A Research Paper on

“A COMPARATIVE ANALYSIS OF COMPETITION COMPLIANCE PROGRAMME UNDER VARIOUS LAWS”

Submitted to

COMPETITION COMMISSION OF INDIA

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ACKNOWLEDGEMENT

The project work bears the imprint of many people, and I express my gratitude to all those who have helped me and rendered their help in all the possible ways in a completion of my project report.

It is a matter of immense pleasure to express my gratitude to my intern guide the Deputy Director (eco) Mr. Rajinder Kumar for his guidance and excellent insights which gave direction and focus to this paper. I thank him for lending his precious time in making this project an authentic piece of work.

I also owe sincere gratitude to the staff at library for always helping in the process of finding material and other sources for research. I am very grateful to all the individuals involved in the subgroup for their contributions and assistance in compiling this report and the recommendations that go with it: they are the outcome of an open, interactive and creative cooperation.

I also thank social networking site for searching the required information in precise and as per needed. How I can forget to give credit and my satisfaction to the whole team of CCI for conducting an Internship Programme for students to enhance and broaden their area of knowledge regarding competition issues. My institution and family really supported me throughout in my endeavours to which I am honoured to thank.

At last, I express my heartfelt gratitude to the God Almighty, without whose blessing and motivation, the completion of this project would have been impossible.

Thanks to all.............
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Chapter 1

INTRODUCTION

1.1 WHAT IS COMPLIANCE?

The wide-ranging meaning of compliance is to confirm a rule whether a specification, policy, law or standard. If we go by the dictionary meaning it can be described as the act of confirming, acquiescence or yielding.

1.2 WHAT IS COMPETITION COMPLIANCE?

Competition compliance is the practice that ensures that undertakings achieve the overall purpose of competition law, which is to make markets competitive for the benefit of both undertakings and consumers. The compliance of competition law provisions encourages a self correcting mechanism for the undertakings by incentivizing adoption of the competition code. This can be achieved by competition compliance programme.

Competition Compliance Programme is a practice or the set of corporate regulations and rules that enables undertakings or associations of undertakings to monitor themselves in terms of competition law. The existence of a compliance programme is an indication of the importance and consciousness about competing in accordance with the law. In other words, compliance programme includes methods showing the measures that undertakings or associations of undertakings use to avoid actions and decisions violating the competition legislation and how those measures are applied in the organization.

Absence of a compliance programme would lead to non-compliance of the competition act which can have serious consequences for the enterprise for example recently in India the competition commission fined some cement companies for cartelization in a case.

1.3 WHY COMPETITION COMPLIANCE IS REQUIRED?

Every business and individual has a duty to act lawfully. The competition law of each country operates on the assumption that all businesses and their senior management wish to comply with
the competition law. Compliance is important for all businesses, regardless of their size, for both legal and practical reasons.

The legal, economic and reputational risks of non-compliance to companies and their directors and officers outweigh any advantages. For example, contravention of the competition act whether civil or criminal, can expose a business to significant fines or administrative monetary penalties and recovery of damages by private parties under provisions of the Competition Act. Non-compliance can also result in negative publicity, loss of management time, significant legal costs and a prohibition from participating in government bidding processes. In addition to, or in lieu of, fines, individuals convicted of criminal offences may be sentenced to a period of imprisonment.

The importance of a compliance programme in avoiding contraventions under the Acts, and in detecting and dealing with such behaviour, should not be underestimated. The procedures put in place as the result of a compliance serve not only to identify unlawful or questionable conduct but also to promote awareness that will result in ethical standards of conduct.

1.4 RESEARCH METHODOLOGY

The research design is both qualitative and quantitative in nature.

1.4.1 RESEARCH OBJECTIVE:

- To do critical analysis of the various compliance programmes existing in different nations.
- To study the basic factors leading to compliance of competition law.
- To identify the best practices from other compliance programmes.
- To design guidelines for competition compliance in India

1.4.2 RELEVANCE OF THE STUDY:

It may be noted that so far the CCI has published a small booklet under its advocacy awareness programme which is only a suggested framework for competition compliance. Henceforth the
basic approach of this paper is to study the various competition compliance programmes existing in different nations, to highlight and pick out the best practices that can be used by our country to help in designing guidelines for competition compliance programme in India.

1.4.3 SOURCES OF INFORMATION:

The researcher has predominantly referred to primary sources on internet such as www.internationalcompetitionnetwork.org & papers on “ICC Comparative study” by International Chamber of Commerce & Best practices for compliance programmes: Results of an international survey by Theodore Banks (dir.). Websites of OECD and UNCTAD, i.e., www.oecd.org and www.unctad.org for getting the information regarding various competition compliance guidelines & programmes being practiced in the various nations. In the course of writing this paper, he has also referred to a few relevant commentaries and observations of jurists and experts in order to elucidate his views.
CHAPTER-2
COST& BENEFITS OF COMPETITION COMPLIANCE

"AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE"

In social life, it is obligatory to act legally; otherwise, it constitutes a risk for undertakings and managers. Acting illegally has both material and moral consequences. Responsible and professional management understanding requires foreseeing of the coming events and avoiding legal/financial risks. A knowledgeable and conscious manager takes measures necessary for avoiding sanctions that will harm the undertaking in terms of both finance and reputation. From this point of view preparing and implementing "competition law compliance programmes" is among the leading measures to be taken. In short, legal compliance is becoming a top priority. Many companies now understand that good compliance programs help to reduce corporate risk. However, fewer companies understand how good compliance programs may actually assist them to compete effectively in the marketplace some Cost & benefits of competition compliance are discussed hereunder :

2.1 BENEFITS OF COMPLIANCE:

Some of the specific benefits of a credible and effective programme may include the following :

Compliance with the competition law helps reduce the risk of non-compliance of the provisions mentioned in the act that contributes to maintaining a good reputation of the enterprise in its trade which leads to avoidance of costs related to litigation, fines, adverse publicity and the disruption to operations which results from Competition authorities investigation and proceedings before the court. A tailor made compliance programme of the enterprise give early warnings of potentially illegal conduct of the employees of firm it reduces the exposure of employees, senior management and the corporation to criminal, civil or penal liability arising due to noncompliance.

