Rethinking Compliance

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ABSTRACT

This article addresses optimal deterrence and its limits in the context of creating a more effective mechanism for antitrust compliance to take hold in businesses. We suggest proactive encouragement of compliance programs. Antitrust authorities should work with the business community to create a regulatory scheme that rewards good behavior while punishing bad behavior. To do so, antitrust authorities need to understand how to create and sustain compliance efforts within a company. 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. Antitrust authorities should play a role in encouraging and supporting this in the same way other enforcement authorities do (for example in relation to FCPA / anti-bribery enforcement). We argue that from a policy perspective, antitrust enforcement should not just be about punishment but about changing normative values within organizations.

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Corporate compliance is a significant part of corporate governance initiatives globally.[1] A recent survey of corporate compliance programs concludes, "It has become increasingly clear

[1] See e.g., PwC's 3rd Annual State of Compliance 2013 Survey, available at http://www.pwc.com/us/en/risk-management/assets/soc-survey-2013-final.pdf. It has even been recognized as a part of effective government, with increased recognition that government agencies, including those with enforcement authority, should have compliance programs themselves. See The Rutgers Center for Government Compliance and Ethics, http://rcgce.camlaw.rutgers.edu/. Doing so would certainly provide them with greater insight about compliance programs.

that managing compliance is not only required to maintain legal or regulatory standing, but is essential to navigating the global environment to executive business strategy."[2] Within the context of antitrust/competition law (herein "antitrust"), mitigating the risk of cartel-like behavior occurring and endeavoring to ensure compliance by companies remain critical issues in corporate governance, particularly given sizable fines for cartels[3] and the significant reputational damage to companies (and litigation risk) following on from a cartel finding.

Since antitrust authorities are resource constrained and rely extensively on self-reporting (through leniency and immunity applications) to detect and deter wrongdoing, we suggest that antitrust authorities focus more attention on actively encouraging companies to invest in credible and robust compliance activities. Further, antitrust authorities need a better understanding of the efforts and resources needed to implement and sustain a credible and robust antitrust compliance program, and should interact with businesses more effectively to reap the benefits of improved social welfare due to better compliance. Antitrust is arguably an outlier when compared to how other areas of law address issues of non-compliance – in particular the promotion of credible compliance programs through penalty mitigation and in some compliance areas, the decision not to impose penalties, but rather to impose deferred prosecution agreements requiring robust compliance measures to be implemented. We suggest that antitrust authorities' approach to compliance needs to be revisited. We also identify gaps in the empirical literature that if filled, could better shape antitrust authority policy.

[2] Id at 4.

[3] See Dong Ailin et al., Busted! Now What? Effects of Cartel Enforcement on Firm Value and Policies (May 14, 2014), INSEAD Working Paper No. 2014/38/FIN, available at SSRN: http://ssrn.com/abstract=2422200 or http://dx.doi.org/10.2139/ssrn.2422200.

I. Antitrust Enforcement Background

Although antitrust compliance activities take many forms, this article focuses on the compliance function specific to cartel related[4] enforcement, as cartels and information exchanges between competitors have become perhaps the area of most significant emphasis in recent years in terms of detection of illegal (or potentially illegal) activity and its prosecution. Cartel enforcement has become global, with increased international cooperation to improve enforcement.[5] As a result, companies must now be concerned about compliance, detection and punishment not merely in "traditional" jurisdictions (for example the US and Europe) but potentially worldwide.[6] What had once been behavior that was accepted (and in some cases indeed facilitated) by government is now globally understood to harm consumers and to be detrimental to economic growth and social welfare.[7] We also recognize that any antitrust compliance program will typically occur in the context of a broader, company-wide compliance program addressing a broad range of legal and ethical risks.

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[4] The concept of what may constitute a "cartel" has grown significantly in recent years and could include the single exchange of information in a single meeting: see *T Mobile Netherlands BV and others*, Preliminary Ruling of the EU Court of Justice 04 June 2009 at para 61 ("what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition"), available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=74817&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=210558. For a discussion of plus factors in collusion, see Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343 (2011); William H. Page, *Objective and Subjective Theories of Concerted Action*, 79 ANTITRUST L.J. 215 (2013); William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393 (2011).

[5] D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 102, 115 (2007); D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081 (2009).

[6] Nevertheless, there may still be global under-deterrence. *See* Michal Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Though Jurisdictional Reliance*, 51 VA. J. INT'L L. 57 (2010) (providing an alternative mechanism to combat global under-deterrence).

[7] See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* 540 U.S. 398, 408 (2004) (calling collusion the "supreme evil" of antitrust).

The cartel enforcement model, however, while initially successful in some ways, has demonstrated its limits in other critical areas. One might assume that with increased enforcement, over time one might find fewer cartels being detected worldwide. This has not been the case.[8] Something seems to be missing in the way in which antitrust authorities address cartel enforcement. As Levenstein and Suslow conclude:

> The adoption of amnesty and leniency policies, combined with dramatic increases in the largest fines, has led to the demise of many cartels that had negatively affected global markets. However, there are limitations to the effectiveness of these policies as currently designed. Cartels continue to form, suggesting that deterrence may still be insufficient. [9]

The limitations on cartel enforcement suggest that we may not yet have achieved optimal deterrence for cartels.[10] We suggest that the approach to antitrust enforcement requires rethinking, to move beyond the traditional enforcement approach (increased fines and incarceration) that many authorities and academics take. Instead, an important part of antitrust enforcement should emphasize creating pro-compliance cultures in companies.

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[8] Margaret C. Levenstein & Valarie Y. Suslow, *Cartels and Collusion: Empirical Evidence, in* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol eds. 2014 forthcoming).

[9] Id.

[10] Optimal deterrence against participating in cartels requires sufficient ceilings for penalties. Paolo Buccirossi & Giancarlo Spagnolo, *Optimal Fines in the Era of Whistleblowers: Should Price Fixers Still Go to Prison?, in* THE POLITICAL ECONOMY OF ANTITRUST 81 (Vivek Goshal & John Stennek eds., 2007). Yet, some authors suggest that penalties can be set too high, and that penalties that are too harsh may undermine optimal deterrence - see Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 276 (2008); Office of Fair Trading, Assessment of Discretionary Penalties Regime 6 (2009) ("Higher fines can increase the cost of errors, may (in some situations) lead to insolvency and may not deter individual managers."). If compliance costs are too high, then these extra costs of companies exiting the market will be borne by consumers because of a higher marginal cost of production; see Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 736 (2001).

Given that the underlying policy goal of any antitrust enforcement regime is not the imposition of fines for the sake of imposing fines, but rather to avoid the need for fines in the first place by ensuring a real commitment to compliance,[11] one might think that antitrust authorities would be at the forefront of understanding how to promote compliance and encourage the adoption of robust and credible antitrust compliance programs. In practice, many antitrust authorities still do not do so. Many rely instead merely on the imposition of fines and other penalties.[12]

The OECD has commented that extremely high fines could raise questions about the proportionality of the punishment relative to the harm caused by the violation. Regardless of their mathematical optimality, if fines become so high that the public begins to perceive them as vindictive, they may undermine respect for antitrust law and thus do more harm than good.[13] Very high fines might also raise concerns about over-deterrence, as companies[14] may react to them by over-investing in monitoring and compliance and risk chilling competition by avoiding conduct that is not actually anticompetitive. Those outcomes would ultimately impose higher costs on consumers.

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[11] Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Compliance and Competition policy Business Europe & US Chamber of Commerce. Competition conference Brussels, 25 October 2010 ("The ultimate aim of our cartels and antitrust policies is not to levy fines – the objective is to have no need for fines at all") available at http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm?locale=en.

[12] Vivek Ghosal & D. Daniel Sokol, *The Evolution of U.S. Cartel Enforcement*, J.L. & ECON (forthcoming) (providing an empirical analysis of US cartel enforcement from the 1950s to the present). This traditional approach has not escaped criticism. See D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785 (2013); Maria Bigoni et al., *Fines, Leniency, and Rewards in Antitrust*, 43 RAND J. ECON. 368 (2012); Giancarlo Spagnolo, Divide et Impera: Optimal Deterrence Mechanisms Against Cartels and Organized Crime (Univ. of Mannheim C.E.P.R., Working Paper, 2003).

[13] OECD, Promoting Compliance with Competition Law 2011, DAF/COMP(2011)20 at 13, available at http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf; Joseph Murphy, Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play? (June 2011), prepared for the OECD Competition Committee http://www.oecd.org/dataoecd/12/13/48849071.pdf.

[14] We use "company" rather than "firm" as the term for the economic agent because practitioners are more likely to identify the word "company" as the word that describes their client whether they are in-house or at an outside law firm.

Traditional enforcement alone (in terms of imposing fines and individual sanctions) can fail to produce real compliance commitments because it does not directly address the societal perception of the morality of the behavior that is being regulated. It merely puts a price on non-compliance. The focus should therefore be on how to engender a culture of compliance and not merely a fear of non-compliance.

