribunal.org.uk/files/1140-42_Recruitment_Judgment_010411_2.pdf> (accessed May 17, 2015).

149 *Construction Recruitment Forum*, *supra* n. 144, para. 5.337; *Eden Brown Limited v. Office of Fair Trading*, *supra* n. 148, para. 122.

150 *Eden Brown Limited v. Office of Fair Trading*, *supra* n. 148, para. 123.

151 *Id.* para. 127.

152 *Id.* para. 129.

153 *Id.*

154 *Id.* para. 127.

155 *Id.*

156 *Id.*

157 *Eden Brown Limited v. Office of Fair Trading*, *supra* n. 148, para. 130.

Summarising comments. The above decisions of the CMA and CAT appear to demonstrate the very rational position where CMA provides a larger discount of 10% to companies that have adopted diligent compliance programmes before the infringement, despite having failed, and a smaller discount of 5% – to companies that adopted compliance measures after the infringement had occurred.

Also, the view by the CMA that its evaluation of compliance measures should not be disproportionate to its task of setting penalties, represents a limitation of the CMA's investigative efforts in order to maintain reasonable investigative costs and timeframe.

4.4.2. Bid Rigging in the Construction Industry in England

In the *Bid Rigging in the Construction Industry in England* case[158] the CMA, following a detailed evaluation, was satisfied with submissions by around 80 companies (out of 103 companies), evidencing their existing compliance policies.[159] CMA stressed that companies had 'adequately demonstrated that they have taken positive steps to introduce a formal compliance policy that is appropriate for the size of the undertaking . . . and to ensure that all appropriate staff have been properly aware of their competition law obligations.'[160] For these companies the CMA provided a 5–10% reduction of the penalty,[161] assuming that they these companies 'have successfully minimised the likelihood of future infringement'[162] by introducing such programmes.[163]

Summarising comments. Following the above decisions, we can conclude that two major factors are considered by the CMA as sufficient evidence of robust compliance programmes: the introduction of a formal compliance policy that is appropriate to the size of a business, and proper awareness of the company's staff of their obligation under competition law. It appears that the above criteria are broad enough to follow the stages described in the four-step approach,[164] or be considered as reasonably equivalent measures, in order to be used by the CMA as a general basis for evaluation of compliance programmes.

The details of the CMA's assessment of compliance efforts are not revealed in the investigation and the CMA has stipulated reasonable limitations in its appraisal of compliance programmes. Given a substantial level of the CMA's discretionary,

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158 *Bid Rigging in the Construction Industry in England*, *supra* n. 145.

159 *Id.* para. VI.317.

160 *Id.*

161 *Id.* para. VI.318.

162 *Id.*

163 *Id.*

164 *See supra*, Sec. 4.3.

this may create some extent of uncertainty for companies seeking a reduction in fines, and in general weaken the incentives for companies to put recourses in implementing compliance programmes.

The experience of the CMA may be of particular interest for other antitrust authorities, which have the intention to build a competition culture in jurisdictions with less developed competition law than in the UK. The next Chapter considers the FAS implementation of mechanisms and deterrents and asks whether the UK concept of recognition of benefits of compliance programmes, if implemented in Russia, could increase the effectiveness and the deterrent effect of Russian competition regime.

5. Russia: On the Way to Rewarding Compliance Programmes

In order to consider possible mechanisms and the driving forces in the compliance which can be applied by the FAS within the Russian antimonopoly legislation, it is necessary to have a brief overview of Russian antimonopoly laws, addressing questions of the regulation the cartels in Russia and the imposition of sanctions for committed violations.

5.1. Overview of the Russian Antimonopoly Law and Competition Authorities

5.1.1. Competition Law

According to the Head of the FAS, Mr. Igor Yu. Artemiev, '[t]he Russian Federation has entered the second decade 21st century with an effective state policy relating to the development of competition and the institutional infrastructure for antimonopoly regulation and effective legislation on sanctions for the restriction of competition, as well as formed judicial practice.'[165]

Russia has taken a fast development path in antimonopoly legislation since the 1990s, matching the serious transition in Russia from prevailing state regulation to the market economy and recognition at the political level of the benefits of the competition. An important step in this direction was the adoption of a new competition law in 2006[166] and, later, in 2007, the relevant changes in the Administrative Code,[167]

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[165] *Алешин Д.А., Артемьев И.Ю., Башлаков-Николаев И.В. и др.* Конкурентное право России: Учебник [Aleshin D.A., Artem'ev I.Yu., Bashlakov-Nikolaev I.B. i dr. *Konkurentnoe pravo Rossii: Uchebnik* [Dmitry A. Aleshin et al. Competition Law of Russia: Textbook]] 44 (Igor Yu. Artemiev et al., eds.) (2nd ed., Publishing House of the Higher School of Economics 2014).

