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Thesis title:

The Unbearable Lightness of Not Rewarding Effective Antitrust Compliance Programs

PhD in	Law of Business and Commerce
Cycle	29th
Student's Advisor	Prof. Federico Ghezzi
Calendar year of thesis defence	2017

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19 March 2017

Abstract

Antitrust infringements are hard to fight. From a corporate perspective, they are not always clear-cut so that without adequate training unintentional antitrust violations by employees cannot be ruled out. As to public enforcement, the limited amount of resources granted to antitrust authorities translates into selective prosecution, with the result of the increased level of fines having proved less effective than desired in terms of deterrence.

Effective compliance programs can help preventing antitrust violations while reducing the investigative burden on competition authorities. Trainings and internal procedures indeed spread a culture of antitrust compliance within the company and reduce the probability of unintentional antitrust violations being committed. The provision of incentives and disincentives in corporate codes of conduct encourages employees not only to comply with the law but also to correctly implement the compliance program. Finally, periodical audits and monitoring activities can enable early discovery by the management of antitrust violations, thus allowing the company to promptly decide how to best handle them.

However, effective compliance programs are costly. Due to the impossibility to carry out a cost-benefit analysis in a counterfactual scenario, the advantages arising from the adoption and implementation of an effective compliance program are almost impossible to monetize in advance. The fundamental question thus becomes how to encourage companies to invest in effective compliance.

The adoption of compliance programs has always been welcomed by competition authorities worldwide. Yet, not all competition authorities are willing to grant fine reductions on grounds of effective compliance programs. This paper argues that such a view is definitely short-sighted. Only if the actual possibility of obtaining a fine reduction in the event of an infringement can be factored in, then companies will be successfully incentivized to adopt and implement effective compliance programs. The idea that only because an infringement occurred then the program is not effective and shall not be rewarded should be overcome. Hence, companies having devoted significant resources to the implementation of a compliance program before the occurrence of the investigated wrongdoing should be rewarded for their efforts insofar as they can demonstrate that the program was generally effective. Antitrust authorities have nothing to lose and everything to gain in doing so.

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The Unbearable Lightness of Not Rewarding Effective Antitrust Compliance Programs

Introduction*

> "*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice.*"
>
> Adam Smith, The Wealth of Nations, 1776

It would be naïf to think of a world without antitrust infringements. Every horizontal or vertical anticompetitive agreement makes perfect commercial sense. Indeed, it answers to a specific commercial need. Raising prices all together so as to increase revenues without losing market shares, imposing resale prices so as to guarantee adequate margins to distributors, fixing quantities or allocating markets so as to be more efficient.

From the employee's perspective, compared to other corporate crimes, anticompetitive conduct are more difficult to identify, with the result of the moral blame attached to them being less strong. Cartelists often defend themselves by saying that they did not want to (nor actually did) harm anyone. The company itself can also send mixed signals as to the lawfulness of a conduct. It is not uncommon that infringers believe that they have acted in the company's best interests.

* I am grateful to Professor Federico Ghezzi for his very helpful comments and suggestions on this work. Also, I would like to thank the Fondazione Cariplo for having contributed to finance my research period at Fordham University, School of Law, New York City, USA. The usual disclaimers apply.

It would be equally naïf to think that competition authorities can detect and sanction every anticompetitive agreement on their own. No amount of resources will ever be enough to achieve this goal. And market players know that. The probability of getting caught is thus not strong enough to deter infringements in the first place. Significantly increasing pecuniary sanctions can certainly help deterring antitrust infringements. But in most cases the ones bearing the cost of the fine are not those who actually violated the law. Then corporate managements change over time, with the result of the antitrust fine once imposed becoming a mere memory from the past.

Leniency programs have represented a huge innovation. By significantly increasing the probability of getting caught, they have made cartels more unstable and enabled competition authorities to uncover anticompetitive agreements which otherwise would have likely remained concealed.

These are all *ex post* cures, whereas any sound enforcement policy should also care about *ex ante* measures. No doubts that effective prevention proves cost efficient in the long run, the main issue here appears to be how to encourage companies' commitment to it before the occurrence and uncovering of infringements.

Compliance programs are ideally placed to achieve this goal. They are structured so as to train employees while at the same time monitoring and regulating their behavior. They are intended to convey a clear message from the management of commitment towards compliance. Especially when the law does not provide for personal liability for antitrust infringements, they hold employees accountable for anticompetitive behavior, by rewarding them for compliance with the program (and thus with the law) and providing for disciplinary sanctions in case of antitrust

violations. Furthermore, they help spreading a culture of antitrust compliance among industries. The positive effects of effective compliance programs also in terms of public enforcement are unquestionable.

Therefore, should not it be obvious for competition authorities to encourage the adoption and implementation of antitrust compliance programs? It should, and all authorities do indeed welcome the adoption and implementation of antitrust compliance programs by companies, at least in words. But are words enough? The answer posited here is negative. Antitrust authorities should actively reward effective *ex ante* compliance programs, in particular in terms of fine reductions in the event of an infringement occurring despite the program. Of course, not all compliance programs should receive credit, but only those that can be considered in line with the best practices recognized at international level. The adoption and implementation of this kind of compliance programs require a significant investment from companies, which might not be counterbalanced by tangible and quantifiable benefits. This is why companies will hardly afford such an investment without a concrete reward by antitrust authorities in the event of an infringement being committed anyway.

The first part of this work will illustrate how corporate compliance programs in general are defined, in particular with regards to a common law legal system (i.e., the USA) and a civil law legal system (i.e., Italy). The second part will instead focus on antitrust compliance programs as well as those characteristics that make a compliance program an effective one. The third and last part will deal with the main issue, namely whether competition authorities should recognize a fine mitigating effect to effective antitrust compliance programs.

PART I

A. One, no one and one hundred thousand definitions of effective corporate compliance programs

It has been almost over half a century that governments around the world started to interfere more effectively with corporate activity by passing a considerable amount of regulatory laws.[1] As a consequence, the costs borne by companies, in terms of sanctions, civil damages, shareholder derivative suits as well as company's reputation have significantly raised. Companies have thus gradually introduced corporate compliance programs, in attempt to stem these costs.[2] However, as the main objective of regulating corporate behavior cannot be easily obtained if the costs of enforcing the laws are too high,[3] direct governmental policies have been gradually flanked by incentives to corporate self-regulation.[4]

Such a "carrot and stick" approach towards corporate liability had at least a twofold effect. On the one side, it boosted the spread of corporate compliance programs. On

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[1] Note, Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, Harvard Law Review, Vol. 92, Issue 6, 1979.

[2] HUFF K. B., *The role of corporate compliance programs in determining corporate criminal liability: a suggested approach*, Columbia Law Review, 96/1996, pp. 1252-1298; PITT H. L., GROSKAUFMANIS K. A., *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, The Georgetown Law Journal, 78/1990, pp.1559-1654; STEWART D. O., *Basics of Criminal Liability for Corporations and Their Officials, and Use of Compliance Programs and Internal Investigations*, Public Contract Law Journal, 22/1992; WALSH C. J., PYRICH A., *Corporate Compliance Programs As a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, Rutgers Law Review, 47/1995, pp. 605-689; WEBB D. K. ET AL., *Understanding and Avoiding Corporate and Executive Criminal Liability*, Business Law, 49/1994, pp.617-668.

[3] STONE C., *Where the Law Ends: The Social Control of Corporate Behavior*, Harper & Row, New York, 1975, pp. 976-984.

[4] RUHNKA J. C., BOERSTLER H., *Governmental Incentives for Corporate Self-Regulation*, Journal of Business Ethics, 17/1998, pp. 309-326; ODED S., *Corporate Compliance. New Approaches to Regulatory Enforcement*, Edward Elgar, 2013. See also VEDIA JEREZ H., *Competition Law Enforcement and Compliance Across the World: a Comparative Review*, Wolters Kluwer, 2014, indicating that self-compliance of the law can be driven by factors other than the legal obligation to obey the law, such as (i) the perception of internal (e.g., what is considered to be just and moral) and external factors (e.g., the gains and losses resulting from different conduct), and (ii) the company's sense of social responsibility.

the other side, lacking a uniform approach among law enforcers towards compliance programs qualifying for "the carrot", it fueled the idea that corporate compliance programs might be too expensive to implement, if compared to the benefits a company can ultimately get from them. The latter effect has proven particularly true in relation to antitrust compliance programs, as the DOJ and the European Commission have traditionally refused to give companies any credit, such as fine reductions, for having adopted and implemented an effective compliance program.

The lack of incentives to adopt strong compliance programs may also be explained by one paradox of the relationship between corporate crime liability and corporate self-regulation through compliance program. It has been observed that by adopting a truly effective compliance program, a company increases the risk that the evidence produced via the implementation of the program might be used against it if a crime is eventually committed. Furthermore, while self-reporting to the competent authority will risk end up having the company convicted for the wrongdoing,[5] doing nothing might enable the company to avoid prosecution at all.[6] Such paradox thus ultimately leads the company to be incentivized not to invest in a corporate compliance program. Assuming a scenario of non-detection by public authorities, inaction might prove more profitable.