This article identifies the relationship between antitrust law and compliance in terms of effective corporate governance and the prevention of company misconduct. It explains why some companies may be better at creating and sustaining a robust and credible compliance program than others and addresses incentives both within a company as well as incentives in the relationship between the company and antitrust enforcers. We conclude with some thoughts about how authorities might work better to understand the dynamics of compliance and work with business to create a more effective enforcement system by more actively encouraging robust and credible antitrust compliance activities, and by understanding how antitrust compliance inter-relates with other compliance activities the company will almost invariably need to invest in (for example, anti-bribery and corruption compliance).

II. The relationship between antitrust law compliance and broader issues of corporate governance

A. How Antitrust Authorities Treat Compliance

1. The Current Framework of Company Behavior and Its Limits

Antitrust enforcement is based on an optimal deterrence model.[15] Optimal deterrence should make the company that participates in illegal activity internalize the cost of crime.[16] Under the optimal deterrence theory, companies should be deterred when the expected costs to the company of undertaking illegal activity exceed the expected benefits to them based on a calculation of the probability and magnitude of fines.[17] The simple model of deterrence theory as applied to cartel enforcement is perhaps incomplete. There is more to compliance than deterrence. The legal regime should change social norms to create more pro-compliant behavior.

Encouraging compliance should be a priority for any antitrust authority. With limited resources, antitrust authorities cannot handle all cases that may arise, and they will never have the resources to police the entire economy. Companies need to be actively encouraged to undertake a more central role in changing values and ensuring genuine compliance efforts to supplement enforcement by antitrust authorities.[18] For compliance to take hold, a company needs to ensure that it has appropriate internal incentives to align its policy with that of compliance with the law. The same is true of antitrust authorities: to ensure a change in

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[15] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[16] In a publicly listed company, one might argue that the "cost" is ultimately borne by the shareholders of the company – who most likely are also consumers of the company's products, so significantly/consistently increasing antitrust fines may possibly even harm social welfare in some senses.

[17] We note that in the corporate context, much of the optimal deterrence theory literature focuses on companies or simple models of why people break the law. More recent work in experimental economics and psychology suggest additional explanation of the mindset of individuals and their relationship to breaking the law. See e.g., Muel Kaptein, *Why Do Good People Sometimes Do Bad Things?: 52 Reflections on Ethics at Work*, available at http://ssrn.com/abstract=2117396. See also SRIDHAR RAMAMOORTI ET AL, ABCS OF BEHAVIORAL FORENSICS: APPLYING PSYCHOLOGY TO FINANCIAL FRAUD PREVENTION AND DETECTION (2013); HENRY N. PONTELL & GILBERT L. GEIS, INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME (2013); LINDA KLEBE TREVIÑO & GARY R. WEAVER, MANAGING ETHICS IN BUSINESS ORGANIZATIONS: SOCIAL SCIENTIFIC PERSPECTIVES (2003).

[18] IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1995).

normative values and the adoption of a compliance culture, antitrust authorities need to be more creative in their enforcement activities, and ensure that (robust and credible) compliance programs are encouraged and appropriately incentivized.

For many companies, the incentives may already be in place for some level of expenditures of resources on compliance effort. However, the incentives may not be sufficient to encourage the ongoing high level of effort and resources required to ensure (and continuously maintain) a robust compliance program. There is also an internal "competition" for resources (even within larger companies, and even between various compliance topics) and where antitrust is seen to be "merely" punitive (rather than encouraging and incentivizing compliance activities), the antitrust compliance efforts may lose out in the internal allocation of resources to other compliance areas such as anti-bribery and corruption / FCPA compliance, where compliance efforts are perceived as being rewarded (or are at least perceived as being beneficial to the company in terms of providing a complete or partial defense when individuals within the company break the law, despite the company's compliance policies).

If antitrust authorities thought more creatively about how antitrust compliance programs could be used as part of enforcement, they could encourage a wider range of companies to spend more time and resources on compliance. This creative thinking could take a number of forms – the most obvious perhaps is providing mitigation of fines or defenses if companies can demonstrate they had "adequate procedures" in place (similar to the UK Bribery Act). Thought could also be given to removing parental liability for the acts of subsidiaries where the parent company has a credible antitrust compliance program which the subsidiary clearly violated. In addition, antitrust agencies could consider the use of (requirement to adopt or improve) an antitrust compliance program in settlements and other enforcement decisions (including the

possible use of "no-action" agreements / commitments similar to US DOJ (FCPA) Non-Prosecution and Deferred Prosecution Agreements).[19]

But a desire to mitigate fines alone should not be the only aim of an antitrust compliance program. 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.[20] We discuss this issue in depth below.

2. Drivers of Illegal Behavior

We note the lack of recent empirical work on the behavioral drivers of compliance and non-compliance in antitrust. [21] Some of the behavior may be based on financial gain but in other

[19] In the chloroprene rubber ECJ judgment of 26th September 2013, the General Court held that having a compliance program imposed by a parent in the joint venture (JV) was one factor in evidencing control over the JV for the purpose of imposing liability on the parent. While the ECJ did not specifically refer to the compliance program, the General Court did, and the ECJ upheld the General Court, so one assumes the ECJ did not disagree. The issue of a compliance programme was not specifically referred in the Commission decision, but in the General Court Judgement, as it came up in the Oral Hearing. European Court of Justice, Appeal - Competition - Agreements, decisions and concerted practices - Market for chloroprene rubber - Price-fixing and market-sharing - Infringement of Article 81 EC - Imputability of the unlawful conduct of a subsidiary to its parent company - Joint control by two parent companies - Decisive influence - Rights of defence, See at para. 73-74. ("The fact that [the parent company was] engaged in the implementation of that investigation confirms that those parent companies believed that they had the means of requiring their joint venture to conduct itself in accordance with the competition rules. The applicants also explained that, when DDE was created, DDE had been given a chief legal adviser, who, before becoming the employee of DDE, had been a member of EI DuPont's legal department and that that legal adviser had applied a competition law compliance programme at DDE based on the model previously applied at EI DuPont. It follows from the foregoing that, in the light of all the economic, legal and organisational links between EI DuPont and DDE, the Commission did not err in finding that EI DuPont, as one of DDE's parent companies, had exercised decisive influence over DDE's conduct on the CR market… [and that it] did not therefore err in finding that EI DuPont and DDE formed a single undertaking for the purposes of Article 81 EC….)

[20] Anne Riley & Margaret Bloom, *Antitrust Compliance Programmes–Can Companies and Antitrust Agencies Do More?*, 1 COMPETITION L.J. 21 (2011).

[21] For a review of drivers of behavior outside of antitrust, see e.g., Uri Gneezy & Aldo Rustichini *A Fine is a Price*, available at http://rady.ucsd.edu/faculty/directory/gneezy/pub/docs/fine.pdf; Francesca Gino & Joshua D. Margolis, *Bringing ethics into focus: How regulatory focus and risk preferences influence (Un)ethical behavior*, 115 ORG. BEHAVIOR & HUMAN DECISION PROCESSES 145 (2011); Linda Klebe Trevino et al., *Managing Ethics and Legal Compliance: What Works And What Hurts*, 41 CAL. MGMT. REV. 131 (Winter 1999); Gary R. Weaver et al., *Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors*, 42 ACAD. MGMT. J. 41 (1999). On the methodological limitations of studying these behavioral drivers, see Michael J. O'Fallon & Kenneth D. Butterfield, *A Review of The Empirical Ethical Decision-Making Literature: 1996-2003*, 59 J. BUS. ETHICS 375 (2005).

cases the wrong-doing was not motivated by performance pay but by personal and emotional factors such as one's ego (organizing the cartel despite company policy made the individual feel important) or where the individual is motivated by revenge (organizing a cartel despite company policy because the individual felt over-looked in their careers). The OECD suggests that the factors that drive non-compliance include, "an ambiguous commitment – or no commitment – to compliance by management, uncertainty about legal requirements, employee naiveté and/or simple error, "rogue" employees, arrogance, and competing interests from other compliance areas."[22] These drivers need to shape potential policy responses.

Understanding the drivers of compliance and non-compliance has important implications. The relative costs and benefits of compliance may shape the behavior of companies and the decision to comply with the law.[23] Some companies will invest more than others in compliance efforts and some organizational structures, corporate policies and norms make shaping a genuine commitment to compliance easier. The different behavioral drivers can be addressed internally through risk assessments. Such risk assessment varies across companies and within a company depending on the level of employee, industry, country, and existing norms. This makes a one size fits all approach difficult to implement and probably inappropriate. In some cases, companies may not properly assess the risks of non-compliance. The inability or failure to identify such risks impacts company behavior. If, however, a company fails to address compliance issues, then over time, behavior that is illegal or potentially illegal may become

[22] OECD, Promoting Compliance, *supra* note 15 at 11.