[166] Federal Law No. 135-FZ of July 26, 2006, 'On Protection of the Competition' [Федеральный закон от 26 июля 2006 г. № 135-ФЗ «О защите конкуренции» [*Federal'nyi zakon ot 26 iyulya 2006 g. 'O zashchite konkurentsii'*]] [hereinafter Competition Law].

[167] Federal Law No. 195-FZ of December 30, 2001, 'Code of the Russian Federation on Administrative Offenses' [«Кодекс Российской Федерации об административных правонарушениях» от 30 декабря 2001 г. № 195-ФЗ ['*Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh' ot 30 dekyabrya 2001 g. No. 195-FZ*]], Art. 14.32 [hereinafter Administrative Code].

which for the first time established turnover fines for infringement of the antimonopoly legislation. To date, the Competition Law, with significant changes adopted in 2009, 2012,[168] is the principal document, containing substantial and procedural competition law rules in Russia.

The Russian antimonopoly legislation is complex by its nature and includes the rules of administrative, civil and procedural law. Apart from the Competition Law, antimonopoly legislation includes, *inter alia*, the rules of Administrative Code, Governmental and Presidential decrees, normative legal acts of the FAS relating to the protection of the competition.[169] There is a significant influence on the practice of application of antimonopoly legislation provided by judicial practice.

The Russian antimonopoly legislation is in constant development, through the initiative of the FAS making significant changes practically every three years. A number of new changes to the antimonopoly laws, the so called 'the fourth antimonopoly package'[170] is due for adoption in the spring of 2015.[171]

It is of note that 'it is the European supranational competition law has been the basis for Russian legislation,'[172] the Russian antimonopoly legislation evolving to keep pace with European legislation, as well as global trends, based on a best judicial and administrative practice of the leading antimonopoly authorities of the world.[173]

5.1.2. Liability for Breaching the Antimonopoly Legislation

While Russian legislation provides all types of liability in order to protect competition, such as, civil-law, administrative and criminal liability, the prevailing administrative sanctions remain the most effective, imposed on individuals and businesses in the form of fines (including turnover fines for the latter) and disqualification of persons in a professional capacity.[174] The administrative legislation

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168 Changes were called as the second and the third competition packets.

169 Aleshin et al., *supra* n. 165, at 63.

170 Проект федерального закона «О внесении изменений в Федеральный закон «О защите конкуренции» и отдельные законодательные акты Российской Федерации» [*Proekt federal'nogo zakona 'O vnesenii izmenenii v Federal'nyi zakon "O zashchite konkurentsii" i otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii'* [Draft Federal Law 'On Amending the Federal Law "On Protection of Competition" and the Separate Legislative Acts of the Russian Federation']], at <http://fas.gov.ru/legislative-acts/legislative-acts_51214.html> (accessed May 17, 2015).

171 *Титов С.* Правительство одобрило поправки ФАС в закон о защите конкуренции [Titov S. *Pravitel'stvo odobrilo popravki FAS v zakon o zashchite konkurentsii* [Sergey Titov, *The Government Has Approved Amendments of FAS to the Competition Law*]], *Vedomosti* (Sep. 4, 2014), <http://www.vedomosti.ru/politics/news/33007501/pravitelstvo-odobrilo-popravki-fas-v-zakon-o-zaschite> (accessed May 17, 2015).

172 Aleshin et al., *supra* n. 165, at 37.

173 *Id.* at 44.

174 Administrative Code, Arts. 14.9, 14.31–14.33, 19.5, 19.8.

does have a Leniency Programme for companies which voluntarily admit their participation in a cartel.[175]

It is worth noting that along with the existing institute of civil protection of the rights, the norms of criminal law are rarely used in relation to antimonopoly violations and remain in fact dormant.[176]

5.1.3. The Russian Competition Authority

The system of the antimonopoly bodies in Russia consists of the federal executive authority – the FAS, which is under the control of the Russian Government, and its territorial network of antimonopoly bodies.[177] According to the rate list of the *Global Competition Review* magazine the FAS is included in the top twenty antimonopoly authorities of the world.[178]

The FAS is vested with the key authority to initiate, consider and impose sanctions for the violation of antimonopoly legislation, to issue binding orders, to apply for arbitration with the claims and statements on any violations of the antimonopoly legislation, amongst other things.[179]

While FAS tended to use preventive measures in the fight against violations, in the view of Mr. Artemiev, thanks to changes of the proposed 'fourth antimonopoly package,' FAS will transform from a body, that punishes for violations of the competition law into the 'authority of the warning control.'[180]

The FAS has power and competency in relation to the control and supervision of the execution of the legislation and regularly develops and implements significant changes in antimonopoly laws, by raising it to a new level. However, the downside is that initiatives of the FAS can stall through confrontation with Russian business and criticism by Government experts in matters relating to excessive regulation of the business.