Moving back to a general perspective, corporate compliance programs can be defined as those programs that seek to ensure a corporation's compliance with the law.[7] Focusing on prevention and detection of corporate misbehavior, it has been

[5] Leniency programs represent an exception in this regard.
[6] ARLEN J., *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, Prosecutors in the Boardroom (Barkow A. S., Barkow R. E., edited by), 2011, pp. 62-86.
[7] HUFF K. B., *The role of corporate compliance programs in determining corporate criminal liability: a suggested approach*, cit.

noted that corporate ethic programs[8] can be theorized as "*organizational control systems aimed at standardizing employee behavior within the domains of ethics and legal compliance*".[9] As such, corporate ethics programs are based on codes of conduct illustrating company's values and expectations for ethical behavior,[10] and serve the goal of deterring corporate crimes,[11] while allowing the possibility "*to persuade prosecutors or regulators to decline filing charges*".[12]

In order to achieve their objectives, corporate compliance programs provide for rules of conduct and associated enforcement procedures, which are communicated by the company's top management. Depending on the company's range of activities, the content of corporate compliance programs varies; so does their sophistication, as a reflection of each company's commitment to compliance.

Despite these differences, all corporate programs entail three main features: (i) the training of the employees as to the company's values and illegal activities to be prevented, (ii) the monitoring of employees' behavior, and (iii) the adoption of disciplinary measures in case of infringements.[13]

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[8] In what follows the terms "corporate ethic programs" and "corporate compliance programs" will be used as synonyms.

[9] WEAVER G.R., KLEBE TREVIÑO L., COCHRAN P.L., *Corporate ethics programs as control systems: influences of executive commitment and environmental factors*, Academy of Management Journal, 42/1999, pp. 41-57; the Authors note that in this sense the goals of ethics control systems are similar to those of control systems in general.

[10] Id., p. 42.

[11] WEBB D.K., MOLO S.F., *Some practical considerations in developing effective compliance programs: a framework for meeting the requirements of the Sentencing Guidelines*, Washington University Law Quarterly 71, pp. 375-396; LANGEVOORT D.C., *Monitoring: The behavioral economics of corporate compliance with the law*, Columbia Business Law Review, 71/2002, pp. 1-39.

[12] TARUN R., *Unlucky side effects: 13 common problems with compliance programs*, The Corporate Counsellor, 1998. See also GIMENO BEVIÁ J., *Compliance Programs as Evidence in Criminal Cases*, (Brodowski D., Espinoza de los Monteros de la Parra M., Tiedemann K., Vogel J., edited by), Regulating Corporate Criminal Liability, Springer, 2014, pp. 227-234.

[13] ANGELUCCI C., HAN M.A., *Monitoring Managers Through Corporate Compliance Programs*, Amsterdam Center for Law & Economics Working Paper No. 2010-14, pp. 1-45.

While identifying what the core features of a corporate compliance program are is quite straightforward, less clear is understanding which are the requirements to fulfill for the program to be positively evaluated in the event of a corporate wrongdoing. In other words, what constitutes an *effective* corporate compliance program?

In what follows, the above definition of effective corporate compliance programs will be briefly illustrated with regards to a common law legal system (i.e., the USA) and a civil law legal system (i.e., Italy). The analysis will then focus specifically on the characteristics of effective compliance programs in the field of antitrust law. While for an antitrust compliance program to be considered effective essentially the same features need to be present, no matter the jurisdiction taken into account, the approach taken by antitrust authorities as to the credit to recognize to effective antitrust compliance programs, in terms of possible fine mitigation, drastically varies from one jurisdiction to another.

a. An effective compliance and ethics program according to the U.S. Sentencing Commission Guidelines

Under §8B2.1 of the US Sentencing Commission Guidelines Manual ("USSCG Manual"),[14] "compliance and ethics program" means a program designed to prevent and detect criminal conduct. The adoption of an "effective" compliance and ethics program is taken into account by the DOJ when calculating the culpability score within the context of fine determination, as well as by the Court when imposing a term of probation. More specifically, pursuant to §8C2.5 (f)(1) of the USSCG Manual,

[14] United States Sentencing Commission, Guidelines Manual, §3E1.1 (Nov. 2015), available at http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf (accessed January, 22 2016).

a reduction in the calculation of the culpability score is applied if the offense occurred even though the company had in place at the time of the offense an effective compliance and ethics program,[15] whereas under §8D1.4 (b)(1) of the USSCG Manual, the lack of an effective compliance and ethics program at the time of sentencing may prompt the Court to order a term of probation.[16]

Under the USSCG, for a company to be considered having an effective corporate compliance program, it shall exercise due diligence to prevent and detect criminal conduct and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.[17] Furthermore, a compliance and ethics program shall be reasonably designed, implemented, and enforced so that it is generally effective in preventing and detecting criminal conduct.[18] However, the USSCG Manual clarifies that 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.[19]

The main features of effective compliance programs are illustrated in more details under §8B2.1 (b)-(c). As clearly indicated in the USSCG Manual, an effective

[15] Such a general rule knows a number of exceptions and limitations provided under §8C2.5 (f) (2)-(3). These exceptions and limitations will be illustrated *infra*.

[16] This is the case when the company (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program. According to USSCG, §8D1.1(a)(7) a term of probation shall be imposed on companies convicted for federal crimes when the court decides not to fine them. However, a term of probation can be imposed even when the court sentences a fine, in addition to it. The length of probation for antitrust violations may vary between one and five years. During this period the company cannot engage in any further criminal conduct and has to fulfill the conditions imposed by the court (e.g., make restitution, implement an effective compliance program, publicize its conviction at its own expense, periodically report to the court, etc.). Failure to comply with the conditions of probation will lead the court to resentence the company, possibly extending the length of probation or impose additional conditions. For a general overview, see DOYLE C., *Corporate Criminal Liability: An Overview of Federal Law,* Congressional Research Service Report, pp. 1-34, available at https://www.fas.org/sgp/crs/misc/R43293.pdf, consulted on 4 October 2016.

[17] USSCG, §8B2.1 (a).

[18] Ibid.

[19] Ibid.

compliance program implies a periodical assessment of the risk(s) of infringement faced by the company, as well as appropriate amendments to the program in order to take into account any such new or modified risk(s).

As to the general features of an effective compliance program, standards and procedures have to be put in place in order to prevent and detect criminal conduct. Furthermore, the company's governing body has to be aware of the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to its implementation and effectiveness. While the responsibility for the company having an effective compliance program lies with the company's high-level personnel, specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program and shall be delegated day-to-day operational responsibility for the compliance and ethics program. In order to comply with their role, the specific individual(s) shall be given adequate resources, appropriate authority, and direct access to the company's governing body, to which they should report periodically on the effectiveness of the compliance and ethics program.

Remarkably, the USSCG Manual indicates that the company shall use "*reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program*".[20]

[20] USSCG, §8B2.1 (b) (3).

In terms of training, the company shall ensure periodical and practical communication as to the standards and procedures to be adopted within the context of the program to all personnel (i.e., the members of the governing body, high-level personnel, substantial authority personnel, employees, and, as appropriate, agents), depending on each individual's role and responsibilities.

Furthermore, the company should (i) monitor the implementation of the program, (ii) periodically evaluate the effectiveness of the program, (iii) implement and publicize a system (possibly involving mechanisms allowing for anonymity or confidentiality), whereby employees may report or seek guidance regarding potential or actual criminal conduct, (iv) set forth incentives to perform in accordance with the compliance and ethics program, (v) introduce disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

Finally, in the event of a criminal conduct being detected, any necessary modifications to the program should be made so as to prevent further similar criminal conduct. As it will be illustrated below, pursuant to §8C2.5 (f)(2), a fine reduction on account of the implementation of an effective compliance program can be granted only if, after becoming aware of a criminal conduct, the company does not unreasonably delay reporting the offense to appropriate governmental authorities.

b. An effective compliance program according to the Resource Guide to the U.S. Foreign Corrupt Practices Act

Corporate compliance programs also play a role in the public enforcement of US anti-corruption policies.

Indeed, pursuant to the Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA Guide"),[21] the adequacy of a company's compliance program may influence DOJ's and SEC's decision whether or not to resolve charges through a deferred prosecution agreement ("DPA") or non-prosecution agreement ("NPA"), as well as the appropriate length of any DPA or NPA, or the term of corporate probation. Furthermore, an effective compliance program will often affect the penalty amount and the need for a monitor or self-reporting.

From the FCPA Guide's perspective, compliance programs are described as essential to detect and prevent FCPA violations. As to their characteristics, compliance programs are considered effective when tailored to the company's specific business and to the risks associated with that business, so that they are dynamic and evolve as the business and markets change.[22]

The underlying idea is that "*if designed carefully, implemented earnestly, and enforced fairly, a company's compliance program – no matter how large or small the organization – will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately*".[23]

[21] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, available at http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (accessed February, 4 2016).
[22] Ibid, p. 56.
[23] Ibid, p. 57.

Having stated that there is no one-size-fits-all program, the FCPA Guide indicates a number of hallmarks of effective compliance programs that are generally taken into account by the DOJ and the SEC.