[23] Eric Helland, *The Enforcement of Pollution Control Laws: Inspections, Violations, and Self-Reporting*, 80 REV. ECON. & STAT. 141 (1998).

embedded as part of the organizational norm.[24] At some point (and this process may be gradual) an organization may reach a tipping point in its culture in which illegal activity (whether in antitrust non-compliance or in other areas) becomes one of the defining elements of the organization.[25]

A robust compliance program can fight against such a "slide" in corporate culture towards illegality as a cultural norm.[26] Changing the culture of a company involves changing incentives to promote compliance and to promote the ethical value of compliance. By changing organizational culture and behavior, the cost of detection of wrongdoing may be decreased as more people within the company will be on the lookout for illegal behavior and will have greater incentive to report it in others (and avoid it themselves). A pro-compliance culture also raises the cost of participation for cartel activity as the potential cartel member now must contend with an increase in the probability of detection. In those situations in which individuals receive rewards for their cartel participation, where internal monitoring of cartel activity is not strong, and where country level norms about collusion do not emphasize a societal moral failure, these norms may serve to reinforce inappropriate behavior within a company.[27]

Increasingly, more companies will put greater emphasis into antitrust compliance because of pressures through Corporate Social Responsibility (CSR) programs. Though there are many

[24] Ruth V. Aguilera et al., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 ACAD. MGMT. REV. 836 (2007).

[25] Tammy L. MacLean & Michael Behnam, *The Dangers of Decoupling: The Relationship Between Compliance Programs, Legitimacy Perceptions, and Institutionalized Misconduct*, 53 ACAD. MGMT. J. 1499 (2010).

[26] Benjamin E. Hermalin, *Leadership and Corporate Culture, in* THE HANDBOOK OF ORGANIZATIONAL ECONOMICS (Robert Gibbons & John Roberts eds., 2014).

[27] D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201(2012).

definitions of CSR,[28] it typically suggests that businesses work in an ethical way to exceed the current level of regulation through a form of self-regulation.[29]

CSR is a growing issue within and for global business. Over half of Fortune Global 250 companies regularly provide public documents and reports on their CSR policy and behaviors.[30] Though historically there have been economic critiques of CSR, increasingly there is a sense that a goal of shareholder wealth maximization can motivate CSR.[31] Indeed, a meta-analysis of 167 studies on CSR and corporate financial performance find a positive correlation between the two.[32]

There are a number of reasons to think that companies with active CSR programs will include antitrust compliance within the broader CSR portfolio of activities (and indeed a number already do). Anti-competitive behavior, and especially cartel behavior is considered "immoral" because it is a form of theft from customers (or in the case of a purchasing cartel, theft from suppliers). This unethical and illegal behavior involves the same types of concerns that motivate much of CSR. There are a number of reasons why a company can engage in a CSR strategy regarding antitrust compliance that is profit maximizing. First, a credible compliance program

[28] See ANDREW CRANE ET AL. EDS., OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (2009).

[29] Aleix Calveras et al., *Regulation, Corporate Social Responsibility and Activism*, 16 J. ECON. & MGMT & STRAT. 719 (2007).

[30] PHILIP KOTLER & NANCY LEE, CORPORATE SOCIAL RESPONSIBILITY: DOING THE MOST GOOD FOR YOUR COMPANY AND YOUR CAUSE (2004).

[31] Markus Kitzmueller & Jay Shimshack, *Economic Perspectives on Corporate Social Responsibility*, 50 J. ECON. LIT. 51 (2012) (providing a literature review).

[32] Joshua D. Margolis et al., Does It Pay to be Good? A Meta-Analysis and Redirection of Research on the Relationship Between Corporate Social and Financial Performance 21 (July 2007) (unpublished manuscript), available at http://stakeholder.bu.edu/Docs/Walsh,%20Jim%C20Does%C20It%C20Pay%C20to%C20Be%20Good.pdf.

creates an improved reputation for a company.[33] It may assist to attract and keep employees who want to work for ethical companies.[34] Moreover, increasingly customers demand CSR compliance.[35] CSR may be used as a type of insurance to protect reputational assets of a company for investors.[36]

As the CSR movement expands beyond a number of traditional categories, areas of law that address failures of ethical behavior (such as cartel conduct), may be included within a company's CSR portfolio. Lack of antitrust compliance may expose companies to greater scrutiny by customers and consumer activist groups. The move to greater use of CSR in the antitrust area also may reinforce institutional pressure for higher standards of good governance.[37]

3. Antitrust Authorities and Compliance

Antitrust authorities can become more effective in their cartel enforcement when they work with the business community actively to encourage companies to invest in credible antitrust compliance efforts. Some antitrust authorities provide explicit penalty reductions for a robust and credible (well- functioning) antitrust compliance program.[38] By doing so, these antitrust

[33] Charles J. Fombrun, *Building corporate reputation through CSR initiatives: evolving standards*, 8 CORPORATE REPUTATION REV. 7 (2005); Charles J. Fombrun & Mark Shanley, *What's in a name? Reputation building and corporate strategy*, 33 ACAD. MGMT. J. 233 (1990); R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER PERSPECTIVE (1994).

[34] Samuel Bowles et al., *Incentive-Enhancing Preferences: Personality, Behavior, and Earnings*, 91 AMER. ECON. REV. 155 (2001).

[35] Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value: The Role of Customer Awareness*, 59 MGMT. SCI. 1045 (2013) (showing that customers are more likely to respond to CSR activities when the activities align with the firm's strong CSR reputation.).

[36] Paul C. Godfrey, *The Relationship between Corporate Philanthropy and Shareholder Wealth: A Risk Management Perspective*, 30 ACAD. MGMT. REV . 783 (2005); R. EDWARD FREEMAN, JEFFREY S. HARRISON, AND ANDREW C. WICKS, MANAGING FOR STAKEHOLDERS: SURVIVAL, REPUTATION, AND SUCCESS (2007).

[37] Sanjay Sharma & Irene Henriques, *Stakeholder influences on sustainability practices in the Canadian forest products industry*, 26 STRAT. MGMT. J. 159 (2005) (providing a similar discussion in the area of environmental regulation).

[38] For example, see Chile. Fiscalía Nacional Económica, "Competition Compliance Programs: Complying with

authorities arguably provide greater incentive for proactive change for those companies that otherwise may not have sufficient incentive or motivation to invest in a robust compliance problem – and perhaps importantly continue to encourage companies to invest in compliance (even where they are already minded to do so), given the "competition for resources" between different compliance requirements within a company across substantive areas of law and regulation.

The two most important jurisdictions, the United States and the European Commission do not offer such positive incentives for antitrust compliance efforts. Instead, both DOJ Antitrust and DG Competition use a strict liability regime framework for cartel enforcement. The mere fact that a company comes forward to the authorities with evidence of a cartel infringement is *prima facie* evidence of a "failed" compliance program.[39] This is a strict liability legal theory. Such thinking has been challenged.[40] Adopting a strict liability approach is arguably not socially optimal with regard to entity liability and punishment. It also puts antitrust out of synch with other areas of enforcement.

The limitation of strict liability is that it will cause under-investment in compliance (at least for some companies). In situations in which the cost of compliance is high, the likelihood of

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Competition Law" (June 2012) http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf (providing for penalty mitigation for a well-functioning compliance program); Competition Commission of Singapore, CCS Guidelines On the Appropriate Amount of Penalty section 2.13 (June 2007) (same).

[39] EU Commissioner Almunia's speech 25 October 2010: "*To those who ask us to lower our fines where companies have a compliance programme, I say this: if we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed?"- See* http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm?locale=en; see also Wouter Wils, *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, 1 J. ANTITRUST ENFORCEMENT 1 (2012). US enforcers have taken a similar approach.

40 See Sokol, *Policing the Firm*, *supra* note 14; Damien Geradin, *Antitrust compliance programmes and optimal antitrust enforcement: a reply to Wouter Wils*, J. ANTITRUST ENFORCEMENT, 2 (2013); Nathalie Jalabert-Doury and Joseph Murphy, *Cartel Prevention and Compliance Regimes: It Is Time For a Smarter Approach*, BUSINESS COMPLIANCE 82 (03-04/2013); Compliance Policy at the Antitrust Division, 4 ANTITRUST & TRADE 3 (Nov. 14, 2011)(Bloomberg Law Reports).

detection is low and the penalty for non-compliance is low, a company may have a strong disincentive to invest in compliance beyond the minimum of what is legally necessary.[41] This is particularly problematic because, given information asymmetries, the company (or at least certain individuals within the company) may have better knowledge of its non-compliance, or a better ability to obtain such knowledge, than does the antitrust authority.[42]

This style of thinking on incentives of strict liability perhaps needs to be reconsidered for those compliance programs that are credible (and credibility in this sense does not necessarily mean the entire absence of any compliance incidents, it refers rather to the company's genuine commitment to compliance). The problem of antitrust strict liability is exacerbated in a relative sense. Other compliance regimes (e.g. anti-bribery and corruption) offer complete defenses for "adequate procedures" or improved treatment for companies with diligent programs.