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175 Administrative Code, Art. 14.32 (note).

176 According to the Supreme Court of Russia, for the period 2010 – first half of the 2012 only 3 individuals had been condemned by the courts under Art. 178 of the Criminal Code of the Russian Federation. Note that only for the year 2012 the FAS had identified 89 cartels. *See* Разъяснение ФАС России о проекте федерального закона «О внесении изменений в статью 178 Уголовного кодекса Российской Федерации» [*Raz'yasnenie FAS Rossii o proekte federal'nogo zakona 'O vnesenii izmenenii v stat'yu 178 Ugolovnogo kodeksa Rossiiskoi Federatsii'* [*Explanation of FAS in Relation to the Draft Federal Law 'On Applying Amendments to Article 178 of the Criminal Code of the Russian Federation'*]], Anticartel (Jun. 17, 2013), <http://anticartel.ru/article/1040> (accessed May 17, 2015).

177 *Гаврилов Д.А., Пузыревский С.А., Серегин Д.И.* Конкурентное право: Учебник [Gavrilov D.A., Puzyrevskiy, Seregin D.I. *Konkurentnoe pravo* [Denis A. Gavrilov et al., Competition Law: Textbook]] 295 (Norma; INFRA-M 2014).

178 *Id.* at 78.

179 Competition Law, Art. 23.

180 Глава ФАС надеется, что четвертый антимонопольный пакет будет принят до конца 2014 г. [*Glava FAS nadeetsya, chto chetvertyi antimonopolnyi paket budet prinyat do kontsa 2014 g.* [*Head of the FAS Hopes That the Fouth Antimonopoly Package Will Be Adopted before the End of 2014*]], RBC (Mar. 4, 2014), <http://www.rbc.ru/rbcfreenews/20140304195358.shtml> (accessed May 17, 2015).

5.1.4. Regulation of Cartel Agreements

As it was noted by Mr. Artemiev, cartels are clogging the large number of the industries of the Russian economy.[181] Socially valuable industry – food products, pharmaceuticals, utilities market, as well as the government procurement and bid rigging, are closely monitored by the FAS and are priority in its work.[182]

The norms of Art. 11 of the Competition Law prohibiting cartels in fact are similar to the rules of Art. 101(1) of the TFEU; the difference being that the definition of the Competition Act contains the term 'cartel' and expands the scope of prohibited *per se* agreements to include boycotting of the buyers or the sellers of the goods. At the same time, the range of the agreements, which are identified in the Competition Law, in contrast to the European norms, does not include agreements of buyers (purchasers of the goods), which may not be recognised as cartels and do not fall in the number of *per se* prohibitions.[183]

The imposition of fines on infringing companies (from 1 to 15% of the sales revenue of the company-offender for the previous year in the market, where the infringement took place, but not more than 4% of the total turnover of the company-offender)[184] was introduced in 2007, by analogy with the norms of the European legislation.

The Deputy Head of FAS, Mr. Alexander Yu. Kinyov said that in 2010 FAS initiated the maximum number of cases against participants in cartels, no fewer than 600.[185] In 2011 this number decreased to 500, and in 2012 to less than 300 cases, 40% less in comparison to the previous year.[186] FAS explains this positive tendency as the improvement of the quality of consideration by FAS of the existing cases, a focus on the larger cases, impacting at the federal level.[187]

At the same time, there has been an increase in the number of persons brought to account. Where previously there were 2–3 participants involved in a cartel agreement, lately it was not rare to find cases with 20–30 participants. The number of persons liable for cartel agreements is growing – with 1500 companies in 2012; consequently the total amount of the fines is also growing, amounting to more than 3 billion rubles in 2012.[188]

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181 *Кинёв А.Ю.* Противодействие картелям. Итоги, проблемы, перспективы [Kinyov A.Yu. *Protivodeistvie kartelyam. Itogi, problemy, perspectivy* [Alexander Yu. Kinyov, *The Opposition to Cartels. The Results, Problems, Prospects*]], Garant (Mar. 15, 2013), <http://www.garant.ru/action/interview/462523/> (accessed May 17, 2015).

182 *Id.*

183 FAS has proposed amendments to the Competition Law, which include the notion of cartel agreements between purchasers, that will lead to compliance with the existing practice in the EU and the US in the case of adoption of such changes.

184 Administrative Code, Arts. 14.32(1), 3.5(4).

185 Kinyov, *supra* n. 181.

186 *Id.*

187 *Id.*

188 *Id.* The amount equals to US$98.7 million at the exchange rate as of December 30, 2012.

The growing number of participants in cartels appears to demonstrate, *inter alia*, insufficient awareness of competition law prohibitions by businesses necessitating FAS to undertake measures to increase such awareness among businesses to prevent cartels in Russia.