It helps to increase awareness of possible conduct in breach of the Acts among competitors, suppliers and customers in the market also assist a company and its employees in assessing the competition risks they may face due to noncompliance.
It helps in assisting a company and its staff in their dealings with the competition commission; for example, by identifying contraventions of the competition act early enough to request immunity or lenient treatment which would improve a business’ ability to recruit and retain staff. An ethical company is likely to attract higher-quality employees and have positive successful retention rates improve a business’ ability to attract and retain customers and suppliers who value companies that operate ethically; and to assist a business to qualify, in certain circumstances, for a reduced sentence or other lenient treatment where a contravention of any of the Acts has occurred.

2.2 THE COSTS OF NON-COMPLIANCE FOR A COMPANY:

Noncompliance can have devastating consequences in terms of enormous costs, hefty fines, demoralized workforce and a serious dent to hard earned reputation which is often irreversible, which results into damage to reputation that has been built at very high cost. Heavy fines are levied, ten per cent of the average of the turn over for the preceding three years of violation, for anti-competitive agreements and abuse of dominance. In the case of a cartel there are provisions for imposing on each member of the cartel a monetary penalty of up to three times of its profit for each year of the continuance of such cartel or ten per cent of its turnover for each year of the continuance of such cartel, whichever is higher. Abuse of dominance can also result in division of the dominant enterprise being ordered by the Commission. In case a violation is determined by the Commission, affected parties can approach the Competition Appellate Tribunal (CAT) for compensation, which can be very large depending on the type of violation involved:

- Drain of resources in handling competition law infringement cases.
- Loss of business as potential customers / investors / joint venturists may be repelled.
- It is amply proved by an order handed down by European Competition Commission against Microsoft, the world’s largest software company, guilty of abusing its dominant position in the market for personal computer operating system and for tying Windows Media Player (WMP) with its software “Window 2000”, by imposing a record fine of Euro 497 million (US $ 612 million equivalent to approximately Rs.2630 Crores). In US, the fine imposed is US $ 900 million against Vitamins Cartel and German National Authority has imposed was fine of US $ 725 million against Cement Cartel. Needless to
say that imposition of such huge penalties can put financial planning and working of any “Enterprise” into disarray.
Chapter-3

FACTORS THAT ENCOURAGE COMPLIANCE AND NON COMPLIANCE

3.1 Before proceeding further it would be noteworthy to have a brief insight into factors that encourage compliance and to its contrary all these factors are self-explanatory. Moreover it’s a range of possible influences on compliance:

- Fear of monetary sanctions imposed on corporations or individuals.
- Fear of imprisonment.
- Fear of damage to individual or corporate reputation.
- Morality.
- Good training.
- Employer-driven incentives for employees. Rewarding compliance and/or penalizing non compliance, such as by linking bonuses and promotions to compliance or otherwise making it clear that management is serious about complying with competition law, can be a motivating factor.
- Desire to avoid the diversion of the company’s attention that competition investigations and litigation cause.
- A culture of competition within the firm, industry, and country. Companies and individuals that operate in environments where the value of competition is widely understood and appreciated, and in which competition laws are respected, are more likely to comply with those laws.

Notably, this simple list of factors suggests that promoting compliance could involve more than deterrence alone.
3.2 FACTORS THAT ENCOURAGE NON-COMPLIANCE

- A culture of non-compliance & least interest to promote a culture of compliance within the firm, industry or country.

- Mixed signals about compliance from management. For example, a company’s top executives might express support for competition law compliance, but simultaneously give signals in other contexts that they really do not care how sales targets are met, just as long as they are met.

- Market conditions that facilitate collusion or an abuse of dominance. The market conditions that facilitate cartels are well known and include features such as a small number of players, price transparency, a homogenous product, pervasive exchanges of information among competitors or sending public signals about planned price or output levels. Conditions that facilitate abuses of dominance vary, depending on the conduct. As an example, characteristics that favour predatory pricing include a dominant incumbent with very high market share, deep pockets, excess capacity and low price elasticity of demand.

- The perception that the likely gains from not complying outweigh the likely costs.

- Ignorance of the likely legal consequences of not complying with arrogance among the senior leaders or perpetrators. When individuals in a company believe they are above the law or that they are so smart that they will not get caught or convicted, they are more likely to violate the law.

The insularity of large organizations to the people who work in them. Large organizations’ internal priorities and incentive systems may have a much greater bearing on their behaviour than the seemingly distant threat of external rules.
Chapter-4

COMPARATIVE ANALYSIS OF COMPETITION COMPLIANCE PROGRAMME UNDER VARIOUS LAWS

In the present chapter an attempt has been made to identify best practices and features by doing comparative analysis of competition compliance policies /guidelines of some of the well-established competition agencies.

The competition commission of India had published a small booklet on competition compliance under its advocacy programme. But the contents of the booklet can’t be regarded as the official views of the CCI. Henceforth an attempt has been made to design guidelines for India for the purpose of competition compliance after doing a study of various nations that have existing policy or guidelines given by their respective competition commissions to the enterprises for making their compliance programmes. Most of the competition agencies throughout the world have given competition compliance guidelines to the enterprises, so by following these guidelines enterprises can develop their own tailor made competition compliance programme.

International scenario of competition compliance:
Over here an attempt has been made to study the existing compliance programmes in various nations and their features or practices which can be suited for the Indian system:

A. AUSTRALIA:-

A.1 EXISTENCE OF COMPLIANCE CULTURE: The ‘culture’ of a company can be seen as a system of deep-rooted values, attitudes and beliefs that affect the way company employees perceive the company, what it stands for and the environment in which the company operates, i.e. their relationship with suppliers, customers, investors and regulators.