The lack of incentives to reward good compliance programs leads to less, not more, resource allocation within companies for antitrust compliance. This can be seen most clearly when one assesses regimes where (appropriate and adequate) compliance efforts are rewarded. For example, the UK Bribery Act section 7 provides a complete corporate defense to a company which can demonstrate it has "adequate procedures." But antitrust law has no such defense, and thus management – when deciding where to spend compliance resources would rather spend it in an area where the company can benefit from a clear defense, rather than on antitrust, where not

[41] Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321, 323 (2012) ("Corporate criminal liability thus cannot serve its central purpose unless it is structured to provide firms with strong incentives to detect and self-report violations, as well as to cooperate with governmental authorities' efforts to sanction individual wrongdoers. Indeed, corporate sanctions undermine the central purpose of corporate liability when firms face higher expected sanctions when they engage in optimal corporate policing than when they do not.").

[42] This is not always the case. Since cartels are, by their nature covert, where a company has a clear policy requiring compliance, individuals involved in the cartel may also take steps to hide their involvement in the cartel from the company itself, as well as from the antitrust authority. The agencies may have investigative powers, such as wire taps and compelled testimony from third parties that the companies do not have.

only is there no defense, but compliance programs are viewed with such skepticism[43] that having an antitrust compliance program may unfortunately be viewed as being counter-productive or even positively harmful.[44] Indeed, the existence of a compliance program could even be used against a company in antitrust (at least in Europe) as evidence that a violation was willful or to link a parent to a subsidiary's liability because the parent operated a group-wide compliance program.[45]

Of course, there may be cases in which a company believes - despite the absence of encouragement and support from the antitrust authorities - in the importance of compliance and makes a significant investment as a result. In such cases, a strict liability regime paradoxically penalizes a good corporate citizen when a "rogue" employee undertakes illegal behavior that damages the company and does so for a period of time before he/she is caught by the compliance program.[46]

The limits of the strict liability regime suggest that perhaps a negligence regime may be preferable. However, the negligence regime has its own unique set of problems. In a negligence regime, the incentives are such that companies may become too cautious, particularly in situations in which courts make the determination of liability. *Ex ante*, the legal regime must determine the proper amount of care for which to impose liability and courts may not be able to determine with ease whether there was a violation, what the legal standard should be and what

[43] Sokol, *Policing the Firm*, supra note 34 at 819; Wils, *supra* note 33.

[44] Sokol, *Policing the Firm*, supra note 34 at 798-801.

[45] ECJ Judgment of 26 September 2013: Case C-172/12P European Commission v EI DuPont de Nemours upholding the General Court judgment stating (para 71-72) that the imposition of a compliance program was one factor in establishing decisive influence (and thus imputing liability to the parent).

[46] Id. at 845.

the correct damages are.[47] However some compliance enforcement authorities (outside antitrust) consider that it is possible for courts and even the authorities to determine what constitutes "adequate procedures" or sufficient compliance efforts.[48]

In a negligence-based regime, *ex post* some companies may attempt to argue even minor compliance efforts (e.g. "cosmetic" compliance programs) should justify some reduction in fine, leading to situations in which negligence may not attach when it should (because compliance was not adequate).[49] As Hamdani notes, "As the optimal monitoring policy becomes more complex and multi-faceted, courts will be less likely to possess the information necessary to apply a negligence standard."[50] Thus, for prosecutors a more viable solution is one where they exercise discretion to consider a company's compliance efforts, but the burden of proof is always on the company.

[47] Id.

[48] See section 7 of the UK Bribery Act 2010: a company can benefit from a complete defense (and therefore receive no financial penalty) if it can demonstrate that it had instituted "adequate procedures" to prevent bribery. In the same way, the US Department of Justice and the US Securities and Exchange Commission have issued joint guidance : *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (see particularly Chapter 5: Hallmarks of Effective Compliance Programs) .Guidelines available at: http://www.justice.gov/criminal/fraud/fcpa/guidance/

[49] Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491-92 (2003); SHARON ODED, CORPORATE COMPLIANCE: NEW APPROACHES TO REGULATORY ENFORCEMENT 167-72 (2013). Corporate oversight duties shape overall compliance within firms. Some firms may invest only to the minimum needed to satisfy the *Caremark* duty overall and engage in cosmetic compliance regarding non-criminal compliance. Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms, in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony S. Barkow & Rachel E. Barkow eds., 2011). Where compliance programs matter under US law in terms of federal prosecution, the company has all the burden of proving its case and the government retains discretion in giving credit. These academic critics theorize without actually doing the hard work required to find out what actually happens. For the implication of this issue to antitrust see Sokol, *Policing the Firm*, *supra* note 34 at 800-03.

[50] Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 85 (2003).

The major work in corporate entity liability therefore advocates a regime that has a mix of both strict and negligence liability.[51] This would support the use of penalty mitigation (or elimination) for a robust and credible antitrust compliance program. "Mitigation" may take two forms. It may mean increased penalties for everyone who does not have a robust and credible compliance program or penalty mitigation for those that do. From an economic perspective both are the same – firms with a credible compliance program have preferred treatment over those that do not. Traditional penalty mitigation may be easier to create in practice as it aligns with how enforcers utilize penalties in other types of crime and therefore such an approach may be easier to implement. For example, such an approach tracks the penalty mitigation provisions of the US Sentencing Guidelines. To the extent that an antitrust authority may use increased penalties for non-compliance, this would be akin to director debarment for individuals or debarment from government procurement in an antitrust setting. Neither approach is often used as an antitrust enforcement tool.

Other areas of law follow the composite model of enforcement, even in the two most prominent antitrust jurisdictions (United States and European Union). Take the example of anti-bribery. The guidance on the U.S. Foreign Corrupt Practices Act ("FCPA") provides that:

> "A well-constructed, thoughtfully implemented, and consistently enforced compliance and ethics program helps prevent, detect, remediate, and report misconduct, including FCPA violations … *These considerations reflect the recognition that a company's failure to prevent every single violation does not necessarily mean that a particular company's compliance program was not*

[51] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

> *generally effective. DOJ and SEC understand that "no compliance program can ever prevent all criminal activity by a corporation's employees*," and they do not hold companies to a standard of perfection. An assessment of a company's compliance program, including its design and good faith implementation and enforcement, is an important part of the government's assessment of whether a violation occurred, and if so, what action should be taken. In appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based on the company's effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation".[52] (Italics added for emphasis)

Antitrust compliance stands in sharp contrast to FCPA enforcement. However, it is not merely U.S. law which embraces the need for a credible compliance program. The World Bank requires a credible compliance and ethics program for those companies that have requested leniency for corruption.[53]

Enforcement should not just be about punishment but about changing normative values within an organization. This is where credible antitrust compliance programs have a role. The major antitrust jurisdictions appear to assume intent on the part of the company to violate the law. However, companies do not commit crimes, individuals do. In some cases, a company's (lack of ethical) culture and lack of effective oversight may

[52] Department of Justice and Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

[53] World Bank Voluntary Disclosure Program Guidelines for Participants, available at: http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.

provide the ability of these individuals (and the company) to reap rewards from cartel activity. However, where senior management within a company is genuinely committed to compliance, but a violation nevertheless occurs, antitrust authorities need to understand that in those cases the individual "rogue" employee does not represent the company or its policies. In such settings, the proper recognition of genuine compliance efforts can incentivize the company (and indeed other companies) to invest more in genuine compliance efforts, and thus deter, detect and punish individual bad behavior. The US Sentencing Guidelines make such a distinction clear:

> "(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—
>
> (1) exercise due diligence to prevent and detect criminal conduct; and
>
> (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
>
> Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. *The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct".* (Italics added for emphasis)[54]

[54] U.S. Sentencing Commission, Guidelines Manual, §8B2.1 (2011), available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/2r1_1.htm.

Certainly if senior management are involved in a cartel, then it is hard to defend the company's compliance program as "credible" – but even so there are occasions where the company has a clear policy on compliance, and a diligent program to implement the policy, and the individual (even a senior individual) flouts the policy and the law – without the support of (and despite the best efforts of) the company. Certainly in a large, multinational company there may be quite a few individuals throughout the various divisions and subsidiaries who qualify as (or who may have a title which makes them appear) "senior" but who may not be acting in the company's interest and may be circumventing the company's compliance controls and policies. This reasoning was what led the US DOJ to prosecute the individual in the Morgan Stanley FCPA case, but exonerate Morgan Stanley itself on the basis of its compliance efforts:

> "This defendant [the individual rogue employee] used a web of deceit to thwart Morgan Stanley's efforts to maintain adequate controls designed to prevent corruption. Despite years of training, he circumvented those controls for personal enrichment. We take seriously our role in detecting and prosecuting efforts to evade those controls," said U.S. Attorney Lynch.
>
> According to court documents, Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment.

> Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners."[55]

Such thinking can and should be incorporated by DOJ Antitrust and DG Competition in their antitrust enforcement actions. In the antitrust setting, a company might through its credible compliance program / compliance efforts detect rogue behavior by one of its employees. The company would then go to the antitrust authority and ask for no company level charge but only an individual one[56] (or a fine based on subsidiary liability rather than parent / Group corporate liability) on the grounds that it could demonstrate it had a robust compliance program. In fact, the US Sentencing Guidelines promote exactly this sort of reasoning,[57] even though DOJ Antitrust appears to ignore the Federal Sentencing Guidelines and appears – incorrectly - to

[55] http://www.justice.gov/opa/pr/2012/April/12-crm-534.html.

[56] It is recognized that it may be difficult to impose penalties on individuals at European Union level – which is an administrative system of law where penalties are imposed at corporate level rather than directly upon the individuals who participated in the cartel. However other penalties short of individual fines and individual criminal sanctions may be possible without a Treaty change (for example by the use of Director Disqualification Orders or similar tools.

[57] *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-28.800 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.800; U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (Nov. 14, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

believe that antitrust has a carve out from the penalty mitigation provisions. As one of us previously explained:

> "DOJ Antitrust has tended to conflate the Guidelines penalty analysis with the Department of Justice's approach to prosecutorial discretion, although the two are distinct. The Department, in all cases except antitrust, does take programs into account with no automatic carveouts that are based on the fact that individual employees committing a violation may have had authority and discretion. The rest of the Department of Justice will consider compliance programs in the various stages of dealing with corporations; DOJ Antitrust appears to avoid programs at all stages of the process".[58]

Should DOJ Antitrust conform to best practices followed by the rest of US government, the DOJ's antitrust enforcement would follow the composite system and would be more effective[59] – not only that, but it would positively encourage more rigorous and vigilant compliance efforts The same is true worldwide across antitrust authorities.

B. How the Market Responds to Compliance failures

The strongest driver for compliance with antitrust law should be the desire to conduct business ethically and to be recognized as doing so. However, one of the critical lessons that those in a compliance function must explain to employees at various levels of the company and to the board of directors are the negative repercussions for the company of non-compliance, in terms of reputational damage and a negative market correction or reaction. Put differently, the stock of a company will take a hit for its lack of compliance in terms of internalizing the actual

[58] Sokol, *Policing the Firm*, *supra* note 34 at 819-20.

[59] Id. at 820-22.

cost of the government fines and potential private suits. We provide the empirical basis for such costs below. Moreover, while the financial penalties for non-compliance can be very significant, a company's reputation also may be seriously damaged by the adverse publicity attracted by a decision that it has violated the law.[60] Much in the way that CSR has become more important in recent years as to stock returns, increasingly there is a shift within the market on reputational effects on the stock price of companies. We are only now beginning to see how this change in social norms has begun to impact stock returns for companies involved in cartel behavior.

Increasingly, there may be a market response to a company (and in particular a publicly quoted company) engaging in cartel activity (or other serious compliance failures). In some areas of law, there is a negative stock return that results from illegal behavior due to a loss of reputation for the company. Antitrust studies of reputational effects on stock performance have been limited and the results mixed, and some of the data perhaps apocryphal rather than providing hard factual evidence. Motchenkova and van der Laan provide a theoretical model that generates reputational loss for large companies across jurisdictions for cartel activities.[61] Bosch and Eckard examined the stock returns for companies involved in price fixing during the period 1962–1980.[62] Their analysis suggested that the majority of the loss in stock value was due to the readjustment effect of what had been monopoly profits moving to the competitive price. More recent studies have not been undertaken to examines the reputation effect of US cartel enforcement since that time, even though there have been significant changes both to

[60] *The ICC Antitrust Compliance Toolkit* – available at http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/.

[61] Evgenia Motchenkova & Rob van der Laan, *Strictness of Leniency Programs and Cartels of Asymmetric Firms*, 58 INT'L REV. ECON. 401 (2005).

[62] Jean-Claude Bosch & Woodrow E. Eckard Jr., *The Probability of Price Fixing: Evidence from Stock Market Reaction to Federal Indictments*, 73 REV. ECON. & STAT. 309 (1991).

enforcement (the introduction of the leniency program and the substantial increase in penalties) and to the establishment of the importance of cartel enforcement.

A study on Dutch listed companies that were the target of antitrust actions of both cartel and dominance cases from 1998 to 2008 as well as EC-level cases concerning Dutch cartels from the same time period finds that the reputational loss, taking into account the legal costs and readjustment effect of the profit stream, is a more significant deterrent than the legal effect.[63] Though information about a massive Dutch construction cartel was already publicly available (and financial penalties already built into the stock price), one study found that after a television show about the Dutch construction cartel appeared, the stock price of companies mentioned in the television show fell by 10%, which suggests a reputational penalty.[64] At the EU level, the most recent works that examines the impact of antitrust compliance are by Langus, Motta, and Aguzzoni[65] and Günster and van Dijk.[66] Langus , Motta, and Aguzzoni found that fines account for between a quarter and a third of the stock price drop, with the remainder due to a readjustment effect and almost none to potential reputation effects. Gunster and van Dijk find a 5% stock return drop around the time of the dawn raid and a 2% drop at the time of a final decision. They do not distinguish the loss among fines, the readjustment effect of the profit stream, and reputational effects.

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[63] Stijn van den Broek et al., *Reputational Penalties to Firms in Antitrust Investigations*, 8 J. COMPETITION L. & ECON. 231 (2012).

[64] Johan J. Graafland, Collusion, *Reputation Damage and Interest in Code of Conduct: The Case of a Dutch Construction Company*, 2 BUSINESS ETHICS: A EUROPEAN REVIEW 127 (2004).

[65] Gregor Langus, *The Effect of EU Antitrust Investigations and Fines on a Firm's Valuation*, 61 J. INDUSTRIAL ECON. 290 (2013).

[66] Andrea Günster & Mathijs A. van Dijk, *The Impact of European Antitrust Policy: Evidence from the Stock Market*, working paper, ETH Zurich / Erasmus University Rotterdam 2010.

Other antitrust-related work on the impact of cartel enforcement on stock returns focuses on the long-term effect of stock prices. This line of work suggests that from a temporal perspective, companies might be willing to take a reputation hit because of a more limited effect of cartel enforcement. Thompson and Kaserman, using the Bosch and Eckard data set, found that 85% of companies in their sample (on a market-adjusted basis) returned to the pre-indictment stock price within a year of the antitrust action.[67] A more recent paper by Detre and coauthors uses a newer data set (1981–2001) and finds that the stock price returned to the pre-indictment level in a time period similar to that of Thompson and Kaiserman.[68] To our knowledge, no study has examined the long-term effect of stock prices focusing only on the period since the introduction of the modern US leniency program.

These academic papers stand in contrast to a recent survey conducted by the OFT, that measured the drivers of compliance and non-compliance as perceived by companies interviewed by the OFT:[69]

> "1.10 The key drivers for competition law compliance mentioned by respondents were the fear of **reputational damage** and **financial penalties**.
>
> 4.1.3 All respondents said that the adverse reputational impact of a competition law infringement decision was the overriding driver of compliance within their businesses. One respondent said this was because such decisions could call into question the ethics and business model of the firm against whom the decision was made, that it sent '…the message that the business has a dodgy business model…'

[67] John S. Thompson & David L. Kaserman, *After the Fall: Stock Price Movements and the Deterrent Effect of Antitrust Enforcement*, 19 REV. INDUSTRIAL ORG. 329 (2001).

[68] Alla Golub et al., The Profitability of Price Fixing: Have Stronger Antitrust Sanctions Deterred?, (2005) (presented before the International Industrial Organization Conference 3, Atlanta, Ga. (Apr. 8-9, 2005)), available at http://ssrn.com/abstract=1188515.

[69] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf.

4.1.4 Some respondents said that there was a negative reputational impact from the fact of having a competition law investigation against their business, even if the business was subsequently cleared; because what would be remembered was the investigation, not the clearance at the end. One respondent expressed concern that stakeholders had perception that competition authorities would not pursue an investigation against a firm unless the issue was serious and there was substance behind the allegation".

Overall, the empirical message is mixed. This is perhaps due to what is a result of rapidly changing perceptions about the social/moral element to cartel participation in Europe. Recent changes in Asia in enforcement also seem to be shifting perceptions there towards greater compliance and reputational penalties for wrongdoing. These changes warrant further empirical study.