In particular, while compliance programs merely providing for a check-the-box system may prove inefficient, as well as ineffective, the following features should be included: (i) the commitment of corporate leaders to a "culture of compliance", which should be reflected and implemented along the entire chain of the company, down to all levels employees, (ii) the adoption of a code of conduct and compliance policies and procedures which should be periodically reviewed and updated, (iii) the appointment of one or more specific senior executives in charge of monitoring the implementation of the program; these senior executives should be provided with sufficient authority within the company, enough autonomy from the management and adequate resources, (iv) the periodic conduct of a risk assessment, (v) the delivery of trainings and the adoption of mechanism allowing employees to get advice if needed, (vi) the provision of incentives for complying with the program as well as disciplinary measures in case of non-compliance with the program, and (vii) a risk-based due diligence on third parties, agents and consultants involved in business transactions.

c. An effective compliance program under Legislative Decree 8 June 2001, No. 231

With the aim of encouraging corporate compliance, Legislative Decree 8 June 2001, No. 231 ("LD 231") introduced in Italy a new regime of corporate liability for certain

crimes[24] committed by a company's representatives. LD 231 follows the path of, amongst others,[25] the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, and is partially modeled after the USSCG Manual.[26]

In a nutshell, when one of the crimes foreseen by LD 231 is committed by a person holding a representative, administrative or (*de facto*) managerial position within the company, or by a person working under his/her control,[27] the company itself shall be charged, alongside the author of the crime, unless it can demonstrate that (i) it had adopted and effectively implemented[28] a so-called organizational, management and control model ("Model"), fulfilling a number of requirements, (ii) the monitoring of the functioning, implementation and update of the Model has been entrusted to a supervisory body (*Organismo di vigilanza*), endowed with autonomous powers of initiative and control, (iii) the author of the crime fraudulently eluded the Model, and (iv) the supervisory body adequately monitored the implementation of the Model.[29]

[24] The number of crimes to which such a corporate responsibility extends has been progressively increased.
[25] Convention on the protection of the European Communities' financial interests of July 26, 1995 and its protocols; Council Act of May 26, 1997 drawing up the Convention made on the basis of Article K.3 (2) (c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.
[26] For an analysis of the main differences between corporate compliance in Italy and in the USA, see ASSUMMA F., TOMKIES S. E., *Corporate Compliance Programs in the United States and in Italy: Are They the Same?*, American Bar Association Publications, 2014, pp. 1-10.
[27] Provided that this person has committed the crimes at least "also" in the interest of or for the benefit of the company.
[28] In the event of the Model being implemented once the crime has already been committed, it cannot exempt the company from liability. However, it could enable the company to benefit from a fine reduction and it will prevent the application of debarments. In addition, the case law has established that the *ex post* adoption of an effective Model eliminates the risk of recidivism so that the application of protective *interim* measures is not required.
[29] LD 231, Art. 6 (1).

The Model is similar to a compliance program under the USSCG Manual, in so far as it shall provide for:[30]

1. the identification of the areas of the company's activity in which wrongdoings are more likely to occur;
2. the adoption of specific internal procedures (also concerning the management of financial resources) aiming at preventing the occurrence of crimes;
3. the introduction of specific reporting mechanisms towards the supervisory body;
4. the setting forth of disciplinary measures to sanction non-compliance with the Model.

As LD 231 expressly states that the Model requires periodical updates, and the number of crimes for which a corporate responsibility is foreseen increases over time, it is important that the company periodically carries out a risk assessment in order to evaluate whether the Model needs any improvement.

d. Conclusion

Very simple points can (and should) be inferred from the above brief overview. Corporate compliance programs serve the objectives of preventing and detecting corporate crimes. Some programs are better than others. Public enforcers encourage – in more or less effective ways – the adoption of compliance programs embodying specific characteristics. These characteristics are approximately the same, notwithstanding the type of corporate crime whose prevention and detection the

[30] LD 231, Art. 6 (2).

program is intended for, as well as the relevant jurisdiction. That said, as it will be illustrated, in the fight against anticompetitive behavior, antitrust enforcers have taken inconsistent paths, with the result of effective antitrust compliance programs not always being rewarded at sentencing as they should be.

B. Recognizing credit for effective antitrust compliance programs: the (almost) unknown

One could expect that the features of an effective compliance and ethics program provided by the USSCG Manual should apply to antitrust compliance programs as well. In theory yes, since the USSCG cover antitrust infringements,[31] not so clear-cut in practice though, given that the DOJ Antitrust Division had traditionally refused to recognize any culpability score value to antitrust compliance programs. However, this approach might be about to change, as the DOJ's most recent practice demonstrates, at least in relation to *ex post* antitrust compliance programs.[32] With the Canadian Competition Bureau as well as a number of national competition authorities in Europe already rewarding companies for the adoption and implementation of effective compliance programs, such a change of course by the DOJ might (hopefully) ultimately push the European Commission into reviewing its (non) approach towards antitrust compliance programs.

In the next section, an overview of whether and how effective antitrust compliance programs are taken into account at sentencing in different jurisdictions is provided. A more detailed description of what may be considered as the main features of an

[31] USSCG, §2R.1.1.
[32] Reference is made to the DOJ Sentencing Memorandum in case U.S. v. Kayaba Industry Co., Ltd, D/B/A Kyb Corporation.

antitrust compliance program for the latter to be deemed effective will then follow under Part II.

a. Consideration given to effective antitrust compliance programs in the US

As mentioned, while §8C2.5 (f)(1) of the USSCG provides for a fine reduction if the offense occurred even though the company had in place at the time of the offense an effective compliance and ethics program fulfilling the requirements listed under §8B2.1, the DOJ has never recognized any fine reduction to antitrust infringers for pre-existing antitrust compliance programs. This tough approach is the result of a number of factors.

The USSCG set forth a number of provisions that make particularly difficult for antitrust infringements to ultimately benefit from the fine reduction.

First, pursuant to §8C2.5 (f)(2), the fine reduction can be granted only if, after becoming aware of an offense, the company does not unreasonably delay reporting the offense to appropriate governmental authorities. In other words, the reduction of the culpability score linked to the existence of an effective antitrust compliance program can be recognized only if the company comes forward before the offense is discovered, or is likely to be discovered, by the DOJ. Due to the existence of leniency programs, in most cases, only the first leniency applicant will approach the DOJ before the exercise of any investigative power by the public enforcer. Thus, fine immunity recognized under the leniency program will be the reward for the

existence of a compliance program enabling the company to detect and stop antitrust infringements.[33]

Second, according to §8C2.5 (f)(3) (A) the fine reduction does not apply in case:

- an individual within high-level personnel of the organization,[34] or
- a person within high-level personnel of the unit of the organization[35] within which the offense was committed (where the unit had 200 or more employees), or
- the specific individual(s) within high-level personnel assigned overall responsibility for the compliance and ethics program, or
- the specific individual(s) within the organization delegated with day-to-day operational responsibility for the compliance and ethics program,

participated in, condoned, or was willfully ignorant of the offense.

Furthermore, if an individual (i) within high-level personnel of a small company or (ii) within substantial authority personnel[36] irrespective of the company's dimensions, participated in, condoned, or was willfully ignorant of, the offense, there

[33] SNYDER B., *Compliance is a Culture, Not Just a Policy*, Remarks as prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop, New York, 9 September 2014, pp. 1-12.

[34] "High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest, USSCG, §8A1.2, app. note 3 (B).

[35] "High-level personnel of a unit of the organization" means agents within the unit who set the policy for or control that unit, USSCG, §8C2.5, app. note 3.

[36] "Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis, USSCG, §8A1.2, app. note 3 (C).

is a rebuttable presumption that the organization did not have an effective compliance and ethics program.[37]

Conduct that might be of antitrust relevance all involve some sort of commercial decisions taken on behalf of the company. These might relate to prices, volumes, products' characteristics, commercial strategies, customers etc.[38] Antitrust violations are thus committed by individuals enjoying some degree of autonomy and discretion in taking decisions influencing the company's commercial policy. Given the broad scope of the definitions adopted by the USSCG, these individuals will almost always be qualified as "high-level personnel" or personnel with "substantial authority", thus implying, at least, that the burden of proof to rebut the presumption of the lack of an effective compliance program lies with the company.

The other, but more important, factor shaping the DOJ's approach towards antitrust compliance programs is the Antitrust Division's belief that if, notwithstanding the adoption of an antitrust compliance program, a company committed an antitrust infringement, this means that the adopted antitrust compliance program, no matter what its features are, cannot be considered effective for the purposes of the USSCG. The underlying idea is that "*a truly well-run compliance program should prevent a*

[37] USSCG, §8C2.5 (f)(3) (B). Both the above provisions do not apply (and thus the fine reduction is applicable) if (i) the individual(s) with operational responsibility for the compliance and ethics program have direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors), (ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely, (iii) the organization promptly reported the offense to appropriate governmental authorities, and (iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense. Clearly, the scope of this provision overlaps with the one of antitrust leniency programs, where the first leniency applicant can benefit from immunity from fines and not only from a fine reduction.

[38] See European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, pp. 1–72, para 86 listing types of commercially sensitive information whose exchange can give rise to restrictive effects on competition.

company from conspiring to fix prices, rig bids, or allocate markets. Effective compliance programs should prevent that crime from beginning or, at a minimum, detect it and stop it shortly after it starts".[39]

Therefore, companies do not generally receive credit at sentencing for the adoption and implementation of an *ex ante* antitrust compliance program, as the existence of the antitrust infringement in itself demonstrates that the program was not effective.