A company with a good compliance culture has a dominant value from top to bottom that encourages compliance with the law. A good compliance culture is shown by the promotion of a positive attitude towards legal compliance activity at all levels within an organization. It is generally reflected in people proactively seeking to understand and act in compliance with the legal obligations affecting their work.
The values, attitudes and beliefs exhibited by senior management represent the single greatest influence on organizational culture, they must drive the development of the right attitudes and beliefs. If the board is not seen to be consistently committed to implementing a compliance culture, it may send a message to all employees that compliance is discretionary. Senior management needs to recognize that setting the right culture will be a major responsibility for them, in parallel with monitoring and controlling responsibility.

It is increasingly the ACCC’s experience that organizations that institutionalize compliance culture move through the following three phases and once the final phase is achieved, companies very rarely revert back to the non-compliant state.

A.2 REVIEW
Review of compliance programmes is an outstanding feature of Australia’s compliance policy which can be a benefit for the Indian system. The concept of review can be understood by:- The purpose of a trade practices compliance programme is to minimize the risk of breaches of the Competition and Consumer Act 2010. Once a trade practices compliance programme has been implemented or updated, its effectiveness and contribution to trade practices compliance within the organization must be assessed.

An audit or review does more than to provide assurance that a trade practices compliance programme is being implemented as required by the undertaking. Review recommendations feed back into companies’ compliance programmes in a cycle of continuous improvement.

A.3 SCOPE OF THE REVIEW
The review should be broad and rigorous enough to provide the corporation and the ACCC with a degree of assurance that:

- The company has in place a trade practices compliance programme that is effective at identifying, preventing and correcting breaches of the Competition and Consumer Act 2010
- The company is complying (or otherwise) with trade practices compliance programme elements of the s. 87B undertaking or court order.
Potential contraventions of the Act or weaknesses in the compliance programme have been identified, and professional advice on how to rectify them has been provided to the company.

As well as the general assurances above, specific but divergent information is required from the review process by the company and the ACCC.

Trade practices compliance programme review report (to be provided to the ACCC)

The ACCC requires information which may include:

Details of the evidence gathered and examined during the review.

The name and relevant experience of the person appointed as the company compliance officer.

The reviewer’s opinion on whether the company has complied with the trade practices compliance programme component of the undertaking.

Actions recommended by the reviewer to ensure the continuing effectiveness of the company’s trade practices compliance programme.

Confirmation that any actual and potential inadequacies in the company’s compliance programme have been brought to the attention of the compliance officer and the governing body.

Confirmation that the reviewer has revisited any actual and potential inadequacies in the company’s trade practices compliance programme identified in any previous review.

Any reservations that the reviewer might have about the reliability and completeness of the information to which the reviewer had access in the conduct and reporting of the review.

Any comments or qualifications concerning the review process that the Reviewer, in his or her professional opinion, considers necessary.

It may sometimes be the case that summaries of the ACCC compliance programme review reports are placed with the undertaking in the Commission's s. 87B public register.
A.4 EVIDENTIARY VALUE OF REVIEW:

To ensure that review reports provide well-informed opinions it is considered necessary that the reviewers have access to all relevant sources of information in the companies’ possession or control without limitation including:

- Inquiries of any officers, employees, representatives, agents and stakeholders of the company.
- The opportunity to view or sample relevant records, including but not limited to complaints registers, reports, training records, computer files, customer transactions and products.
- Documents created by the company’s consultants and solicitors for use in its trade practices compliance programme.

The review report should clearly state what evidence was collected and what methodologies were used in forming the review conclusions and recommendations. A review that relies on passive examination of a number of company records and a limited number of senior staff interviews, rather than actively probing into the compliance activities of the company is unlikely in most circumstances to be considered sufficient or rigorous enough by the commission, and will be of questionable benefit to the company.

A.5 OTHER NOTABLE FEATURES OF REVIEW THAT CAN BE USEFUL FOR INDIA ARE:

A.5.1 Compliance reviewers and compliance advisors

Both the ACCC and the trade practices compliance profession make a clear distinction between compliance advisors that are involved at the design and implementation stage of a compliance programme and the compliance reviewers who assess the outcomes and effectiveness of the company’s compliance efforts.

A.5.2 Compliance advisor

The compliance advisor should possess expert knowledge of trade practices compliance issues and a good understanding (or the ability to quickly acquire it) of the company’s industry conditions and the company’s business operations. The compliance advisor’s main role is to
assist the company to carry out a trade practices compliance risk assessment, and design a trade practices compliance programme that will minimize those risks and serve to imbue a culture of compliance within the organization.

**A.5.3 Compliance reviewer**

The compliance reviewer will be an expert in trade practices issues, and usually be independent of the company being reviewed. The reviewer will have skills and experience in compliance review methodology and be able to assess the condition of the company’s compliance programme and CCA related business operations to the extent that recommendations and opinions can be offered in the review reports.

A separation of the compliance advisor and compliance reviewing functions is an essential component of review independence for medium and large companies.

**A.5.4 Independence of the reviewer**

The reviewer will qualify as independent on the basis that he or she:

- Did not design or implement the compliance programme.
- Is not a present or past staff member or director of the company.
- Has not acted and does not act for the company in any Competition and Consumer Act related matters.
- Has not and does not consult to the company or provide other services on trade practices related matters other than compliance programme reviewing.
- Has no significant shareholding or other interests in the company.

**A.5.5** Apart from the above mentioned picked out practices of Australian commissions guidelines for compliance programmes a note should be made of the approach of promoting institutionalize compliance culture for the enterprises by a three phase strategy and if adopted by India would be beneficial for it that is:

Commitment to comply - where the company develops willingness or commitment to address compliance issues and allocate the resources to achieve it.
Compliance know-how - where specialist personnel (e.g. compliance officer or compliance advisor) are appointed and are made accountable for compliance programme development.

Compliance as business practice - where the compliance becomes the way business is done and no longer external to it.

In the experience of the ACCC, once a company has progressed through the stages to the third phase, companies rarely revert back to the non-compliant state.