III. Focusing on creating and sustaining credible and robust antitrust law compliance programs

How to embed compliance and sustain a compliance culture is the fundamental challenge for companies whether in antitrust or other areas of law and regulation. Implementing and embedding such change within the day to day operations of a large and complex company creates certain challenges. Antitrust authorities, for the most part, do not promulgate compliance

guidelines to assist companies in their compliance efforts,[70] and there is little international drive to further antitrust compliance initiatives.[71] This is an area in need of change.

Self-policing is a method to optimize regulation.[72] It "privatizes" enforcement by requiring or incentivizing companies to take a more active role in ensuring compliance, and thus "pushes" enforcement (deterrence, avoidance and detection) and compliance from the regulator to the regulated company – this in turn contributes to the efficiency of enforcement and the better allocation of antitrust authority resources. Advocating and encouraging antitrust compliance programs also supports the policy objective of ensuring compliance and avoiding violations: the more compliance is encouraged (rather than enforcement actions simply punishing non-compliance), the more likely it will be that normative values will be changed.[73] However, without clear guidance and support from antitrust authorities, it is more difficult for companies to create robust and credible compliance programs.

While some antitrust authorities have taken a lead in promoting compliance and providing guidance on the elements of a credible compliance program (most notably the Canadian

[70] Some antitrust authorities have been more proactive in this area. *See, e.g.*, COMPETITION BUREAU CANADA, CORPORATE COMPLIANCE PROGRAMS (2010), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf; OFFICE OF FAIR TRADING, HOW YOUR BUSINESS CAN ACHIEVE COMPLIANCE WITH COMPETITION LAW (2011); and the Australian ACCC [http://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program]). Indeed as demonstrated above, enforcement authorities in other compliance areas (such as FCPA and UK Bribery Act compliance) have been far more active in giving practical guidance on the necessary constituent elements of a robust compliance program. See also Ted Banks & Joseph Murphy, *The International Law of Antitrust Compliance*, 40 DENVER J. INT'L L. & POLICY 368, 379-80 (2012).

[71] Although this may be changing: For example, the OECD has been discussing the importance of antitrust compliance advocacy, see OECD, *supra* note 15. In addition, the ICN also publishes resources on antitrust compliance: see: http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/business.aspx. The US FTC has also recognized the importance of compliance programs in the areas where it pursues enforcement actions, see Joseph Murphy, *The FTC and antitrust compliance programs*, COMPLIANCE AND ETHICS PROFESSIONAL 49 (July/August 2012).

[72] Louis Kaplow & Steven Shavell, *Optimal Law Enforcement with Self-Reporting of Behavior*, 102 J. POL. ECON. 583 (1994).

[73] Anne Riley & Margaret Bloom, *supra note 21*.

Competition Bureau, the Australian ACC and the UK CMA), some of the major agencies (the US DOJ Antitrust Division and the EU Commission) have not. In addition, neither the OECD nor the International Competition Network have (as yet) adopted best practice antitrust compliance program guidelines. In the absence of international standards relating to antitrust compliance programs, the business sector has taken the initiative to provide some guidance on how to create robust and credible antitrust compliance programs.

In particular the International Chamber of Commerce (ICC) – the global business organization representing businesses both large and small in over 80 different countries – has taken a leading role in helping to shape thinking on credible antitrust compliance efforts. Prompted by suggestions from DG Competition, the UK OFT (now the CMA) and other antitrust authorities, the ICC Task Force on Antitrust Compliance and Advocacy produced an antitrust compliance "Toolkit" for business, and launched this at the ICN in Warsaw in 2012.[74]

This Toolkit has been designed by business for business, and benefited from contributions from antitrust specialists from over 30 companies and law firms around the world and benefits from the practical experience of in-house antitrust compliance efforts. The Toolkit provides practical antitrust tools for SMEs and for larger companies wishing to build or reinforce a robust compliance program. The Toolkit seeks to complement materials produced by antitrust authorities and other sources of guidance, by focusing on practical steps companies can take internally to embed a successful compliance culture The Toolkit is arranged into 11 chapters covering the following topics:

1. Compliance embedded as company culture and policy
2. Compliance organization and resources

[74] ICC, *supra* note 60. See also Joseph Murphy & William Kolasky, *The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior*, 26 ANTITRUST 61 (Spring 2012).

3. Risk identification and assessment
4. Antitrust compliance know-how
5. Antitrust concerns-handling systems
6. Handling internal investigations
7. Disciplinary action
8. Antitrust due diligence
9. Antitrust compliance certification
10. Compliance incentives
11. Monitoring and continuous improvement

There is no compelling reason why antitrust authorities could not build on the work of the ICC (or indeed other organizations) and produce their own guidance on the elements of a robust antitrust compliance program. Doing so would further enhance compliance and so support the policy objectives of antitrust enforcement. Many of the themes of the toolkit already have been considered by the OECD staff report, which suggests that the basis for successful compliance programs include, "efficiency, leadership, training, education, information and due diligence."[75]

A. Internal Management Issues

1. Organizational Design and Management Commitment

Successful compliance programs are critically dependent upon the engagement and support of employees and management at all levels of the company. Simply rolling out a training program (or having compliance efforts driven by lawyers alone without business support) will never lead to full or sustainable compliance. To build a credible and sustainable compliance

[75] OECD, *supra* note 15 at 12.

culture, compliance needs to be seen as being "good" for business, and the program needs to be embraced and supported by senior management. This is why the OECD, in its policy roundtable document *Promoting Compliance with Competition Law,* identifies a "Culture of compliance" - where "playing by the rules" becomes business as usual - as one of the five key components (also described as "5Cs") of a successful compliance program.[76]

A better understanding of organizational design allows for a more nuanced understanding of how company culture plays a critical role in shaping a company's commitment to compliance and increasing the likelihood of individuals within the company to comply with the law.[77] The more complex the organization, the more that this may increase agency costs in the corporate context.[78] Higher corporate agency costs in turn may potentially increase the likelihood of illegal activity[79] - and higher agency (i.e. company) costs in ensuring compliance may possibly contribute to some companies "weighing up" whether it is more effective to invest in programs that are recognized by the authorities rather than in programs that are not recognized.

The creation of a robust compliance culture which is supported by senior management is fundamental to the credibility of a compliance program. In an organization with a strong compliance culture, an individual who suspects wrongdoing will be encouraged to – and therefore is more likely to - report such activity within the organization.[80] As the practice oriented ICC compliance toolkit stresses, "The key to any successful compliance program,

[76] Id. at 13.

[77] Sydney Finkelstein & Donald C. Hambrick, *Top-Management-Team Tenure and Organizational Outcomes: The Moderating Role of Managerial Discretion*, 35 ADMIN. SCI. Q. 484 (1990).

[78] R. Preston McAfee & John McMillan, *Organizational Diseconomies of Scale*, 4 J. ECON. & MGMT. STRATEGY 399 (1995); J. Myles Shaver & John M. Mezias, *Diseconomies of Managing in Acquisitions: Evidence from Civil Lawsuits*, 20 ORG. SCI. 206 (2009).

[79] Marie A. McKendall & John A. Wagner, III, *Motive, Opportunity, Choice, and Corporate Illegality*, 8 ORG. SCI. 624 (1997).

[80] Trevino, *supra* note **23**.

whether it relates to antitrust or another topic, is to reach the stage where the behavior required under the program is an indistinguishable part of your company culture."[81]

The key to any credible compliance program - whether it is antitrust or any other compliance topic – is management commitment and corporate culture. Management support for compliance will set the culture of the organization, and it is by engendering a culture (encouraging normative values) of compliance that actual compliance in practice will be (or at least has a better chance of being) achieved. If management at the most senior levels do not support compliance activities, then it is difficult in practice to demonstrate a real commitment to compliance.

Though the academic literature focuses on the role of top management in antitrust compliance, other white collar employees have an important role in compliance. Within the company, the role of compliance shapes the culture by which middle and lower level management behave. Take the following example. Middle and lower level management may want career advancement. To do so, they may mimic how senior management (or indeed their own direct manager, even if not senior) behaves.[82] In an unethical culture (i.e. in a company that lacks a genuine and robust compliance culture), mimicking behavior may include anti-competitive behavior such as participation in a cartel. Such behavior may be understood as the path for upward mobility within the corporation with a corrupt or unethical culture, because middle (and lower) management may be viewed by more senior management as having "made the numbers."

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[81] ICC, *supra* note 60 at 4.

[82] Joseph Galaskiewicz & Stanley Wasserman, *Mimetic Processes within an Interorganizational Field: An Empirical Test*, 34 ADMIN. SCI. Q. 454, 454-56 (1989); Pamela R. Haunschild & Anne S. Miner, *Modes of Interorganizational Imitation: The Effects of Outcome Salience and Uncertainty*, 42 ADMIN. SCI. Q. 472, 474-75 (1997).