In this sense, the Antitrust Division significantly distances itself from the USSCG which, as mentioned, expressly state that "[t]*he 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*".[40] Furthermore, the approach of the Antitrust Division differs from the one taken by other DOJ Divisions. For instance, as indicated *supra*, the FCPA Guide explicitly recognizes that "*a company's failure to prevent every single violation does not necessarily mean that a particular company's compliance program was not generally effective.* […] *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*".[41]

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[39] SNYDER B., *Compliance is a Culture, Not Just a Policy*, cit. See also BAER B., *Prosecuting Antitrust Crimes*, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium, Washington, DC, 10 September 2014, pp. 1-10; see also HAMMOND S. D., *Agency Update with the Antitrust Division DAAGs*, Comments at the ABA Section of Antitrust Law Spring Meeting, 30 March 2011.

[40] USSCG, §8B2.1 (a). See also U.S. Attorneys' Manual §9-28.800.

[41] FCPA Guide, p. 56. See Press Release, U.S. Dept. of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012) available at http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required, accessed February 5, 2016; Press Release, U.S. Sec. and Exchange Comm., SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud, No. 2012-78 (Apr. 25, 2012) available at https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488702, accessed February 5, 2016.

However, the view of the DOJ is that also ineffective antitrust compliance programs can benefit the company in two ways.

First, pursuant to §8D1.1 of the USSCG the Court shall order a term of probation, *inter alia*, when at the time of sentencing the convicted company does not have adopted and implemented an effective compliance program. Moreover, once a term of probation is imposed, the adoption of an effective compliance program is compulsory.[42] Lacking an effective compliance program, the Antitrust Division then generally seeks terms of probation so as to require the company either to adopt or improve an effective compliance program. As indicated by the Antitrust Division, in this respect, the company's decision to retain culpable individuals who do not accept responsibility for the antitrust infringement in key management positions "*will be considered in deciding whether the company demonstrates a commitment to effective compliance*"[43] since "[i]*t is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management and pricing responsibilities who have refused to accept responsibility for their crimes and who the companies know to be culpable*".[44]

While the USSCG only provide general guidelines as to the features of an effective compliance program and leave up to the companies to decide which kind of compliance program suits their needs best, in the most serious cases[45] the Antitrust Division will seek, in addition to probation, the appointment of a third party

[42] USSCG, §8D1.4 (b) (1).
[43] SNYDER B., *Compliance is a Culture, Not Just a Policy*, cit.
[44] BAER B., *Prosecuting Antitrust Crimes*, cit.
[45] For example cases in which the company refuses to accept responsibility or when the company shows some risks of recidivism, see SNYDER B., *Compliance is a Culture, Not Just a Policy*, cit.

compliance monitor in charge of overseeing the correct adoption and implementation of an effective compliance program by the convicted company.

That was indeed the case for example in U.S. v. AU Optronics Corporation, et al.[46] AU Optronics, its American subsidiary, and a number of senior executives have been convicted for having participated in a long-running price-fixing cartel. The company always refused to accept responsibility for the antitrust infringement, maintaining that price-fixing should be considered legal. Furthermore, it did not have any pre-existing antitrust compliance program, and did not make significant efforts to put one in place after being under investigation. The Antitrust Division considered that "*given the tone from the top executives at the company, any such compliance program could never have been effective*".[47] It thus asked for AU Optronics and its US subsidiary to be placed on probation alongside the appointment of an independent monitor to ensure the adoption and implementation of an effective antitrust compliance program. The Court shared the Antitrust Division's view and ordered a three-year term of probation. In addition, the company was required to hire an independent monitor and to provide the US Probation Office with quarterly reports on the implementation of an effective antitrust compliance program.[48]

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[46] U.S. v. AU Optronics Corporation, et al. case documents available at http://www.justice.gov/atr/case/us-v-au-optronics-corporation-et-al, accessed 6 February, 2016. On the AU Optronics case and its implications as to antitrust compliance programs see TERZAKEN J., ERNST D., *U.S. v. AU Optronics: Lessons for an "Effective" Antitrust Compliance Program*, The Antitrust Counselor, January 2013.

[47] SNYDER B., *Compliance is a Culture, Not Just a Policy*, cit.

[48] Another example is the civil case against Apple and five publishers concerning the retail prices for e-books (see final judgment in case *United States v. Apple, Inc. et al.*, (S.D.N.Y 2012) (No. 12-cv-2826) (Sept. 5, 2013), available at http://www.justice.gov/atr/cases/f300500/300510.pdf, accessed 8 February 2016). While all the five publishers reached a settlement with the Antitrust Division, Apple contested that its conduct did not raise any competitive concern. The Antitrust Division not only obtained an injunction against Apple, but also an order to put in place an effective antitrust compliance program. In order to do so, the Court appointed, at Apple's expenses, an external compliance monitor in charge of evaluating the effectiveness of Apple's compliance policies and training. Furthermore, the external monitor would have worked with a newly hired internal antitrust compliance officer, directly reporting to outside directors. The Court motivated the appointment of an

In light of the above, the adoption of an effective compliance program (or the strengthening of an already existing one) can benefit the company insofar as it may enable the company to avoid probation.

Second, the Antitrust Division has indicated its willingness "*to consider compliance efforts in reaching a fine recommendation in cases where a company makes extraordinary efforts not just to put a compliance program in place but to change the corporate culture that allowed a cartel offense occur*".[49] In this sense, the Antitrust Division, on the one side, reaffirmed its view that pre-existing antitrust compliance programs that failed to prevent the antitrust infringement do not qualify for credit in terms of fine reduction, as they cannot be considered effective antitrust compliance programs within the meaning of the USSCG. By the same token, companies that, after coming under investigation, put into place or improve an antitrust compliance program will not be granted any fine reduction but will (only) be able to avoid probation. On the other side, companies whose compliance efforts go further, reflecting "*genuine efforts to change a company's culture*"[50] will be entitled to receive a consideration in fine calculation.

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external monitor in light of the fact that Apple's senior executives and the in-house counsel were actively involved in the price-fixing. Furthermore, in the Court's view, during the course of the proceedings, Apple did not demonstrate that it had taken the lessons of the litigation seriously. For a comment on the Antitrust Division's approach in the Apple case see BAER B., *Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes*, Remarks as Prepared for the Georgetown Law 7th Annual Global Antitrust Enforcement Symposium, Washington, D.C., 25 September 2013, pp. 1-13.

[49] SNYDER B., *Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?*, Remarks Delivered at the Sixth Annual Chicago Forum on International Antitrust, Chicago, 8 June 2015, pp. 1-6, available at http://www.justice.gov/sites/default/files/atr/legacy/2015/06/30/315474.pdf, accessed 8 February 2015.

[50] Ibid, making reference to a fine reduction granted to Barclays for its compliance efforts within the context of an investigation relating to a collusive conspiracy to manipulate foreign exchange rates.

An example showing such new approach of the Antitrust Division is the Kayaba case, involving a Japan-based manufacturer of car and motorcycles components.[51] The company pleaded guilty to a long-running price-fixing, bid rigging and market allocation agreement. In its Sentencing Memorandum, the Antitrust Division argued for a substantial fine reduction, no probation and no restitution, on the grounds of the company's cooperation as well as the adoption of an effective antitrust compliance program. In the Antitrust Division's view, once the infringement was discovered, Kayaba conceived and implemented a comprehensive and innovative compliance policy, which sought to change the culture of the company to prevent recurrence of the offense. The Antitrust Division positively evaluated a number of characteristics of Kayaba's antitrust compliance program, such as training of senior management and all sales personnel, specific control policies in relation to contacts with competitors, and the establishment of an anonymous hotline to report violations.[52]

That said, it still appears somehow difficult to distinguish between when the company's *ex post* compliance efforts only enable it to avoid probation and when they qualify for a fine reduction. Pursuant to the USSCG, in order to avoid probation an *effective* compliance program must be put in place (*ex novo* or as a result of amendments made to a pre-existing compliance program) consistent with §8B2.1. It does not seem that "*to put into place or nominally improve an antitrust compliance program*"[53] is sufficient, nor compulsory under the USSCG to avoid probation. Only

[51] Case U.S. v. Kayaba Industry Co., Ltd, D/B/A Kyb Corporation, Plea Agreement available at http://www.justice.gov/atr/case-document/file/791911/download, accessed 8 February 2016.
[52] On the Kayaba case, see MCDONALD B. J., FENTON K. M., RENDER P. W., *The U.S. Department of Justice recommends a significantly reduced fine for an auto parts manufacturer accused of bid-rigging and price-fixing* (Kayaba Industry), 5 October 2015, e-Competitions Bulletin October 2015, Art. N° 76181; CONNOLLY R. E., *The US Department of Justice provides guidance for an effective compliance program* (Kayaba Industry), 16 September 2015, e-Competitions Bulletin September 2015, Art. N° 76166.
[53] SNYDER B., *Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?*, cit.