Apart from other practices mentioned above what can be beneficial for India that is ACCC has developed four specific compliance programme templates, which give an indication to corporations as to the type and level of commitment expected to be given, depending on the size of the corporation, the level of competition risk and the nature of the contravention that the 87B undertaking is intended to remedy.

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

There are several means by which a corporation can be required to adopt or improve its compliance programme In an 87B (mentioned above) undertaking, corporations or individuals generally agree to remedy the anticompetitive behaviour, accept responsibility for their actions and to establish, or review and improve, their compliance programmes and compliance culture.

Similar provisions if adopted by India would prove to be a boon for its competition compliance.

**B. CANADA**: -

IN Canada implementing a compliance programme is not required by the Acts, but it can be in certain circumstances be ordered by a court. Businesses should nonetheless take a proactive
approach when promoting compliance. All businesses should recognize the value of a well-designed, credible and effective programme.

The decision to implement a programme is generally voluntary. However, the Competition Bureau will recommend or request, whenever appropriate, that a programme be established in the context of a prohibition order obtained under section 34 of the Competition Act, a probation order, and a consent agreement under sections 74.12 and 105 of the Competition Act of Canada. The probation order and abovementioned sections are backed by the criminal code in Canada.

Just like Australia even Canada works on certain elements for a proper compliance programme which are to be incorporated in every programme for the purpose of compliance and are to be taken care of:

- Senior Management Involvement and Support
- Corporate Compliance Policies and Procedures
- Training and Education
- Monitoring, Auditing and Reporting Mechanisms
- Consistent Disciplinary Procedures and Incentives

The remarkable elements of Canadian bureau’s compliance programme that can be termed as best practice if adopted in INDIA are:

Training and Education

A credible and effective corporate compliance programme includes an ongoing training component focusing on compliance issues for staff at all levels who are in a position to potentially engage in, or be exposed to conduct in breach of the Acts.

**B.1 HOW TO TRAIN EMPLOYEES?**

Education and training should demonstrate to staff, in a practical way, how compliance policies and procedures affect their daily activities. Documents alone can only go so far in promoting compliance. The most important thing in this context is that a business chooses the most effective methods for training its employees. For example, a business can use small group seminars, manuals, email messages, online training or workshops to effectively educate staff. Bringing together employees who perform similar duties to present and discuss scenarios dealing
with the specific realities of their work provides the link between the business’ policies and procedures and the situations an employee may face. Additional training could include descriptions of prohibited conduct and the issuance of regular bulletins that discuss current compliance issues that may affect the operations of the business. A credible and effective programme must be successful at training on the general principles and the specifics for individuals who deal with situations that could raise issues under the Acts. The Bureau offers a variety of publications and compliance tools that can be used in the training And education component of a business’ programme.

**B.2 DELIVERY OF TRAINING**

Effective training is best delivered by experts (i.e., by knowledgeable legal counsel or a Compliance officer) and should be given consistently throughout the business to avoid conflicting Information. Regardless of the methods used, it is crucial to allow employees the opportunity for extensive discussions on questions and answers Senior management should also play an active role in delivering compliance messages to employees, reinforcing their support for the programme, by undertaking the necessary compliance training, sending emails supporting the compliance programme and referring to the programme in presentations and during other speaking opportunities. As such, senior management may wish to capitalize on the information made available by the Bureau to train its employees and provide them with examples of how companies and individuals have been sanctioned for breaching the Acts.

**B.3 EVALUATION OF TRAINING**

The effectiveness of a compliance training programme must be regularly evaluated by the business’ compliance officer or its equivalent. One way is to regularly test the employees’ knowledge of the law and the company’s compliance policies and procedures to determine whether its programme needs to be updated or modified.

**B.4 MONITORING, AUDITING AND REPORTING MECHANISMS**

Effective monitoring, auditing and reporting mechanisms help prevent and detect misconduct, educate staff, provide both employees and managers with the knowledge that they are subject to oversight and determine the programme’s overall efficacy.

**B.4.1 Monitoring**

Monitoring refers to the ongoing procedures implemented to prevent contravention of the acts. Evidence of such efforts may also support a due diligence defence should
litigation arise. Depending on the risks, periodic or continuous monitoring may be necessary. A business could take the opportunity to verify whether any of its internal or external practices may potentially contravene the Acts.

**B.4.2 Auditing**

Audits may be periodic, ad hoc or event-triggered and are designed to determine whether a contravention has occurred. The way in which audits are conducted is likely to vary from one company to another depending on the specific risks faced. Audits are designed to identify whether a contravention of the law has occurred and, if so, to ensure that it has been dealt with appropriately.

**B.4.3 Reporting**

An internal reporting procedure encourages employees to provide timely and reliable information that can be the basis for further investigation by the business. Employees must be encouraged to freely report conduct that they believe contravenes the acts or company policy. The programme should clearly identify which actions require reporting, and when and to whom they should be reported. An effective reporting system can be achieved in different ways, for example by implementing a confidential reporting system, endorsing an open-door policy, promoting an anonymous hotline or by identifying legal counsel as compliance resources. While an internal reporting mechanism is important, there may be situations where the use of an external reporting mechanism would be more appropriate.

To conclude with the best practices of Canada The success of Canadian competition laws is largely attributed to voluntary compliance by firms and individuals. An effective compliance programme is a valuable tool in preventing and detecting competition law violators.

**C. PAKISTAN**

Although Pakistan has a fresh set of rules for regulating competition in market but still in the field of competition compliance they do have certain kind of code and guidelines as prescribed by their competition regulating authority which if taken into consideration can be useful for India.
The Commission has released guidance related to a Voluntary Competition Compliance Code (VCCC). A VCCC is a self-correcting mechanism for undertakings. The Undertakings should ensure that the provisions of the Act along with the associated rules and regulations are not violated and if there is any violation committed, then an undertaking should detect it at an early stage and take appropriate corrective action. The elements of a compliance code are:

**C.1 ASSESSMENT OF RISK:**

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

**C.2 ESTABLISHMENT AND IMPLEMENTATION OF COMPLIANCE POLICY:**

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

**C.3 COMMITMENT FROM SENIOR MANAGEMENT:**

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

**C.4 APPOINTMENT OF A COMPLIANCE OFFICER:**

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

C.5 CONSEQUENCES OF NON COMPLIANCE FOR EMPLOYEES:

The employees should be made aware of the consequences of noncompliance with the code. Compliance should be made one of the objectives of the undertaking. Employees should be motivated with bonuses and other benefits if they adhere to compliance with the code.