5.2. The Status of Competition Compliance in Russia

We have come to the question of what compliance culture is in Russia today, and also what problems FAS may encounter when implementing such a culture through the compliance programmes.

It would not be an exaggeration to say that the term 'antimonopoly compliance' only recently appeared in Russia and was first publicly voiced by the FAS occurring in the Strategy, a special programme 'The Strategy of the Development of the Competition and Antimonopoly Regulation in the Russian Federation in 2013–24.'[189] Thus, under the framework of the priority activities of FAS for the creation of '[a] favorable institutional and organizational environment for the effective protection and development of competition,'[190] the Strategy defines one of the challenges of the FAS over the next ten years as follows: 'to develop and implement a set of measures with regards to the advocacy of antimonopoly compliance – one of the ways to reduce the risk of violating the antimonopoly legislation.'[191] As noted by FAS, the Strategy takes into account the recommendations of the Competition Committee of the Organisation for Economic Co-operation and Development [hereinafter OECD], given to the FAS.[192] The Strategy also includes the term 'compliance' in the very same context, which is used by the competition authorities of the US, EU and the UK.

In March 2014, the annual conference of the International Compliance Association hosted – 'Compliance in Russia: The International Context' where the Head of the Legal Department of FAS Mr. Puzyrevsky, 'noted the importance of the procedure of compliance for the purposes of preventing violations of the antimonopoly legislation. He also suggested that the participants in the Conference formulate proposals to improve mechanisms for changes in the legislation of Russia.'[193] This marks a new openness and readiness of the antimonopoly authority to hear the voices of various experts, and, furthermore, to facilitate the necessary changes in legislation for the introduction of compliance culture in Russia.

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189 Strategy, *supra* n. 24.

190 *Id.* at 4.

191 *Id.* ¶ 2.8.1.

192 *Id.* at 4.

193 Сергей Пузыревский принял участие в Ежегодной конференции ICA «Комплаенс в России: международный контекст» [*Sergey Puzyrevsky prinyal uchastie v Ezhegodnoi konferentsii ICA 'Komplaens v Rossii: mezhdunarodnyi kontekst'* [*Sergey Puzyrevsky Took Part in the Annual Conference ICA 'Compliance in Russia: The International Context'*]], FAS (Mar. 20, 2014), <http://www.fas.gov.ru/fas-news/fas-news_35350.html> (accessed May 17, 2015).

5.3. Antimonopoly Compliance in the Corporate Codes of Russian Companies

In spite of all of the above, antimonopoly compliance as a single system of measures in the development of the competition culture in Russia remains for the business community an unexplored area in respect of which there is no unified understanding. The Russian legislation does not have an official definition of compliance, which appeared in Russian practice only with the arrival of foreign companies, for whom compliance is an integral part of their activities.[194] Thus, the culture of consolidating certain rules of compliance with laws and ethical standards in the codes of conduct has safely moved into Russian business practice and has become almost a norm for large Russian companies.

In connection with the above, it is fairly important to analyse the content of the corporate codes of Russian companies for the inclusion of provisions on compliance with antimonopoly law. This research will have made it possible to a large extent, reflecting the significance to date of the understanding within Russian business of the incorporation of the antimonopoly rules in the internal corporate compliance programmes.

The author of Paper used for the analysis the codes located in the web sites of the fifty (50) Russian public companies,[195] acting in the various areas of the economy: banking, telecommunications, metallurgical engineering industry, the automotive industry, energy, oil and the gas industry. The results have shown that only in one code of conduct compliance with antimonopoly legislation was highlighted in a separate chapter, providing a detailed description of proper conduct of company's personnel to avoid violation.[196] This does not preclude however the possibility that certain requirements on the observance of the norms of antimonopoly legislation may be incorporated in other internal documents of the above-mentioned companies, not publicly available.[197]

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[194] Конференция «Комплаенс для юристов: управление рисками на уровне юридической службы или как использовать риски на пользу компании» [*Konferentsiya 'Komplaens dlya yuristov: upravlenie riskami na urovne yuridicheskoi sluzhby ili kak ispolzovat' riski na pol'zu kompanii'* [*Conference 'The Compliance for the Legal Professionals: The Management of the Risks at the Level of Legal Service, or How to Use Risks at the Benefit of the Company*]], *Ob'edinenie Korporativnykh Yuristov (OKYuR)* [Union of Corporate Lawyers (UCL)] (Sep. 24, 2010), <http://www.rcca.com.ru/news/action1.shtml?grid=2&id=107> (accessed May 17, 2015).