Empirically, organizational design and broader corporate governance impact a company's view of antitrust compliance. According to some academic research, companies involved in cartels (1) may tend to file an abnormally large amount of financial restatements, (2) may have less effective monitoring due to foreign or busy (too many board positions) directors, (3) may be less likely to replace directors who resign, and (4) may switch auditing firms less often than the norm.[83] This is the only empirical academic work to that examines corporate governance mechanisms. There is no empirical work that measures (1) middle to junior management staying in one position too long, (2) slack organization / insufficient oversight by managers of what their teams are doing, and (3) insufficient oversight by antitrust authorities of trade association activity.

2. The role of the General Counsel and Chief Compliance Officer

To be credible, antitrust compliance activities must be integrated into a company's culture. A lack of compliance culture may result in a multi-generational (or cyclical) culture of illegality given the risk that senior managers train their successors in how to participate in a cartel.[84] Thus, it is imperative that antitrust authorities around the world cease to think of antitrust (non) compliance merely in terms of enforcement, but start pro-actively engaging with the business community (and indeed society at large) on the benefits of compliance to shape normative values and of market competition.[85]

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[83] Tanja Artiga Gonzalez et al., "Smokescreen: How Managers Behave When They Have Something to Hide," (November 2013) available at ssrn.com/abstract=2230771 .

[84] Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43 (2006) (providing a survey of the literature).

[85] Riley & Bloom, *supra* note 21.

Of course companies also have a role to play here, and can considerably contribute to the compliance debate – especially by understanding what their roles are and how they can really contribute to a compliance culture. The first practical step in establishing an antitrust compliance program within a company is to ensure that the company recognizes that antitrust law compliance is relevant to its operations. Most major companies have a Legal function which should identify (and in most major companies will already have identified) antitrust compliance as something the company needs to address. This identification occurs as part of risk management for the company and identification of particular activities and people that pose greater compliance risk. This is clearly where the General Counsel (whether a specialist antitrust counsel or a generalist) plays a critical role. The General Counsel (Legal Director or Head of Legal) may already be a member of the Executive Board or may have a reporting relationship with the Board or the CEO or with the Audit Committee. The General Counsel can use those reporting lines to highlight antitrust as an issue affecting the company (and may do so along with highlighting other compliance risks relevant to the company's operations, such as bribery and money laundering, etc.). Once the risk has been recognized, someone in the company needs to take ownership of the compliance effort: the compliance risk will always remain a business risk, but an individual in the company needs to be asked to take ownership of the antitrust compliance program and oversee the development of the tools that will be necessary to embed a compliance culture. Where the company has an overall compliance officer, there may be a separate "risk owner" or antitrust specialist who runs the antitrust program in conjunction with the larger umbrella company compliance program.

The identity of the person in charge of the compliance program will depend on the structure and organization of the company.[86] In some companies the Legal Director takes responsibility for the compliance program, sometimes individually and sometimes by appointing a Chief Ethics and Compliance Officer reporting to him/her. In other companies, the compliance function falls within the Finance Department, because of the key role of the Group Audit Committee in overseeing and managing corporate risk. There has also been an increase of Chief Ethics and Compliance Officers reporting directly to the CEO and the board, so that this officer is not subordinate to others in the management suite; this gives the compliance person greater leverage in dealing with executives. Such leverage is particularly useful in antitrust where violations tend to occur at the highest levers of the business. At the end of the day, there is no "one size fits all" and the company should be able to choose a structure that best reflects its needs. The important thing is that wherever the Chief Compliance Officer sits in the organization, he/she has direct access to (i.e. the unfettered ability to report compliance concerns and trends to) the CEO, the Board and the Group Audit Committee. This reporting relationship should involve substantive interaction and not be a mere formality or be subject to filtering by others. The Compliance Officer needs to have the necessary authority, independence, an ability to have line of sight into all parts of the business, and (where appropriate) a place at the table for all important decision-making. Without this, the Compliance Officer is likely to be underpowered and hampered in achieving what is required for the program to succeed.

[86] There is a debate over where the compliance function should sit within an organization – see *Corporate Compliance Insights* available at http://www.corporatecomplianceinsights.com/the-roles-of-general-counsel-and-chief-compliance-officers/.

3. Relationship between Legal and Compliance and the business unit

Lawyers are not trained for the most part (at least in law school), to think about business strategy, accounting and finance or compliance organization – and while their business colleagues may be trained in business strategy and accounting / finance, they are almost certainly not trained (at business schools) in compliance issues. The traditional model of teaching law focuses on analyzing cases and statutes. It does not focus on facts or ask the fundamental question of "what is your business strategy – what are the company's ethical values - and how do law and ethics shape opportunities for the company." Law students (and indeed antitrust authority enforcers) in many cases are not taught about how to undertake risk assessments, how to assess behavioral patterns for compliance "red flags" or about how similar behaviors may either reduce or increase legal and compliance risk exposure.[87]

To address this linguistic barrier, the relationship between the business unit and the legal department (and external legal advisor) needs to be cultivated. This includes regular in-person interactions between the business units and the legal department and must include a common understanding of business objectives. However, much more important than anything else is for the legal department (and especially external counsel) to speak in a language business understands.[88]

Such regular interactions when combined with the ability to reach common understandings and to come up with creative solutions to help the businesses achieve their

[87] There is, however, a movement to have agencies adopt compliance programs which may also assist them in gaining insight into such programs. See The Rutgers Center for Government Compliance and Ethics, http://rcgce.camlaw.rutgers.edu/.

[88] Riley & Bloom, *supra* note 21: Develop clear and simple rules – these can be 'Do's and Don'ts' or any other form that is suitable for the company. The key rule however is to use plain business language – not legalistic jargon. (The notes should not be too lengthy. Make it easy for people to understand and follow the rules; Tailor guidelines to the specific needs of different business units and in different situations; Consider preparing short (1–2 pages maximum) notes on specific topics of particular relevance to the business (e.g. benchmarking, attending trade associations); Think about what languages materials should be translated into and the method of delivery to get maximum reach (e.g. having all materials easily accessible on a company intranet site).

(ethical and legitimate) goals, taking into account the nature of the legal risks involved create a well-functioning relationship between the (internal and external) legal team and each business unit.

Lawyers (both internal and external) can be seen as important to the success of a company's operations. Such an understanding creates incentives for the business teams to become proactive in getting the advice of their (in-house) counsel and – above all - following it.[89] Lawyers, in turn, should call on the expertise of compliance and ethics professionals and other professionals (such as communications experts) for help in integrating the antitrust message into the broader compliance program of the company.

The creation of trust within a company between the business and legal units (and with its external legal advisers) generally reduces transaction costs and leads to more efficient outcomes – ones in which a company can – or should - be rewarded in the market and with regulators for its strong (i.e., robust and credible) compliance program. A company with a good working relationship between its legal and business units will be more likely to see potential risks early and therefore be in a position to respond quickly to them. Such risk includes finding "rogue" actors. A "rogue" actor might be hiding his own actions from the company, especially if he knows the company will terminate his employment if the company finds out about the wrongdoing. Should the "rogue" actor create a compliance problem, the trust between the business unit should be able to allow the legal team to mitigate the consequences with swift action (as soon as the covert behavior comes to light), such as through seeking leniency before its competitors. In addition, a robust compliance program can greatly enhance the company's

[89] Howard Bergman & D. Daniel Sokol, *The Air Cargo Cartel: A Study in Compliance and Detection, in* ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE - THE LENIENCY RELIGION (Caron Beaton-Wells ed., forthcoming 2015).

ability to surface the actions of such rogue actors, through such techniques as compliance audits, compliance due diligence (for example on the activities of trade associations) and periodic screening of business data.

B. Ensuring the program has the right elements

1. Risk Analysis (Identifying and Minimizing Legal Risk)

The credibility of a company's antitrust compliance program and related allocation of resources will depend on whether resources are deployed in the right areas. Understanding the operational risks the company faces helps the Compliance Office / Legal Department focus on relevant activities. It also helps to justify why limited resources are used to tackle higher risks as a matter of priority, and also enables the company to identify appropriate controls to manage the risks and to identify training needs.[90] An employee who meets with competitors, such as at trade association meetings, may be at higher risk of engaging in anti-competitive activities or discussions than other "back office" employees.[91]

The ICC antitrust compliance toolkit (Chapter 3) offers practical guidance on how to undertake antitrust risk analyses, and recommends working closely with the finance function to develop a practical risk assessment methodology. The purpose of undertaking a risk analysis is to identify exactly what risks the company faces, assess the risks in terms of likelihood and impact, and to develop appropriately controls which are designed and adapted to mitigate those risks.

2. Training and raising concerns

[90] A company's risk assessment may not indicate that training is the priority; one might instead find that the company's employees already know not to engage in price fixing, but the incentive system might be driving them in the wrong direction. Training is just one tool, not always the first one to be used.

[91] Riley & Bloom, *supra* note 21.