the adoption of an effective antitrust compliance program can enable the company to avoid probation and whatever indications that the company is not truly committed to implement a compliance policy may lead the Antitrust Division to even request the appointment of an external compliance monitor. What are the "extraordinary" efforts that will not only have the company escaping probation, but also secure a fine reduction is still debatable, although valuable indications can be drawn from the Kayaba case.

b. Consideration given to effective antitrust compliance programs in Canada

Back in 1997, the Canadian Competition Bureau ("Bureau") published the first issue of its Corporate Compliance Programs Bulletin ("Bulletin"). Since then, the Bureau has constantly updated the Bulletin in order to provide companies with more guidance as to the importance and the benefits of effective antitrust compliance programs as well as the basic requirements for an antitrust compliance program to be credible and effective.[54] The Bulletin outlines how Canadian businesses can mitigate their risk of running afoul of the legislation enforced by the Bureau, as well as provides guidance about how to develop a credible and effective corporate compliance program. It also includes hypothetical scenarios, for the purpose of

[54] It is worth clarifying that for a compliance program to be credible it must at least demonstrate the company's commitment to conducting business in conformity with antitrust provisions, whereas in order to be effective, it needs to motivate and inform all those acting for the company about their legal duties, the need for compliance with internal policies and procedures, the potential costs to the business of contravening antitrust provisions, and the harm to the Canadian economy caused by contraventions. It also needs to include tools for management to use to prevent and detect contraventions of antitrust provisions, see Bulletin, Preface.

providing greater understanding of the Bureau's approach to certain compliance-related issues.[55]

Canada is indeed one of those countries (or possibly *the* country) at the forefront of granting credit for the implementation of antitrust compliance programs. A pre-existing credible and effective antitrust compliance program can benefit companies not only insofar as it can prevent the occurrence of an antitrust infringement in the first place or can enable the company to apply for immunity, but also as it can mitigate the sanction ultimately imposed on the company.

Indeed, according to the Bureau, a credible and effective antitrust compliance program serves three main purposes:

- to inform businesses of how to minimize antitrust infringements, thereby avoiding the likely penalties and the costs associated in defending against antitrust enforcement;
- to detect at an early stage actions that may represent antitrust violations, thereby allowing the company or individual to be the first-in to request immunity from prosecution or to be better placed to apply for lenient treatment in sentencing. In this regard, credible and effective antitrust compliance programs may also be taken into account by the Bureau in determining whether to pursue a matter along a criminal or civil track, and in assessing the magnitude of administrative monetary penalties; and

[55] PECMAN J., Speech to Borden Ladner Gervais, Toronto, 25 November 2014, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03850.html, accessed 10 February 2016.

- to identify circumstances where the company is potentially being affected by the anti-competitive conduct of other parties.[56]

In so doing, the view of the Bureau is that companies can benefit from adopting and implementing a credible and effective antitrust compliance program in several aspects. Apart from the "traditional" effect of preventing and detecting violations, antitrust compliance program can allow companies, for example, to maintain their reputation (with positive consequences also in terms of hiring and retaining better employees as well as of attracting customers and suppliers), and to qualify for a more favorable treatment in sentencing.[57]

More specifically on this last point, contrary to what happens in the USA, "[c]*onsideration, and therefore the potential benefits, will be greater in most circumstances for a company with a pre-existing credible and effective compliance program, than for a company that waits until it is investigated before implementing or enhancing a program*".[58]

First, as mentioned, a pre-existing antitrust compliance program can enable companies to detect antitrust violations at an early stage, thus allowing the company to apply for immunity or leniency. Within the context of a leniency application, if the Bureau believes that the program in place at the time of the violation was credible and effective will consider it as a mitigating factor in the sentencing recommendations. The Bureau has clarified that such a possibility does not represent a "free-pass" insofar as the Bureau retains full discretion as to the size of the

[56] Competition Bureau, Corporate Compliance Programs Bulletin, 3 June 2015, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html#s2_1, accessed 9 February 2016.
[57] Ibid, Section 2.3.
[58] Ibid, Section 3.1.

recommended reduction in fines. Also, in order to qualify, companies will be required to demonstrate, based on a thorough review, undertaken by the Bureau, that the compliance program in question is in fact credible and effective.[59]

Being the prevention of any infringement the ultimate goal of antitrust compliance programs, the Bureau clarifies that an immunity or leniency applicant may well decide to then implement a new program or to strengthen the existing one so as to prevent reoccurrence of infringement. Moreover, should the Bureau deem it appropriate, it can always recommend that the Public Prosecution Service of Canada ("PPSC") requires the implementation of a credible and effective compliance program as a condition to obtaining a more lenient fining treatment.[60]

Also in civil matters, the Bureau can[61] take into account the existence of a credible and effective antitrust compliance program in order to recommend, for example, a reduced amount of administrative monetary penalties to be imposed on convicted companies.

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[59] PECMAN J., Speech to Borden Ladner Gervais, cit.

[60] Pursuant to Section 3.7 of the Memorandum of Understanding between the Commissioner and the PPSC, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03227.html, accessed 9 February 2016, the recommendation of the Bureau will be communicated to the Senior Deputy Commissioner of Competition for the Cartels and Deceptive Marketing Practices Branch, who is ultimately responsible for making leniency recommendations to the PPSC. The PPSC has ultimate discretion as to whether to accept or reject the Bureau's recommendation, but the Bureau's recommendation is given due consideration by the PPSC. For examples of a Court order involving the adoption of a compliance program see the order issued in 2009 against Saskatchewan Roofing Contractors Association for a bid-rigging conduct carried out by some members, or the orders issued in 2014 against Overseas Container Forwarding and ECU Line Canada Inc. for their participation in a price-fixing cartel, Bureau's Press Releases available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03720.html, and http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03718.html, both accessed 10 February 2016.

[61] According to the Bureau this may be the case, for instance, "*where there is evidence that the activity is contrary to a business' policies and the statements of its management, that those committing the contravention took steps to avoid detection from management, and that the conduct was terminated and disciplinary action was taken as soon as it became known to management*", Bulletin, Section 3.2.1.

Moreover, there are instances where the Bureau can decide to pursue a matter either criminally or civilly (e.g., false or misleading representations and deceptive marketing practices). In taking such decision, the Bureau will consider, *inter alia*, the pre-existence of a credible and effective antitrust compliance program.

Finally, credible and effective compliance programs are of some significance as to the availability of consent agreements[62] or other alternative case resolutions ("ACR"). While the existence at the time of the infringement of a compliance program is not a prerequisite for a consent agreement or a ACR, the Bureau indicates that it will be more inclined to consider settlements where the company can demonstrate, amongst other,[63] that the conduct was contrary to a pre-existing credible and effective antitrust compliance program. In other words, if a company already had in place at the time of the infringement a credible and effective compliance program it may increase its possibilities to benefit from a consent agreement or an ACR. This obviously does not exclude that if the Bureau is persuaded not to litigate a case, but a credible and effective compliance program is not in place, it can require the company to implement a credible and effective compliance program in accordance with the guidelines provided in the Bulletin.[64]

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[62] For example, the Canadian Competition Act allows for the registration of a consent agreement with the Competition Tribunal under Section 105 to address civil reviewable matters under Part VIII. Similarly, a consent agreement may be registered with a Court under Section 74.12. Section 34 provides that a Court may, on application of the Attorney General of Canada, issue a consent prohibition order with or without an admission of guilt.

[63] Section 3.2.4 of the Bulletin lists the following as other factors that can positively influence the Bureau's decision to avoid litigation: (i) the company terminated the conduct as soon as it was detected, (ii) the company voluntary approached the Bureau, (iii) the company attempted to remedy the adverse effects of the conduct, (iv) the conduct occurred at a lower level in the business, (v) disciplinary action was taken by the company against the employee who engaged in the conduct, and (vi) the conduct was not carried out or endorsed by management.

[64] Ibid. See the consent agreement reached in October 2015 between the Bureau and Direct Energy Marketing Limited concerning conduct of abuse of market dominance where the company agreed to pay a $1 million fine, and committed to establish and maintain a corporate compliance program in the event of re-entering the market, the consent agreement is available at http://www.ct-

As a concluding remark, it is worth noting that it cannot be excluded that the (formal) existence of a compliance program is considered as an aggravating factor. This may be the case, for instance, when one or more managers of the company participated in the infringement (or deliberately ignored the conduct). In these cases, the Bureau may believe that the company is not seriously committed to compliance and the program not only was neither credible nor effective, but also represents an aggravating factor.[65]

c. Consideration given to effective antitrust compliance programs in Europe

The approach of the European Commission could be resumed in the statement: "[w]*hen it comes to taking practical steps to ensure compliance, companies should keep in mind that their efforts will be assessed on the basis of results, in other words they will be judged by their success in avoiding infringements*".[66]

Indeed, the European Commission has traditionally refused to recognize companies any credit for antitrust compliance programs adopted either before or after occurrence of the infringement.[67] The ultimate purpose of antitrust compliance

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tc.gc.ca/CMFiles/CT-2012-003_Registered%20Consent%20Agreement_127_38_10-30-2015_8295.pdf, accessed 9 February 2016.

[65] Ibid, Section 3.2.5, indicating that the company may always demonstrate that the managers acted alone and hid the conduct from others in the company.

[66] European Commission, Compliance Matters, What companies can do better to respect EU competition rules, 2012.