[195] The list of companies includes: OJSC 'Bank of Moscow;' OJSC 'Gazprom;' OJSC 'Aeroflot;' OJSC 'MTS;' OJSC 'URALSIB;' OJSC 'Ingosstrakh;' OJSC 'Oil Company "Rosneft";' OJSC 'Avtodom;' OJSC 'Tatneft;' OJSC 'Power Machines – ZTL, LMZ, Electrosila, Energomashexport;' OJSC 'Severstal-Auto;' OJSC 'Gazprom Neft;' OJSC 'Oil Company "LUKOIL";' OJSC 'Rostelecom;' OJSC 'Sberbank of Russia;' OJSC 'NGK "Slavneft";' OJSC 'Novolipetsk Steel;' OJSC 'Kusbassenergo;' OJSC 'Sibirtelecom;' OJSC 'Magnitogorsk Iron and Steel Works;' OJSC 'SIBUR Holding;' OJSC 'The Seventh Continent;' and others.

[196] Code of Corporate Ethics of OJSC 'SIBUR Holding' (version No. 2) [Кодекс корпоративной этики ОАО «СИБУР Холдинг» (редакция № 2) [*Kodeks korporativnoi etiki OAO 'SIBUR Holding' (redaktsiya No. 2)*]] (adopted March 25, 2013), sec. 6 <http://investors.sibur.com/~/media/Files/S/Sibur-IR/corporate-documents-rus/code-of-corporate-ethics-rus-25-03-2013.pdf> (accessed May 17, 2015).

[197] For example, OJSC 'Oil Company "LUKOIL"' has developed the 'Rules of the Tendering Process for Choosing Suppliers and Contractors,' which is to ensure the compliance with, *inter alia*, antimonopoly regulations.

However, the available policies, analysed in the framework of the present study clearly show that the implementation of the antimonopoly compliance programmes in Russian business is at the very early stages of development.

5.4. The View of the Russian Competition Authorities on Compliance Perspectives

As discussed above, the support of the state authorities is a critical component in the promotion and implementation of certain ideas or programmes. Bearing in mind that the sources of information in regard to the development of the antimonopoly compliance in Russia were very limited and inadequate, it was very important for the author of the Paper to get information from the officials of FAS, competent in the development of compliance in accordance with the Strategy. It was also an important step in order to find out the position of FAS, what feasibly could be implemented into Russian legislation and business practices from the best international experience and what the opinion and strategy of FAS in Russia was, and whether it would require an entirely different approach, taking into account the Russian legal consciousness and the concrete realities of Russian market.

To this end, face-to-face interviews were held with the Head of the Legal Department of FAS, Mr. Sergey A. Puzyrevsky, and the Deputy Head of the Legal Department of FAS, Mr. Denis A. Gavrilov, in Moscow, Russia, on July 15, 2014. This Section includes the conducted Interview and reflects the position of the above-mentioned persons as FAS representatives on the matters, formulated by the author in the Questionnaire[198] with a view to further study on the stated topic. The following text is not a direct transcript, except for the phrases indicated as such. It is as close as possible to the original expression of the views and positions of representatives of FAS. The questions listed below as subtitles reflect the parts of the Questionnaire.

5.4.1. The History of the Question

According to FAS, the question regarding the implementation of antimonopoly compliance in Russian companies is still at the stage of discussion and has been for approximately the past five years, since the initial familiarisation with this term from the USA. The representatives of the Ministry of Justice of the United States and American law firms pointed to this preventive mechanism as being successfully applied in the legislation of the USA in relation to the antitrust violations, providing a model for FAS in considering the possibility of the implementation of compliance in Russia. However, the particular experience of other jurisdictions in this field, including the UK, have not yet been studied by FAS.

5.4.2. What Does FAS Understand by the Term 'Compliance' and What Are the Prospects for Implementation of This System in Russia?

198 *See infra*, Appendix.

FAS considers compliance as a mechanism to prevent companies committing the antimonopoly violations and welcomes this mechanism as one of the ways to reduce antimonopoly violations, the level of which is quite high in Russia. FAS widely discusses with the Russian legal community issues relating to the development of compliance as stated in the Strategy. For example, on instructions from FAS practitioners and experts of non-commercial partnership 'Promoting the Development of Competition' consider possibilities to instil into the Russian legal system mechanisms that would ensure certain benefits for companies so as to incentivise them to implement compliance programmes.

FAS believes that if the mechanisms were available in legislation, and companies see their benefits, in the first place economic (*i.e.* if the company will be able to reduce the potential fines after the implementation of the compliance procedures), this would be an effective way to promote the idea of compliance.

5.4.3. What Benefits Does FAS See in the System of Compliance?

FAS believes that in certain matters compliance can be more effective than coercive measures of state control as compliance has the following advantages:

– in the first place, it is voluntary and not mandatory on the part of the state;

– secondly, internal procedures, imposed by a company are more effective than prescriptions of antimonopoly authority, since the companies will more clearly adhere to the rules that they have established for themselves, at a time when the capabilities to control implementation of the of FAS prescriptions within the company are rather limited.