Having identified the antitrust risks the company faces, the geographic spread of those risks, business units affected, lines of business, personnel, etc. The risk assessment helps to determine what antitrust training should be given, what supporting documentation and communication is required to increase employee awareness, and to ensure that the company's commitment to compliance is fully understood by employees at all levels in the company.

Ideally, training and compliance communications also empower employees to do business lawfully and confidently and will support them in resisting pressures more effectively (whether these are internal or external). However, no matter how good the antitrust compliance training is, it can never completely eliminate the possibility that some individuals in the company may simply ignore company policy and guidance. This is why the way in which antitrust know-how is presented is - in many ways - just as important as the substantive guidance provided.[92] In particular, the sharing of antitrust compliance know-how must encourage employees to seek clarifications whenever they are unclear on how to proceed, in order to find and share the correct (lawful) ways of reconciling antitrust compliance and business strategies. It must also be designed to help motivate employees to do the right thing.

A good (robust and credible) program will also have well-publicized mechanisms that allow employees to obtain advice, "speak up," outside normal reporting lines, and be protected against possible retaliation. These will encourage employees to become more vigilant and willing to raise concerns when they are uncomfortable about certain forms of conduct. This in turn will enable the company to investigate the conduct, and if a cartel is discovered, to report it to the authorities through immunity or leniency applications. A key practice that anchors many modern corporate social responsibility programs and compliance initiatives is the adoption and

[92] ICC, supra note 60 at Chapter 4.

use of an internal whistleblower procedure, reporting channel, or other "hotline" that allows individuals to report compliance concerns so management can uncover and deal with corporate crimes, antitrust violations, corruption and other compliance problems. Companies have also found it is extremely useful to let employees know that it does respond and act upon such calls. For example, some companies provide sanitized reports on investigations so that all employees can learn from these experiences. This technique is important for convincing employees that their calls will be acted upon; a belief that nothing will happen is likely to deter compliance incident reporting.

To ensure antitrust compliance in practice, a company should implement measures that underscore the commitment of the company and its senior management to ethical behavior. These measures could include but are not limited to the adoption of a code a conduct and providing training sessions for employees (see above). Creating a robust and credible compliance structure requires a way to collect and analyze information properly. The compliance function needs continuing budgetary support and sufficient resources to undertake its tasks.[93] As such, the compliance program and the resources devoted to it must be regularly reviewed.

These compliance mechanisms have cost to the company but also benefits. Companies that have a more robust and credible compliance program can leverage the change in the regulatory environment for competitive advantage.[94] If compliance at a company is better than

[93] European Union, *Compliance matters: What companies can do better to respect EU competition rules* available at http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD3211985. ("[w]hilst the Commission does not wish to be prescriptive, a company should devote sufficient resources - appropriate to its size and the risks it faces - to ensure it has a credible programme.").

[94] Chad Nehrt, *Maintainability of first mover advantages when environmental regulations differ between countries*, 23 ACAD. MGMT. REV. 77 (1998); Chad Nehrt, *Timing and intensity effects of environmental investments*, 17 STRATEGY MGMT. J. 535 (1996).

that of its peers, it will be the first to detect wrongdoing and avail itself to the relevant antitrust authorities.

3. Incentives That May Create Risk

If employees receive bonuses based on certain profitability metrics (and particularly profitability metrics related to the performance of an individual business unit rather than the corporate group as a whole), this may encourage the employees to meet their performance-based metric by any means necessary—including engaging in anti-competitive discussions.[95] There is a risk in which the rewards of the individual employee may not be well aligned with the desire of the company as a whole to behave ethically. While companies clearly want to maximize profits, this should only be done in a legitimate and lawful way, and therefore companies need to consider whether their own pay policies encourage ethical behavior or incentivize short cuts and illegal behaviors. Thus, consideration of incentives should ideally be part of a credible compliance and ethics program. Employees might be willing to risk joining a cartel if a very substantial proportion of their individual pay is linked to their own business results or targets, as the short-term incentive of a significant payout will increase,[96] especially if the risk of detection is low both inside the company from compliance officers and outside the company from antitrust enforcers.

One recent empirical study reviews the specific pay mechanisms and other incentives used by companies which had the effect of rewarding collusive behavior (even if it was not intended to have this effect). The study also found that individual employees who engaged in the

[95] Paolo Buccirossi & Giancarlo Spagnolo, *Corporate Governance and Collusive Behavior*, *in* 2 ISSUES IN COMPETITION LAW AND POLICY 1219, 1224 (Wayne Dale Collins ed., 2008).

[96] Gonzalez et al., *supra* note 71.

cartel are more likely to exercise stock options more rapidly than individuals in other companies.[97]

Empirical work has yet to be done that examines actual contractual incentives of individual members of cartels. It may be that one reason that such studies have not yet been undertaken is due to the nature of what evidence gets collected for criminal cases. Antitrust enforcers and private plaintiffs are concerned about the illegality of price fixing and the mechanisms used to undertake it across companies. The incentive mechanisms within companies do not establish proof of price fixing and hence are not important for cases, especially since most criminal cases (in the United States) end up with a settlement due to a guilty plea.

Research into the incentives used in performance contracts for such individuals and across industries would be useful. The limited work to date suggests a greater need to monitor particular individuals for pay structure of their contracts and what formal oversight they have. New studies should focus on the impact of other behavioral or psychological factors involved in non-compliance such as individual ego, revenge, arrogance etc. For example, it was these other non-financial factors that apparently drove Mark Whitacre at ADM in the lysine cartel.[98]

4. Disciplinary action against wrong-doers

A credible antitrust compliance program should make clear that disciplinary action (up to and including suspension, demotion and dismissal) will be taken if anyone in the company (however senior) contravenes antitrust law. It is important that the disciplinary policy is applied consistently throughout the company and, in particular, that senior employees/managers are not

[97] Id.

[98] KURT EICHENWALD, THE INFORMANT (2000). We note he too was motivated by greed in the embezzlement.

shielded from disciplinary action in the event that they violate the rules.[99] It may also be appropriate to impose some disciplinary measures for violation of compliance program standards, policies and controls. For example, disciplinary measures (short of dismissal – such as a formal or informal warning) could be imposed on employees who fail to attend antitrust training or who attend trade association meetings without appropriate clearance. Setting an ethical tone will reinforce the message within the company of the importance of compliance and embed compliance more firmly within the company culture. This will help to reduce monitoring costs within the company.

5. Compliance after an Infringement

The Treadway Commission[100] on internal controls has pointed out that even with controls in place, it is likely to be impossible for a company to eliminate all risk:

> "Absolute assurance is not possible. Reasonable assurance does not imply that an entity will always achieve its objectives. The cumulative effect of internal controls increases the likelihood of an entity achieving its objectives. However, the likelihood of achievement is affected by limitations inherent in all internal control systems, such as human error and the uncertainty inherent in judgment. Additionally, a system of internal control can be circumvented if two or more people collude. Further, if management is able to override controls, the entire system may fail. In other words, even an effective system of internal control can experience a failure".

[99] ICC, *supra* note 60 at Chapter 7.

[100] *Internal Control – Integrated Framework* published by the Committee of Sponsoring Organisations of the Treadway Commission and 2011 revised versions available at http://www.coso.org/documents/coso_framework_body_v6.pdf.

Ultimately compliance with the law is dependent on human behavior, and a company may be in a situation where its Board and management is committed to ethical business, it has a Code of Conduct and a robust compliance program, but that some individuals within the organization flout company policy and break the law. A single non-compliance incident is not an indication that the company has "failed" in compliance – but the company's response to the compliance incident is highly indicative of the company's culture and commitment.

If a company faces a situation where antitrust risks were not successfully managed and issues have arisen, there should be a strong emphasis on immediate practices and learnings that have come to light, and in particular, measures that will need to be taken to improve the compliance program.[101] Controls will need to be reviewed and systems improved to reduce the likelihood of further problems arising.

IV. Conclusion

Antitrust authorities are becoming increasingly engaged in discussions with business about the benefits in promoting compliance,[102] although often the debate on the side of the authorities focuses exclusively (or almost exclusively) on enforcement, fines and leniency.

While enforcement remains essential and fines obviously have an important role to play, the real debate should be about how to change normative societal values, so that antitrust compliance is on the agenda not because of a fear of enforcement, but rather because ethical and compliant business is "the right thing to do." Further empirical work specific to these issues needs to be undertaken. Antitrust authorities would be well served to focus on such efforts and

[101] ICC, *supra* note 60. This is one of the required compliance program elements under the US Organizational Sentencing Guidelines, U.S.S.G. section 8B2.1(b)(7).

[102] The OECD considered this topic in 2011 (*supra* note 15) and again in June 2014 (not yet published), and the ECN and ICN have both included compliance related topics in their discussions.

to engage more fully with academics, compliance and ethics professionals, and the business community in such efforts to create a more effective antitrust enforcement system and better compliance in practice.