[67] Only in its early practice concerning anticompetitive vertical agreements and abuses of dominance, the European Commission has considered in a limited number of cases the adoption of *ex post* antitrust compliance programs as a mitigating factor or as an element indicating that the infringement had already stopped at the time of the decision so that there was no need to order its termination, see European Commission decisions of 7 December 1982, National Panasonic, [1982] OJ L354/28, para 68-69, of 14 December 1984, John Deere, [1985] OJ L35/58, of 16 December 1985, Sperry New Holland,

programs being the prevention of any antitrust infringement, companies can expect no fining consideration for having put in place a compliance program since the latter did not prevent them from infringing antitrust provisions.[68]

However, the European Commission welcomes and encourages compliance efforts adopted by companies "*as they contribute to the firm rooting of a truly competitive culture in all sectors of the European economy*"[69] and provided some guidelines as to the characteristics an antitrust compliance program should have in order to effectively ensure compliance. By conveying the idea that antitrust compliance programs need to be tailor-made to the company, so that no one-size-fits-all model of antitrust compliance program exists, the European Commission has nevertheless always refrained from formally advising or approving any specific antitrust compliance program.

From a general perspective, the European Commission identifies three main benefits of compliance, namely enhancing a company's reputation and attractiveness for promotional and recruitment purposes, avoiding the huge costs arising from non-compliance with competition rules, and potentially benefiting from coming forward with the European Commission as a leniency applicant in case an infringement is uncovered. In this sense, the European Commission pointed out that, when it comes

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[1985] OJ L376/21, of 18 December 1987, Fisher-Price/Quaker Oats – Toyco, [1988] OJ L49/19, of 22 December 1987, Eurofix-Bauco/Hilti, [1988] OJ L65/19, (although not explicitly stated in the published text of the decision) of 18 July 1988, British Sugar, [1988] OJ L284/41, of 5 June 1991, Viho/Toshiba, [1991] OJ L287/39, and of 15 July 1992, Viho/Parker Pen, [1992] OJ L233/27.

[68] See ALMUNIA J., *Cartels: the priority in competition enforcement*, 15th International Conference on Competition: A Spotlight on Cartel Prosecution, Berlin, 14 April 2011, available at http://europa.eu/rapid/press-release_SPEECH-11-268_en.htm?locale=en, accessed 11 February 2016, where the Commissioner for Competition stated that "*a company involved in a cartel should not expect a reward from us for setting up a compliance programme, because that would be a failed programme by definition*".

[69] European Commission, Compliance Matters, cit.

to fines, companies can only be rewarded if they help the European Commission in uncovering cartels, they cooperate within the context of the investigation or they had a limited role in the conspiracy.[70]

As indicated, the adoption of an antitrust compliance program either before or after the occurrence of the infringement, will not allow the company to obtain any fine reduction, let alone immunity, in case of investigation. The only benefits that a company can get in terms of fine reduction are represented by the possibility (i) to detect and stop the violation in a timely manner (thus reducing the duration of the infringement for fine calculation purposes)[71] and (ii) to apply for immunity or a fine reduction under the leniency program. By the same token, the existence of an antitrust compliance program will not account as an aggravating circumstance in fine calculation.[72]

The EU Courts have upheld the European Commission's view by stating that "*although it was important that* [the company] *had taken measures to prevent future infringements of Community competition law by its personnel, that fact did not alter the reality of the infringement found in the present case*"[73], so that "*the adoption of a compliance programme by the undertaking concerned does not oblige the Commission to grant a*

[70] ALMUNIA J., *Compliance and Competition Policy*, Remarks at the Businesseurope & US Chamber of Commerce Conference, 25 October 2010, available at http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm, accessed 11 February 2016.
[71] See European Commission decision of 5 December 2001, Interbrew and Alken-Maes, [2003] OJ L200/1, para 291-292.
[72] However, see European Commission decision of 14 October 1998, British Sugar, [1999] OJ L76/1, where the European Commission maintained that the fact that British Sugar acted in blatant violation of its antitrust compliance program had to be taken into account as an aggravating factor; in this regard, the European Commission pointed out that the introduction of the very same antitrust compliance program had enabled British Sugar to obtain a fine reduction in a previous investigation (see decision of 18 July 1988, cited under note 62), para 208.
[73] Court of Justice, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri et al./Commission, 2005 I-05425, para 373, see also General Court, casse T-53/06, UPM-Kymmene/Commission

reduction in the fine on that account"[74]. In this sense, "*whilst it is important that an undertaking take steps to prevent fresh infringements of EU competition law from being committed in the future by members of its staff, the taking of such steps does not alter the fact that an infringement has been committed. The Commission is not, therefore, bound to consider such a factor as a mitigating circumstance, all the more so when the infringements found in the contested decision are, as in the present case, a clear infringement of Article* [101 TFEU]"[75].

While the approach of the EU Courts has been consistent in denying any consideration to antitrust compliance programs, irrespective of the antitrust violation at hand, Advocate General Kokott appeared somehow less strict by hinting to a possible different treatment in case of less serious infringements. As she observed in the opinion given in the Shindler case, "[i]*t may be that a compliance programme cannot reasonably prevent every minor infringement of the law. Nevertheless, a compliance programme which 'functions' must be capable of effectively preventing serious, long-term cartel offences and of uncovering and promptly rectifying any infringements of the law committed*".[76]

d. Consideration given to effective antitrust compliance programs in the UK

The Office of Fair Trading (now Competition and Markets Authority) has been traditionally open to favorably consider antitrust compliance program as a fine

[74] General Court, joined cases T-101/05 and T-111/05, BASF AG and UCB SA/Commission, 2007 II-04949, para 52; see also General Court, case T-15/02 BASF/Commission, 2006 ECR II‑497, para 266-267.
[75] General Court, case T-138/07, Schindler Holding Ltd et al./Commission, 2011 II-04819, para 282, upheld by the Court of Justice, Case C‑501/11 P, Schindler Holding Ltd et al./Commission.
[76] Court of Justice, Case C‑501/11 P, Schindler Holding Ltd et al./Commission, Opinion of Advocate General Kokott, para 99.

mitigating factor, without drawing a distinction between compliance programs adopted before the occurrence of the infringement and those adopted in the wake of the investigation.

As early as 2004, the OFT published its first guidelines on how businesses can achieve compliance with competition law and indicated that the adoption and implementation of an effective compliance program could have resulted in a fine reduction up to 10%. In 2010, in order to make the most efficient use of the resources at its disposal so as to achieve compliance with competition law to the widest extent possible, the OFT carried out a research into the drivers of compliance and non-compliance with competition law. The aim of the OFT was to learn what motivated businesses to comply with competition law and to get a better understanding of what businesses had found worked well in practice to achieve this. Following this research, in 2011, the OFT published a revised version of its guidelines on competition law compliance. The Guidelines, which have been adopted by the CMA Board, illustrate the main features of what is considered to be an effective antitrust compliance program, by describing the OFT's suggested four-step process for achieving a competition law compliance culture.[77]

As to the impact of antitrust compliance programs on fines, the Guidelines, which have to be read in conjunction with OFT's Guidance as to the Appropriate Amount of the Penalty,[78] clarify that not every compliance program will suffice for a fine reduction. Indeed, companies will get a fine reduction up to 10% "*only where adequate*

[77] OFT, How your business can achieve compliance with competition law, June 2011, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf, accessed 12 February 2016.
[78] OFT, Guidance as to the appropriate amount of a penalty, September 2012, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf, accessed 17 September 2016.

steps have been taken with a view to ensuring compliance with [EU and UK competition law]".[79] In this regard, the four-step process is not binding and companies can take reasonably equivalent "adequate steps".[80] Furthermore, these can take place either before the infringement or quickly following the business first becoming aware of the potential competition infringement.[81]

The Guidelines point out that for a fine reduction to be granted, businesses shall adduce evidence of adequate steps having been taken in relation to: (i) achieving a clear and unambiguous commitment to competition law throughout the organization, (ii) risk identification, (iii) risk assessment, (iv) risk mitigation, and (v) review. Also, the above steps shall be appropriate with regard to the size of the business concerned and its overall level of competition law risk. In addition, the Guidelines on Penalties require the business to present evidence on the steps it took to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation.[82] Being defined the maximum limit of the fine reduction, its exact amount will be determined on a case-by-case basis, also having regard to the steps taken by the business following discovery of the infringement.[83]

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[79] OFT, How your business can achieve compliance with competition law, cit., point 7.2.

[80] The Guidelines on Penalties indicate that "*the mere existence of compliance activities will not be treated as a mitigating factor. However, in an individual case, evidence of adequate steps having been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation (from the top down) – together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities – will likely be treated as a mitigating factor*", point 2.15, note 26.

[81] OFT, How your business can achieve compliance with competition law, cit., point 7.2.

[82] Guidelines on Penalties, point 2.15, note 26. See Case CE/9627/12, Investigation into the supply of healthcare products, where the OFT increased the fine reduction granted to Hamsard Limited up to 10% in light of the company's efforts to improve its existing compliance program.