Thus, FAS' view is that the mechanisms for a serious self-regulation and deterrence of the behaviour of its employees through compliance can help to solve many of the problems, which FAS formerly had to solve in another way.

5.4.4. What Place is There for Compliance in the Russian Antimonopoly Regulation?

There is no clear decision on what place compliance will hold in the system of Russian antimonopoly regulation, and is still being discussed. This is due to the fact that, for the introduction of compliance by the subsequent legislative mandates, the system of compliance must have some standards that would be perceived by the State for the relevant decision-making processes.

These standards should not necessarily be determined by the State, but they must be recognised by the State. The existence of standards will make it possible to avoid a situation where a compliance system in companies is built on different principles, whereby some companies create an entirely cosmetic programme, while others introduce a truly effective programme. The existence of standards would allow the company to be assured that, if there is the standard, it will thus be exempted from punishment and will obtain certain benefits. The question as to which organisation should formulate this standard, remains open.

FAS is considering a possible mechanism of certification of the compliance programme. The idea is that certifying authority will check the internal policies of the company (compliance programme) and decide whether the policy and its implementation mechanisms comply with the standards. Therefore, the company, following this policy, will be able to protect itself from the antimonopoly violations, and in the case of violations – have the right to the appropriate reduction of the penalty.

The certifying authority can be either a specialised organization, or FAS itself. The experts in the discussion of this matter are more inclined to transfer these powers to FAS, recalling the existing example of the institute of notification, when consultation with FAS agreements on joint activities that give the companies confidence that they would not be accused of being part of a cartel. Such a mechanism could successfully be applied in the case of compliance programmes. However, from the point of view of FAS, this would impose additional responsibility on the antimonopoly authority.

5.4.5. What Is the Concept of FAS with Respect to the Proposed Benefits for Companies with Compliance Programmes?

FAS is inclined towards the elaboration of the following options, which are in the process of the discussion:

– to reduce the amount of administrative fines imposed on the company, applying the mechanism of discounts bearing in mind the extenuating circumstances;[199] or

– to release the company (a legal entity) from liability and to impose an administrative fine on the company official who had committed the violation. All of this should be done only on the condition that an administrative fine will be increased for serious penalties, being commensurate with the nature of the committed offences.[200]

FAS' view is that for the introduction of the above-mentioned benefits for the company, FAS may consider adding changes to the Administrative Code, including the part in the introduction on the compliance programme in the list of circumstances, extenuating administrative liability (mitigating factors). FAS is ready to develop this position and to give the signal to business for the development and introduction of compliance programmes.

5.4.6. What Is FAS' Opinion Regarding the Positions of the Various Academics and Experts Who Believe That an Effective and Running Competition Compliance is Only Possible If There Is Criminal Liability on Company Officials Participating in the Cartel. Will There Be Criminal Penalties for Cartels in Russia in Practice?

In the FAS view, compliance will operate only when there is a mechanism for liability as such.

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[199] FAS states that it is possible even to reduce the fine to the minimum amount (1% of the relevant turnover of the company-offender in case of cartels).

[200] FAS states that at the moment, the maximum fine that can be imposed on an official person has an insignificant amount (50,000 RUB, approximately US$1,282) which does not have a deterrent effect.

In relation to cartel participants in Russia, administrative liability includes turnover penalties for companies, fines and occasionally disqualification for officials involved. In FAS' opinion, the very existence of significant administrative fines already pushes companies towards establishing security measures for their behaviour, such as compliance programmes, with the threat of criminal sanctions simply doubling the need for it.

FAS is considering criminal liability as an effective mechanism for deterring offences. Administrative liability is also effective, but it imposes the liability on the company, not on any official, often not affected by the fact that the company pays fines and suffers losses as a result of this employee's action. An official should be aware that antimonopoly violation is very serious, that it can likely result in disqualification, and in the case of cartel violation subjection to criminal liability. As soon as there is a clear operating mechanism for criminal liability, the need for compliance will greatly increase.

Criminal liability is in place in the Russian legislation,[201] but it does not work. The FAS is considering 150 cartel violations over a one-year period, but they are not investigating further into the internal affairs authority in order to make the official criminally liable.[202] According to FAS, to connect administrative procedures with criminal ones in the Russian legal system is very difficult. It is hard to resolve the issues that have traditionally been laid out in the law as incompatible.

Another important issue is that FAS must challenge and break the current situation and synchronise the release of liability for the company officials within the frame of the Leniency Programme: with those who receive exemption from administrative liability being released from the criminal liability too. At present, the risk of criminal liability for individuals seriously slows down the development of the Leniency Programme.