C.6 Regular evaluation should be made of the effectiveness of the compliance code by testing employees on their understanding of the compliance code put up by the undertaking.

C.7 For successful adoption and implementation of the compliance code the undertaking should ensure effective monitoring, auditing, and reporting. Undertakings should establish their clear policies when dealing with trade associations and should ensure involvement of their legal counsel in any meetings with them. Furthermore Undertakings should avoid discussions with trade associations on pricing, profit levels, costs etc. The guidelines in the end talk about the incentives of adopting a compliance code and why it is really helpful for an undertaking.

The Commission has a separate Advocacy and IT department which holds seminars, conferences etc. over different aspects of competition law to increase awareness regarding compliance amongst undertakings and consumers even public statements on antitrust compliance programmes can be found there.

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

The adoption of a compliance programme by an undertaking remains a voluntary exercise. However there are additional penalties for undertakings who are involved in continuous violations of the competition laws.

After discussing the guidelines given by the Pakistan competition commission the best practices which can be picked out for India are setting up of separate department which looks into the advocacy and public awareness of competition law which can also be opened on the same lines
in Indian commission. Also another noteworthy feature is the mitigating of penalties if compliance programmed is being followed by the enterprise. The compliance programme can also be registered with the commission by enterprise.

D. UNITED STATES OF AMERICA:

In America the US Federal Sentencing Guidelines (the Sentencing Guidelines) are generally used by the US Federal Courts when imposing sentences, including for criminal violations of section 1 of the Sherman Act. The Sentencing Guidelines indicate that an "effective compliance and ethics programme" might reduce the fine that will be imposed.

D.1 According to the Sentencing Guidelines, in order to be considered as having an ‘effective compliance and ethics programme an organization must: Exercise due diligence to prevent and detect criminal conduct and Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. The Sentencing Guidelines make it clear that the compliance and ethics programme must be reasonably designed, implemented and enforced so that the programme is generally effective in preventing and detecting criminal conduct. They also provide that any failure to prevent or detect the offence before the court does not necessarily mean that the programme is not generally effective in detecting and preventing criminal conduct.

D.2 A BRIEF OVERVIEW OF THE SENTENCING GUIDELINES CONTAIN THE FOLLOWING FEATURES IN REGARD TO COMPETITION COMPLIANCE: The Sentencing Guidelines set out the minimum standards that must be met in order for the business to be regarded as having exercised due diligence and promoted an organizational culture that encourages ethical conduct and a commitment to compliance, as follows: The organization must establish standards and procedures to prevent and detect criminal conduct, and ‘high-level personnel’ (which means the board or, if the organization does not have a board, the highest-level governing body of the association) must ensure that the organization has an effective compliance and ethics programme, be knowledgeable about the content and operation of the programme and must exercise reasonable oversight with regard to the implementation and effectiveness of the programme. Specific high-level personnel must be assigned overall responsibility for the compliance and ethics programme. In addition, specific individuals within the organization must be delegated day to day operational responsibility for the compliance and ethics programme.
They must report periodically to high-level personnel on the effectiveness of the programme and be given adequate resources, appropriate authority and direct access to senior management. The organization is required to take reasonable steps not to include within its senior management (or positions involving substantial commercial discretion) anyone who it knows, or ought to have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics programme.

The organization must take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance programme to its management and employees, by conducting effective training and otherwise disseminating information appropriate to such individuals of their respective roles and responsibilities.

**D.3 THE ORGANIZATION MUST TAKE REASONABLE STEPS TO:**

- Ensure that the organization’s compliance and ethics programme is followed. The programme must include monitoring and auditing mechanisms to detect criminal conduct, evaluate periodically the effectiveness of the organization’s compliance and ethics programme, and
- Have and publicise a system, which might include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents might report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.
- The organization’s compliance and ethics programme must be promoted and enforced consistently through:
  - Appropriate incentives to perform in accordance with the compliance and ethics programme, and
  - Appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

As noted above, under the United States Sentencing Guidelines, fine reductions are available for “effective” compliance programmes, except in the area of antitrust. The Sentencing Guidelines provide non-binding recommendations to courts as to the proper amount of fine based on the nature of the violation, and certain factors that may increase the fine (e.g., repeated violations), or factors that may mitigate a fine (e.g., a compliance programme). In the presence of a compliance programme, a $1 million fine might be reduced to $50,000.

Although there are no statistics available, anecdotal evidence indicates that many to
prosecutors frequently decide not to prosecute a corporation when it is clear that a violation was caused by a “rogue employee” and the corporation, as evidenced by its compliance programme, had no intent to violate the law.

D.4 The U.S. Federal Sentencing Guidelines set out, in considerable detail, what sort of programme will qualify as an “effective” compliance programme to reduce a company’s criminal fine range. Clear articulation of policies: the Guidelines begin with a focus on establishing “standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law.” (Unlike the “internal controls” requirement in Sarbanes-Oxley, these internal controls are not limited to those likely to ensure accurate financial reporting, but extend broadly to ensure compliance with all laws.).

a. Accountability: under the guidelines, accountability resides with the board itself, which must select a “high-level” individual to oversee the compliance programme and assign compliance responsibility to managers throughout the organization.

b. Careful selection of compliance officers: the board must not assign compliance responsibilities to someone whom it knows, or should know, has a propensity to engage in illegal or illicit activities.

c. Training: steps must be taken to communicate standards and train employees, including at upper levels of the organization.

d. Auditing effectiveness: a compliance programme must include monitoring and auditing programmes designed to detect criminal conduct, periodic re-evaluations of the effectiveness of the programme, and mechanisms for anonymous reporting by employees (without fear of retribution).

e. Enforcement and discipline: in addition to enforcing the programme through appropriate discipline, including disciplinary actions against those who fail to monitor compliance vigorously, the guidelines require an organization to provide incentives for compliance as well.
f. Prevention: the organization must be responsive and comprehensive in modifying the programme after a violation to prevent future violations while undertaking specific risk assessments, and modifying the programme accordingly, to avoid potential violations before they occur.