[83] OFT, How your business can achieve compliance with competition law, cit., point 7.4. See for instance Case CE/9784-13, Conduct in the ophthalmology sector, available at https://assets.digital.cabinet-office.gov.uk/media/55d5989f40f0b609ff000009/Conduct_in_the_ophthalmology_sector_decision_v2.pdf, accessed 13 February 2016, points 5.50-5.52, where the CMA granted a 10% fine reduction in light of the adequate steps taken by CESP (an association of undertaking in the eye medical treatment sector) with a view to ensuring future compliance, namely the adoption of an organization-wide competition law compliance program, to which the CESP board had fully and publicly committed,

Antitrust compliance programs will not be considered as aggravating factors unless under exceptional circumstances, such as where the purported compliance program had been used to facilitate the infringement, to mislead the OFT as to the existence or nature of the infringement, or had been used in an attempt to conceal the infringement.[84]

The OFT's approach in recognizing credit to companies for having implemented an effective antitrust compliance program has been upheld by the Competition Appeals Tribunal, which stated that "*the decision-maker should in our view take such a* [compliance] *programme into account in assessing any deterrent element in the penalty*".[85]

To conclude, a different, yet connected, fine-related aspect where antitrust compliance program are taken into account is Company Director Disqualification Orders ("CDO"). CDOs have been introduced by the UK Enterprise Act of 2002[86] as additional tools to foster compliance by individuals.[87] Pursuant to section 204 of the Enterprise Act, following an application by the OFT, a director of a company having infringed EU or UK competition law can be disbarred from office for a period of up to 15 years if the Court considers that his conduct as a director makes him unfit to be

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which was based on a thorough risk assessment and envisaged a comprehensive risk mitigation strategy. In addition to the characteristics of the compliance program, the CMA also valued that CESP's commitment to compliance sets a good example for other membership organizations in the medical professions; see also the Property sales and lettings investigation, where a 5% fine reduction was granted in light of the adoption of an antitrust compliance program,

[84] Ibid, point 7.5. See also MARRIOTT A., *Damned either way, Compliance programmes under the spotlight*, Competition Law Insight, 21 September 2010, pp. 1-3.

[85] *Kier and others v Office of Fair Trading* [2011] CAT 3 para. 217; see also *Eden Brown and others v Office of Fair Trading*, [2011] CAT 8 at para. 127.

[86] In particular by amending section 9A of the Company Directors Disqualification Act 1986.

[87] WHISH R., BAILEY D., *Competition Law*, 7th edition, Oxford, 2012; RAB S., STEMPLER I., *Competition and Corruption, UK and EU competition rules and the new UK bribery legislation share common goals and features*, Competition Law Insight, 5 January 2012, pp. 1-3.

concerned in the management of a company. In deciding whether a CDO is appropriate, the High Court will assess if the director directly contributed to the infringement, or he had reasonable grounds to suspect that the conduct of the undertaking constituted a breach and he took no steps to prevent it, or he did not know but ought to have known that the conduct of the undertaking constituted a breach.

In 2011, the OFT published a guidance document intended to provide guidance to directors as to their responsibilities under competition law.[88] In its guidance document, the OFT indicates that in deciding whether to seek a CDO it will take into account the individual director's level of commitment to competition law compliance and the steps he/she took to prevent, detect and bring to an end infringements of competition law by the company. By stressing such a direct link between corporate compliance and CDOs, the OFT created a direct individual incentive for directors to be committed to ensuring that their company has an effective competition law compliance culture.[89]

e. Consideration given to effective antitrust compliance programs in France

Pursuant to Section III of Article L. 464-2 of the Commercial Code,[90] a company accepting not to challenge the statement of objections[91] issued by the French

[88] OFT, Company directors and competition law, June 2011, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284410/oft1340.pdf, accessed 13 February 2016.
[89] Ibid, point 2.10.
[90] Introduced by Article 73 of Law No. 2001-420 of 15 May 2001 relating to New Economic Regulations and amended by Article 2 of Ordinance No.2008-1161 of 13 November 2008 for the Modernization of Competition Regulation.

Competition Authority ("Autorité") can obtain an additional fine reduction if it undertakes to set up measures aiming at preventing the future occurrence of other antitrust infringements, such as corporate compliance programs which prove to be relevant, trustworthy and verifiable.[92]

In 2012, the Autorité published a framework-document order to provide more guidance as to its approach in relation to antitrust compliance programs, also with specific regard to their characteristics for the purposes of benefiting from this additional fine reduction.[93]

The Autorité considers that effective compliance programs, on the one side, prevent the risk of committing infringements and, on the other side, provide the means of detecting and handling misconducts that have not been avoided in the first place. In other words, antitrust compliance programs can benefit companies by either avoiding infringement or enabling the company to immediately put the conduct to an end and deciding how to react (e.g., whether to apply for leniency).

This also means that, contrary to the approach of other competition authorities, the Autorité believes that the mere occurrence of an infringement does not imply that the compliance program is ineffective in itself. However, the Autorité acknowledges the

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[91] Autorité de la Concurrence, Notice of 10 February 2012 on Settlement procedures, available at http://www.autoritedelaconcurrence.fr/doc/communique_ncg_10fevrier2012.pdf, accessed 13 February 2016.

[92] Autorité de la Concurrence, Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties, available at http://www.autoritedelaconcurrence.fr/doc/notice_antitrust_penalties_16may2011_en.pdf, accessed 13 February 2016.

[93] Autorité de la Concurrence, Framework-Document of 10 February 2012 on Antitrust Compliance Programmes, available at http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf , accessed 13 February 2016.

EU Courts' position that the mere existence of an antitrust program does not affect the objective reality of the infringement.[94] Hence, the Autorité clarifies that the mere existence of an antitrust compliance program "*should not be taken into consideration in itself when making an individual decision on the amount of the financial penalty to be imposed, insofar as it did not prevent the occurrence of the infringement*".[95]

On the other hand, antitrust compliance programs fulfilling the requirements indicated by the Autorité might benefit the company in terms of fine reduction. The Autorité goes as far as stating that if, by means of an antitrust compliance program, a company uncovers the existence of a cartel, it has to immediately cease the conduct and apply for leniency as this is "*the action that is the most consistent with an ethical commitment with respect to compliance*".[96] In the event the discovered antitrust infringement does not qualify for leniency,[97] the company has to cease and redress the misconduct immediately. If then the Autorité launches an investigation and the undertaking can prove, based on objective and verifiable evidence, that it has ceased and redressed the practice on its own before any inspection or investigation is conducted, such a circumstance may be considered a mitigating circumstance.[98]

As mentioned, companies can offer the adoption or strengthening of an antitrust compliance program as a form of commitment within the context of the settlement

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[94] See case law mentioned under note 68 above.
[95] Autorité de la Concurrence, Framework-Document of 10 February 2012, cit. para 25.
[96] Ibid, para 27.
[97] According to Article L. 420-1 of the Commercial Code and Autorité's Procedural Notice relating to the French Leniency Programme issued on March 2nd, 2009, available at http://www.autoritedelaconcurrence.fr/doc/cpro_clemence_uk_2_mars_2009.pdf, accessed 14 February 2016, the French Leniency Program covers cartels between undertakings consisting in the fixing of prices, the allocation of production or sales quotas or the sharing of markets, including bid-rigging, or any other similar anticompetitive behavior between competitors.
[98] Autorité de la Concurrence, Framework-Document of 10 February 2012, cit., para 28.

procedure.[99] In particular, if after having been issued with a statement of objection the company still does not have a compliance program, it can commit not to contest the statement of objections and to adopt and implement a compliance program in line with the requirements indicated by the Autorité. If before the issuance of a statement of objections, the company already has a compliance program, although not meeting the requirements indicated by the Autorité, it can commit not to contest the statement of objections and to improve the program. As a result of such commitments, companies can benefit for a fine reduction by up to 10%, to which other reductions available under the settlement procedure may be added.[100]

Finally, the Autorité will not consider the existence of an antitrust compliance program as an aggravating factor, even if corporate officials and managers participated in the infringement notwithstanding their formal commitment to antitrust compliance arising from the corporate compliance program.

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[99] Please note that the settlement procedure has been introduced by the so-called Macron Law of 10 July 2015. The newly introduced settlement procedure replaced the former procedure under which a company could benefit from a fine reduction in exchange for not challenging the statement of objections. For the purposes of the present discussion, there is no need to distinguish between the two procedures.

[100] Ibid, para 29-31. See for instance cases 13-D-03, decision of 13 February 2013, available at http://www.autoritedelaconcurrence.fr/pdf/avis/13d03.pdf, English press release available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=483&id_article=2035, 12-D-10, decision of 20 March 2012, available at http://www.autoritedelaconcurrence.fr/pdf/avis/12d10.pdf, English press release available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1826, 11-D-07, decision of 24 February 2011, available at http://www.autoritedelaconcurrence.fr/pdf/avis/11d07.pdf, English press release available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1557, 11-D-02, decision of 26 January 2011, available at http://www.autoritedelaconcurrence.fr/pdf/avis/11d02.pdf, English press release available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1548, 10-D-39, decision of 22 December 2010, available at http://www.autoritedelaconcurrence.fr/pdf/avis/10d39.pdf, English press release available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=368&id_article=1522, all links accessed 14 February 2016.

f. Consideration given to effective antitrust compliance programs in Italy

Following years of somehow blurred practice on fines calculation, in October 2014 the Italian competition authority ("ICA") published its much welcome first guidelines on the setting of fines ("Guidelines").[101]

Being transparency and predictability key elements to any deterrent fining policy, the Guidelines illustrate the method followed by the ICA in setting fines, also with reference to the weight attributed to mitigating and aggravating factors.