Thus FAS asserts that the synchronisation of the release of liability in administrative and criminal proceedings and the existence of effective liability – are the two important conditions for development of the compliance programme. Therefore the reciprocal responsibility of the company and the company officials is essential.

5.4.7. What Are the Possible Mechanisms for the Recommendations of the OECD 'How Can the Government Promote Compliance and Ethics Programmes?'[203] *That May*

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201 Federal Law No. 63-FZ of June 13, 1996, 'Criminal Code of the Russian Federation' [«Уголовный кодекс Российской Федерации» от 13 июня 1996 г. № 63-ФЗ [*'Ugolovnyi kodeks Rossiiskoi Federatsii' ot 13 iyunya 1996 g. No. 63-FZ* [The Criminal Code of the Russian Federation]], Art. 178.

202 In 2013, FAS referred to the investigative body 56 statements on cartels. On their basis, only 9 cases were instituted, however, none of them have been referred to the court for further proceedings. *See Малышева Е.* ФАС хочет стать органом дознания для борьбы с картелями [Malysheva E. *Fas khochet stat' organom doznaniya dlya bor'by s kartelyami* [Elena Malysheva, *FAS Wants to Become an Inquiry Authority to Combat the Cartels*]], RBC (Jun. 24, 2014), <http://top.rbc.ru/economics/24/06/2014/932127.shtml> (accessed May 17, 2015).

203 *Promoting Compliance with Competition Law*, *supra* n. 57, Appendix III (cited in Appendix, *infra*, ¶ 10).

Be Considered by FAS as Acceptable? What Is the Timeframe for Implementation of Compliance in Russia?

FAS believes that all of the recommendations, proposed by the OECD for the state promotion of the compliance programme[204] can be considered by FAS for possible implementation.

Considering the timeframe for implementation of compliance measures, FAS assumes that legal decisions can be taken in a period of 1–1.5 years and then time will be required for the implementation of these programmes, the education and formation of a class of professionals who will promote this system of compliance measures. FAS acknowledges that the subject of compliance is at a very early stage, but in three to five years it believes 'it will be possible to demonstrate the achievements in Russia in this area at the international level.'[205]

6. Conclusion: Suggestions for Implementation of Compliance Programmes in Russia

Effective competition compliance programmes, based on the fundamental standards attributable to the business and the size of a particular organisation, must become a valuable addition to other enforcement instruments of competition authorities to combat cartels, along with significant fines, criminal sanctions and the leniency policy.

The unique and notable experience of the UK, effectively changed the approach of EU law and embedded into national competition law mechanisms allowing for the rewarding of infringing companies for efforts to comply. The UK approach has been researched throughout the Paper with a view to its implementation in Russia, where the competition compliance culture is at its very early stages. FAS which tended to rely primarily on the application of preventive measures in its dealing with violations has voiced its intention to actively respond to the developments of international competition practice and to promote compliance programmes to business practice in Russia.

This research has argued that the existing prerequisites and conditions speak in favour of the statement that competition compliance is required in Russia and could safely be implemented with the promised support of the FAS.

Russian antitrust law has a high degree of maturity and an effective concept of administrative liability for violations. It demonstrates consistent progress in action against cartels. However, the growing number of cartel participants in Russia reflects the need for the adoption by the FAS of measures to spread awareness of competition rules and to encourage businesses to comply with competition law.

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[204] *See infra*, Appendix, ¶ 10.

[205] Interview.

For that purpose, the following measures, successfully implemented by the CMA, may be of particular interest to the FAS:

– the publication of reports and guidance documents on competition law compliance; fixing at the legislative level that an effective compliance programme may be regarded as a mitigating factor leading to discounts in fines;

– the elaboration of a detailed four-step process, which, together with a clear commitment to competition law compliance by an organisation will be considered as evidence of adequate measures undertaken by the company to ensure the compliance, which, in case of violation, can be treated as sufficient grounds to reduce fines for the company.

At the same time, certain measures introduced by the CMA may be less acceptable in Russia due to the peculiarities of its legal concepts. For instance, the CMA's relatively liberal position in granting discounts to companies that implement adequate compliance measures once the investigation has begun, though at a lower level of discount, is unlikely to be considered reasonable, at least at this stage of the development of competition law in Russia.

Further, the existence of uncertainty for whatever reason in adequate assessment by the CMA of the compliance programmes of companies seeking a reduction in fines, may be improved in Russia by the creation of a system of certification of compliance programmes, which appears to be more appropriate for Russian law.

The Paper, therefore, concludes by proposing a three-step plan of action for the FAS to implement competition compliance programmes in accordance with the Strategy.

6.1. Step 1: Initial Stage

The purpose of the first stage measures is to create a transparent and predictable environment for market players with regard to the potential liability and benefits that the FAS could provide in the presence of mitigating circumstances.