Also at a minimum, an effective compliance programme that meets the requirements imposed by the U.S. Federal Sentencing Guidelines also should include the following key features:

A Written Policy Statement - A compliance programme should include a clear-cut statement of the corporation’s policy to comply with the laws relevant to its business. The statement should make clear that all employees are expected to comply with these laws. This policy should be communicated to all employees in writing as part of a compliance manual.

Basic Legal Concepts and Terms - The written compliance manual should also include a description of the applicable laws that affect your business, the activities prohibited under the laws and the potential penalties. The manual can incorporate or reference other statements of prohibited conduct, such as more detailed guidelines for specific activities, memoranda distributed to employees, or handouts distributed in education programmes. At a minimum, the manual should provide or reference guidelines for specific areas such as:

- **Antitrust Laws** - Contacts with competitors (including price-fixing, market or customer allocations, group boycotts, involvement in trade associations, information exchanges); Relations with customers or suppliers (including exclusive dealing or requirements on contracts, preferential treatment/ price discrimination, tying arrangements, and reciprocity and resale price restrictions); & monopolization and unilateral conduct by the company (including refusals to deal, terminations, and predatory pricing).

- **Customs** - Importation of products into a country is subject to various customs, fiscal laws and regulations. Your company must be sure that all imports comply with these requirements and that any information provided to customs and tax officials is accurate and truthful. An effective compliance programme would alert employees of the customs laws that affect your business and provide a mechanism for reporting violations and asking questions.
International Bribery and Corruption - The U.S. Foreign Corrupt Practices Act (FCPA) prohibits bribes to foreign governments and other officials (such as political candidates, political parties and their officials, employees of government-owned businesses, U.N. officials, etc.). A violation of these laws is a serious criminal offense for both companies and individuals and can result in fines, loss of export privileges, and imprisonment. Most developed countries have similar prohibitions. An effective compliance programme would alert employees of the bribery and corruption laws, prohibit any violation of them, impose penalties, and provide mechanisms for consulting with company management if there are questions or concerns.

Trade Restrictions, Export Controls and Boycott Laws - The United Nations, the EU, Switzerland, the U.S. and a number of other countries impose restrictions on export and trade dealing with certain countries, entities and individuals. Trade restrictions in the U.S. also impose licensing requirements on the exports of certain products or technology. U.S. Anti-boycott laws also prohibit participation in or cooperation with a foreign boycott not sanctioned by the U.S., such as the Arab League boycott of Israel. These laws are complex and broad. An effective compliance programme should alert employees of the laws, prohibit any violation of them and impose penalties, and provide mechanisms for consulting with company management if there are questions or concerns.

Unfair Business Practices - An effective compliance programme should discourage employees from violating U.S. unfair business practice laws. This includes prohibiting employees from making false statements about competitors or their services, prohibiting the stealing or misuse of a competitor’s trade secrets, and prohibiting the interference with a competitor’s or a customer’s contractual relations.

Compliance Officer and Reporting System - The Company should designate a compliance officer who oversees the compliance programme and reports to the chief executive officer, the general counsel, or another high-level executive at the company. If the violation involves a high-level executive, the compliance officer should be given authority to report directly to the governing board of the company. The compliance officer should not be someone who the company knows, or should know through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with the compliance programme. A compliance manual should include a system
permitting employees to report criminal conduct by others without fear of retribution and permitting employees to ask questions. A helpline or hotline which allows employees to make reports anonymously should be part of that system.

- Training - The Company should conduct mandatory training programmes on a regular basis to communicate standards and procedures effectively to all employees. The training should be aimed at educating the employees about the applicable laws and instilling sensitivity in employees so that they recognize potentially dangerous areas of conduct and consult with the appropriate persons, before acting.

- Disciplinary Measures - The Company must consistently discipline employees who disregard the company’s compliance policy or who fail to report misconduct of others. This means that standards, once adopted, must apply to all employees equally.

D.5 After a brief study of the guidelines given by U.S. for the purpose of competition compliance it may be concluded that the guidelines given by U.S. are exhaustive in nature, moreover they not only aim to increase compliance with the anti-trust laws of America but also aim to comply with the other countries for e.g. In the compliance programme training and information should also be given to the company employees regarding the boycott of trade relations of U.S. with specific countries in order to avoid infringement of trade laws.

It is suggested that the above mentioned practices should be looked into whenever India formulates its formal guidelines or policy regarding compliance of competition law.

E. UNITED KINGDOM:

In early 2010, the OFT (office of fair trading) conducted detailed research into the drivers of compliance and non-compliance with antitrust law. The results were published in May 2010. During the research process, respondents asked the OFT to provide further guidance on risk-based steps businesses could take to comply with antitrust law. Specifically, the OFT was asked to update and expand its current guide "How Your Business Can Achieve Compliance). The OFT published a draft updated guide in October 2010. The draft guidance sets out the OFT’s proposed four-step process for creating a culture of antitrust law compliance in a business. It also includes a quick guide for owners and directors of small businesses.
First, the guidance explains that the core of a compliance culture is an unambiguous commitment to compliance by the business. Senior management commitment is an essential and the commitment should be demonstrated at all levels of the management chain. The guidance makes a number of suggestions for communicating the commitment to compliance to a business.

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

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

E.1 A brief overview of OFT’s guidance to the enterprises is:

- Expressly including competition compliance in the business's code of conduct and making it clear that activity that risks causing an infringement of competition law attract disciplinary sanctions.
- Ensuring that one board member or other senior manager has the role of driving compliance within the business. They should report regularly to the board on compliance efforts.
- Other directors should challenge the effectiveness of compliance measures by asking questions about the current competition law risks, which risks are high, which are medium and which are low risks, the measures that are being taken to mitigate the
risks, and the timescale for next reviewing the risks to see whether they have changed.