1. Initially, FAS should take a number of preparatory steps to enhance the liability mechanisms that are insufficiently effective, such as: (i) the synchronisation of exemption from administrative and criminal liability under the Leniency Programme; (ii) administrative liability for officers in the form of large fines commensurate with the violation and disqualification; (iii) criminal liability for employees involved in cartels; and (iv) civil liability in the form of compensation for damages.

2. FAS should undertake certain preparatory procedures focusing on the promotion of compliance culture, including:

– a review of the lessons learned from best international practice, including the UK, and consultation with international experts on the implementation of a competition compliance framework;

– the establishment of an internal entity within the FAS with responsibility for the development and implementation of integrated activities aimed at advocacy of antitrust compliance to deter antitrust violations [hereinafter FAS Entity]. The

appointment of a government official who would manage the FAS Entity and be responsible for compliance and ethical connections and the training of compliance professionals in the FAS, including its regional antimonopoly bodies, to ensure a high level of governmental support of competition culture implementation;

– the development of efficient compliance programme models by the FAS Entity; including the publication of guidance and clarifications on the FAS website, the provision of recommendations to business and legal communities on adoption of such programmes, outreach and advocacy activities, educational workshops and conferences. The particular experience of the CMA, including the four-step process, discussed in Secs. 4.2–4.4 of the Paper may be taken as a model example in this respect.

6.2. Step 2: Intermediate Stage

1. After a lapse of a certain period (1–1.5 years) after the Initial Stage, the FAS should carry out a comprehensive assessment of the impact made by the new preventive methods on the frequency and nature of offences committed by market players. This may be conducted in the form of research, similar to the CMA's reports[206] with publication of its results.

2. Depending on the results obtained, subsequent compliance implementation measures should be determined by FAS. These should lead either to further improvement of deficient mechanisms or to the next stage of implementation of integrated measures at the legislative level.

3. FAS should develop and establish a system of standards at this stage that can ensure the compliance framework is built on the same principles. This framework may involve certification of compliance programmes, which makes businesses confident that their corporate programmes and policies meet legal requirements. In comparison to the CMA's evaluation system, this certification mechanism establishes a more transparent and predictable system for the market players to guarantee that their programmes are in compliance with the competition law.

6.3. Step 3: Final Stage

In the Final Stage, FAS should introduce amendments to antimonopoly legislation, in particular, to the Administrative Code with a view to establishing a preferential treatment mechanism for companies with compliance programmes in place, should they violate the antitrust law and be subject to administrative sanctions.

The proposed changes may include:

– inclusion of the company's efficient compliance programme on the list of circumstances that mitigate administrative liability and therefore taken into account when decreasing the amount of the fine for a cartel agreement;

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[206] OFT Report, *supra* n. 110.

– introduction of other norms at the discretion of the FAS, *e.g.* releasing a company from liability and imposing a substantially larger administrative fine on the offending company officer.

To conclude, with a sufficiently mature environment in place for the integration of compliance programmes into the Russian competition laws, FAS can successfully carry out a programme to set up a legislative mechanism and phase it into Russian competition law and business practice. This would raise the competition compliance culture in Russia to be in line with one of the best international practices – the UK.

Appendix

Questionnaire for the Federal Antimonopoly Service of Russia (FAS)

1. What does FAS understand by the term 'compliance' and what are the prospects for implementation of this system in Russia?

2. What benefits does FAS see in the compliance programmes?

3. What place is there for compliance in the Russian antimonopoly regulation?

4. What impediments can FAS foresee in the introduction of the compliance system in Russia?

5. What is the concept of FAS with respect to the proposed benefits for companies with compliance programmes?

6. For what markets in Russia is compliance especially important and what challenges may it resolve in these markets?

7. What particularities of the introduction of compliance programmes may be caused by the specifics of Russian economy, in view of the complex transformation from state regulation to the free market?

8. What may be an incentive for Russian companies to implement compliance programmes?

9. What is FAS' opinion regarding the positions of the various academics and experts who believe that an effective antimonopoly compliance is only possible if there is a criminal liability for company officials, participating in the cartels. Will there be criminal penalties for cartels in Russia in practice?

10. What are the possible mechanisms for the recommendations by OECD 'How Can the Government Promote Compliance and Ethics Programmes' considered by the FAS as acceptable for Russia:

– take effective programs into account in decisions to prosecute;
– offer a reduction in penalties for those with effective programmes;
– publicize the actual benefits given to companies with good programmes;
– use practical, flexible standards in assessing programmes;
– publish a strong governmental policy favouring effective compliance and ethics programmes as in the public interest;

– offer the benefit for effective programmes in government procurement;
– provide a role model of a robust compliance and ethical approach through government agency compliance and ethics programmes;
– have an internal governmental official as a compliance and ethics liaison?[207]

11. What is the approximate timeframe for implementation of compliance in Russia?

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