- Regular e-mail and other direct communications by the chief executive, or other very senior officials.
- Manager that underlines the importance of competition law compliance. The communications should set out the business's competition law compliance policy and what individuals should do if they have compliance concerns.
- Establishing a confidential system that individuals can use anonymously to alert the business to compliance concerns. Implementing business policies under which managers of all levels must demonstrate their commitment to competition law compliance, such as linking bonuses to compliance activities. The guidance suggests that middle or junior managers can demonstrate their commitment to competition law compliance by taking compliance training, and making sure that their staff also receive training. They could appoint “compliance champions" within their teams who have the role of making sure that all of the team complies with relevant laws and regulations, including competition law.

E.2 OFT'S SUGGESTED FOUR-STEP RISK-BASED PROCESS FOR ACHIEVING COMPLIANCE
The cycle can be explained in steps:

**E.2.1 STEP ONE** - Risk identification. The guidance sets out that, as a first step, the business should identify its key antitrust law compliance risks. The risks will depend on the nature and size of the business. The guidance identifies different types of antitrust law risk, listing a wide variety of commercial practices that could restrict competition.

**E.2.2 STEP TWO** - Risk assessment. Once the antitrust law risks have been identified by a business, it needs to assess the level of those risks. For example, a business might decide that its risk of cartel activity is high where sales staffs have frequent contact with competitors at trade association meetings. A business with a high market share in a market with high barriers to entry and limited or no buyer power may decide that the risks of abusing a dominant position are high. The guidance suggests that businesses could carry out a staff-based risk assessment. This would entail identifying their employees' degree of exposure to the identified risks.

**E.2.3 STEP THREE** - Risk mitigation. The third step in the process is for the business to mitigate the risks identified in a way appropriate to the level of risk assessed at step two. This will, generally, involve implementing training and policies and procedures. In addition to training, the guidance sets out that it will be necessary for businesses to have policies and procedures in place to minimize the risk of antitrust law breaches occurring. Again, these will have to be appropriately structured for the business in question. The guidance contains some examples of procedural measures that a business could consider. These include:

a) Making it clear that involvement in an antitrust infringement is a serious disciplinary matter.

b) Allowing lawyers to review and advise on standard form commercial contracts (and any variations to the standard terms) and significant contracts.

c) Requiring employees to obtain approval before joining trade associations and to alert managers before attending meetings.

d) A system for reporting contacts with competitors.

e) Linking bonus payments to achievement of antitrust law targets.
f) Appointing "compliance champions" within business units who take responsibility for promoting antitrust law compliance within the unit.

g) Rewarding employees who proactively take steps to raise antitrust law compliance concerns.

h) Allowing for anonymous reporting of antitrust law concerns.

i) Active management review of business travel and expenses incurred by employees in respect of meetings or other business contacts to the extent that expense claims may indicate meetings that could raise antitrust concerns.

j) Imposing an obligation on employees to report antitrust law concerns to senior staff.

**E.2.4** **STEP FOUR - Review.** The guidance sets out that businesses should review all stages of the process to make sure that an unambiguous commitment to antitrust law compliance persists in the business, that the risks identified and the assessment of them have not changed, and that the risk mitigation activities remain appropriate and effective.

To conclude in U.K. antitrust authorities have devoted significant resources to understanding which factors drive compliance (and non-compliance) with antitrust law. Detailed guidance (for both companies and individuals) follows a major review of compliance literature and company/adviser attitudes. Reflecting a philosophical commitment to driving compliance through avoidance as well through high fines etc. the remarkable feature is the four step process to avoid any contravention of law & can be termed as a best practice if adopted by India would really improve the scenario of competition compliance in India.

**F. SINGAPORE:**

The CCS (competition commission Singapore) has issued detailed guidance on compliance programmes. The CCS also provides guidelines regarding the key provisions or the Act. The CCS also conducts regular talks and issues speeches, which typically touch on several issues within competition law, including compliance matters and the importance of ensuring compliance. A comic strip relating to Competition Law had also been issued. Recently, the CCS has organized a “CCS digital film animation competition” in order to improve antitrust awareness and correspondingly, compliance.
The CCS has expressed that it does not endorse individual compliance programmes, but may refer to Individual examples of best practice from time to time in its general communications. The CCS also encourages parties to obtain legal advice, or seek guidance/approval regarding conduct. In short, the CCS do not review draft programmes for guidance. However, the CCS is open to requests to give presentations to industries or associations to help them better understand the guidelines.

F.1 The CCS has stated in its guidelines that it would consider compliance programme as a mitigating factor.

However, this would depend on:

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

(b) Whether the programme has been actively implemented.

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

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

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

Some of the hallmarks considered by the CCS for compliance programme are mentioned below:

An effective compliance programme should contain the following elements:

F.2 ACTIVE IMPLEMENTATION:

A compliance programme goes further than a written or verbal commitment to comply with the law. It should be actively implemented and promoted through appropriate policies and procedures.
F.3 APPROPRIATE POLICIES AND PROCEDURES TO ENSURE COMPLIANCE:
For a compliance programme to work well, businesses should put in place effective policies supported by appropriate procedures. An effective policy could include seeking a written undertaking from employees and directors to conduct their business dealings within the compliance framework and taking disciplinary action against employees/directors whose actions resulted in an infringement of the law. The relevant procedures should give employees avenues to seek advice on whether a particular transaction complies with competition law and report activities that they suspect infringe the law. Staff should be educated on the business' policy and procedures on compliance. One way of doing this would be to issue a compliance manual/handbook detailing competition law and the business' compliance procedures.

F.4 SUPPORT AND ADHERENCE OF SENIOR MANAGEMENT:
The support and adherence of senior management should be visible, active and regularly reinforced as these are important indicators of a business' commitment to complying with competition law. They not only signal to external stakeholders that the business values compliance, but also encourage junior employees within the organization to support the compliance programme and actively follow its principles.

F.5 ACTIVE AND ONGOING TRAINING FOR EMPLOYEES AT ALL LEVELS WHO MAY BE INVOLVED IN ACTIVITIES CONCERNING COMPETITION LAW:
Training on competition law itself and on the business' policies and procedures in relation to compliance should be conducted. The training could be offered as part of the induction programme for new staff and on a regular basis thereafter to reinforce the compliance message and keep staff updated on any changes in business practices and the law. Businesses should keep a record of any training given.

F.6 REGULAR EVALUATION AND REVIEW:
Evaluation is essential as a means of ensuring that the compliance programme is working properly, as well as to identify and address areas of potential risk. Evaluation could take the form of testing individual employees' knowledge of the law, policy and procedures. Adherence to
compliance policy could also be used as one of the criteria against which an individual's and department's performance is appraised. The evaluation process should be carried out as openly as possible to indicate to employees that their conduct is constantly subject to review against the terms of the compliance programme. Firms may also wish to include independent reviews of their agreements or behavior on a sampling basis.

F.5To conclude CCS is doing a significant job by giving out detailed guidelines for competition compliance moreover it has published a report “Better Business with Competition Compliance Programme” which gives an insight into what all the enterprises should practice to protect themselves from anti-competitive practices even the use of mass media like movies and publishing a comic strip are unique methods of promoting compliance to spread awareness amongst all generations in regard to Anti-trust law.

These best practices of CCS Singapore would be fruitful for India if considered while structuring its formal competition compliance guidelines.
Chapter-5

CONCLUSION AND SUGGESTIONS

Authorities in a number of key antitrust jurisdictions provide guidance often very detailed on how companies can drive antitrust compliance. Several competition authorities go even on how companies can implement antitrust compliance and some go even further, providing a 'template' or framework for antitrust compliance programme. For examples:

- Australia (which provides four differentiated templates), Canada, Japan as well as efforts undertaken in the Netherlands) The genuine commitment of certain authorities to compliance efforts is reflected by a willingness to 'endorse' or 'certify' a particular programme meeting (stringent) criteria (Brazil, Korea).

- Many countries specifically recognise that compliance guidance will differ according to size/sophistication/risk profile of the company. In particular, Canada provides guidance tailored to SMEs (and the detailed UK guidance acknowledges that SMEs face different issues).

- Some antitrust authorities spend significant effort and resources in engaging in advocacy and outreach to change societal and business norms to accept and expect a culture of compliance (Brazil). The significant role of an effective compliance programme is reflected by the fact that, in a number of jurisdictions, companies may be required to give an undertaking (at the enforcement stage) to implement a compliance programme (Canada, South Africa).

Certain antitrust authorities have devoted significant resources to understanding which factors drive compliance (and non-compliance) with antitrust law the ACCC in Australia refers to a three phase evolution it has observed over time and the fact that a company rarely reverts to non-compliance once it has progressed to the third phase. The detailed UK guidance (for both companies and individuals) follows a major review of compliance literature and company/adviser attitudes - reflecting a philosophical commitment to driving compliance through avoidance as well through high fines etc. in Japan, the Fair Trade Institute (an affiliate of the antitrust authority) helps companies establish and implement compliance programmes and has also established sample compliance programme.
Some authorities specifically recognise that compliance programmes can be beneficial for antitrust authorities (in terms of reducing enforcement efforts etc.) in Australia, compliance is regarded as an "important component of the ACCC's integrated suite of compliance tools". In France, the Autorite described compliance as an "asset" for antitrust authorities.

But in India, there is only a suggested framework which is not sufficient as binding guidelines or active efforts to promote compliance should be there. Some of the suggestions have been given but still, a stringent policy on competition compliance should be there to promote compliance culture in India.

**SUGGESTIONS**

On the basis of the comparative analysis of competition compliance programme in various nations & taking note of the best practices following points may be suggested for India to design its guidelines for enterprises on competition compliance programme.

a) Setting up of a separate *compliance cell* in Competition commission of India which shall draft out the formal guidelines for competition compliance to be followed by the enterprises.

b) The guidelines should be clear in stating what is expected from enterprises to achieve in the matter of compliance.

c) A sample compliance programme should be designed by this *compliance cell* and published so as to give a fair idea to enterprises regarding designing their own compliance programme tailored to its need.(As provided by Singapore)

d) To encourage compliance and co-operation of the enterprise with C.C.I. the enterprises voluntary registering their compliance programme in the compliance cell would be treated leniently if they un-intentionally contravene any provision of the competition law.(practiced in Brazil)

e) The guidelines should encourage the enterprise for adopting “review” in their compliance policy as it can be termed to be of evidentiary value in case of any violation of law and the records can be checked.(as practised in Australia)

f) The *compliance cell* should hold seminars & conferences with the representatives of enterprises to keep them updated and guide them with various facets of competition law.
g) The *compliance cell* should issue certificates to the enterprises who have registered their compliance programmes with CCI.

h) *Compliance cell* should also look after those enterprises keep updating their competition compliance programme with advancement in law or in case of change in nature of business.

i) OFT publishes *a guide* to guide enterprises for framing their competition compliance programme same should be done by India it should also adopt the OFT's suggested four-step risk-based process for achieving compliance by the enterprises.

j) The *compliance cell* should encourage or itself get educational films and documentaries made for the purpose of educating students and executives in competition law and its compliance.

k) The commission shall also evaluate the compliance programmes followed by the enterprises regularly so as to check whether the programme is reaching expected results.

l) The *compliance cell* can appoint its own experts for the purpose of training the compliance officers in various enterprises for which the cost would have to be borne by the enterprise.

m) In its guidelines the CCI should request all the states within the territory of India to appoint separate officers of their respective industries department, who can impart valuable knowledge regarding competition law & its compliance to the new enterprises & industries operating & being setup in their respective states.
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