Point 23 of the Guidelines formally recognizes the adoption of an antitrust compliance program as a mitigating factor, for which a fine reduction up to 15% can be applied.

In particular, while the mere existence of a compliance program will not be sufficient, the Guidelines indicate a number of characteristics of antitrust compliance programs, whose implementation should enable the company to obtain a fine reduction. These elements are not dissimilar to those promoted by other competition authorities. According to the ICA, by implementing these elements, companies should provide

[101] Italian Competition Authority, Guidelines on the methods of setting fines, available at http://www.agcm.it/component/joomdoc/normativa/concorrenza/Linee_guida_criteri_quantificazione_sanzioni.pdf/download.html, accessed 15 February 2016. On the Guidelines see, ex multis, GHEZZI F., PINI G.D., *The Italian Guidelines on the method of setting fines. A (half) step towards transparency and deterrence*, Osservatorio del Diritto Civile e Commerciale, 2016, pp. 297-328; AMMASSARI F., *Guidelines on the method of setting fines for infringements of competition rules: key issues*, in Rivista italiana antitrust, 3/2014, pp. 231-234. See also NASCINBENE L., BARDANZELLU A., *Linee Guida dell'AGCM sui criteri di quantificazione delle sanzioni antitrust, Buona la prima (o quasi)*, in Mercato Concorrenza e Regole, 3/2015, pp. 485-512; TETI E., RAFFAELLI A., L*e nuove Linee Guida dell'AGCM in materia di Sanzioni: I programmi di compliance adottati dalle imprese saranno valutati come circostanze attenuanti*, TelexAnie, N. 11/12, Anno XIX, novembre-dicembre 2014, pp. 3-12.

"*solid and credible proofs of a true and strong commitment to respect what is foreseen in that program*".[102]

The Guidelines do not clarify whether only programs adopted following the occurrence of the infringement and/or in the wake of the investigation, or also already existing programs (possibly improved following the infringement), qualify for the fine reduction.[103] However, the most recent case-law developed so far sheds a light on this issue.

Indications as to the scope and content of this mitigating factor can be drawn from some speeches of ICA's officials, as well as from the limited number of cases where the applicability of this provision has been so far questioned by the companies.

In theory, the mitigating effect should not be limited to antitrust compliance programs adopted after the violation. The ICA has indeed emphasized the importance of rewarding the significant costs involved in the structuring and implementation of preventive compliance programs.[104] However, in the last case to date in which the ICA has considered antitrust compliance programs as mitigating factors,[105] the ICA took a clear stand arguing that the fact that the company infringed

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[102] PEZZOLI A., *Fines, Discounts, Compliance Programs and Competition Culture*, Remarks made at Antitrust Compliance Programs: Status Quo and Challenges Ahead, Fiesole, 26 June 2016, available at http://www.eui.eu/Projects/ENTRANCE/Documents/entrance2015/ComplianceWorkshop/AndreaPezzoliAgcm.pdf, accessed 15 February 2016.

[103] Several respondents to the public consultation on the draft Guidelines raised this point, the comments received are available at http://www.agcm.it/concorrenza--intesa-e-abusi/linee-guida-sanzioni/107-concorrenza/intese-e-abusi/7297-contributi-alla-consultazione-pubblica-contributi-alla-consultazione-pubblica.html, accessed 15 February 2016.

[104] PEZZOLI A., *Fines, Discounts, Compliance Programs and Competition Culture*, cit., where the ICA's Director General for Competition stated that "[t]*he "preventive approach" will be durable and sustainable over time only if the authorities won't have an attitude of "skeptical rejection" about it. The Guidelines go in this direction, providing a reasonable degree of certainty for the reduction of sanctions for the firms that adopt and implement rigorous compliance programs*".

[105] Case I792 – Gare Ossigenoterapia e ventiloterapia, decision of 21 December 2016, in Bull.2/2017.

competition law, notwithstanding the adoption of an antitrust compliance program, demonstrates that the program was *per se* ineffective.[106] Such curt point of view is somehow mitigated by the fact that the ICA has also recognized that companies already having antitrust compliance programs in place before the occurring of the infringement could still benefit from a fine reduction, provided that they improve the program after the beginning of the investigation.[107]

So far, the ICA has applied this mitigating factor only in six cases. In a cartel investigation concerning the market for concrete in the north of Italy,[108] two companies obtained a 5% fine reduction for having adopted and implemented effective antitrust compliance programs. Both programs were adopted after the beginning of the investigation, but before the sending of the ICA's statement of objections. Within the context of the same investigation, the ICA refused to recognize analogous fine reductions to other companies that merely indicated their intention to adopt compliance programs, without demonstrating adequate implementation of the programs (e.g., the actual delivery of trainings). Indeed, the lack of sufficient proof as to the implementation of the compliance program and the company's commitment towards antitrust compliance appears to be the main motivation for the ICA's decision to refuse the application of the mitigating factor in other two cases.[109]

The ICA applied the fine reduction in another cartel investigation concerning the banking sector in the north of Italy.[110] In particular, the ICA granted to several banks

[106] Ibidem, para. 426-427, 506, 582-583.
[107] But before the sending of the ICA's statement of objections.
[108] Case I780 - Mercato del Calcestruzzo in Veneto, decision of 22 December 2015, in Bull. 49/2015.
[109] Cases I772 - Mercato del Calcestruzzo Friuli Venezia Giulia, decision of 25 March 2015, in Bull. 12/2015; I761 - Mercato dei Servizi Tecnici Accessori, decision of 16 December 2015, in Bull. 47/2015.
[110] Case I777 - Tassi sui mutui nelle Province di Bolzano e Trento, decision of 24 February 2016, in Bull. 6/2016.

a 10% reduction for the adoption of compliance programs after the beginning of the investigation (but before the sending of the statement of objections). According to the ICA's decision, the compliance programs provided for the adoption of a Code of Conduct, the delivery of trainings for the companies' top management, as well as the setting up of internal monitoring procedures and incentives aiming at preventing the occurrence of antitrust infringements.

The third decision[111] where the ICA recognized a fine reduction on grounds of the adoption and implementation of an effective compliance program offers some further indications as to the requirements of this new mitigating factor. In this case, concerning a cartel in the vending machine sector, the ICA granted a 10% fine reduction to five companies for having adopted and implemented, following the opening of the investigation, but before the sending of the statement of objections,[112] effective compliance programs. While this decision further consolidates the view that antitrust compliance programs need to be adopted and implemented[113] before the sending of the statement of objections for the company to benefit from the mitigating circumstance, it also provides some useful insights as to what might constitute an effective compliance program. In particular, the ICA praised the fact that all compliance programs adopted by the five companies provided for (i) a direct involvement of the management, (ii) the appointment of sufficiently high personnel in charge of the implementation and monitoring of the program, (iii) the delivery of

[111] Case I783 - Accordo tra Operatori del Settore Vending, decision of 8 June 2016, in Bull. 21/2016.
[112] Indeed, two other companies argued for the applicability of the fine mitigating circumstance, but the ICA ruled in the negative stressing that those compliance programs where adopted after the sending of the statement of objections so that the effectiveness of their implementation could not be assessed by the ICA. Besides, the ICA stated that these companies did not provide enough evidence as to the implementation of their compliance programs.
[113] For this purposes, it seems important to demonstrate that trainings have already been delivered and/or a compliance code of conduct or manual distributed to employees before the sending of the statement of objections.

trainings, (iv) the provision of specific incentives and disincentives, and (v) mechanism of monitoring and audit.[114]

A more recent decision where this mitigating factor was applied by the ICA concerned an abuse of dominance case, in the form of excessive pricing.[115] While the decision does not offer new insights as to the content of an effective program,[116] the case is of particular interest due to the fact that for the first time the ICA had been faced with an *ex ante* compliance program. In this case, the ICA granted a [5-10%] fine reduction noting that "*notwithstanding the adoption of the compliance program before the beginning of the investigation, the fact that the scope of the program was widened in May 2015*[117] [i.e., during the investigation] *as well as the peculiarities of such exploitative abuse, enable the ICA to grant a fine reduction anyway*".[118] Unfortunately, in this occasion the ICA did not take a clear stance as to the effectiveness of compliance programs implemented before the occurrence of the infringement. Furthermore, the wording used by the ICA, as translated above, could somehow imply that the conclusions reached in this case as to the effectiveness of an *ex ante* compliance program cannot be generalized as they reflect the specificities of the case at hand, in which the program was strengthened following the beginning of the investigation.

[114] Other features of the programs which have been considered effective include (i) the provision of an internal whistleblowing mechanism, (ii) the adoption of disciplinary measures in case of antitrust violations, and (iii) the integration of the antitrust compliance program within the Model pursuant to LD 231.

[115] Case A480 – Incremento Prezzi Farmaci Aspen, decision of 29 September 2015, in Bull. 36/2016.

[116] The ICA merely stated that the program included (i) the involvement of the management, (ii) the identification of the personnel in charge with the implementation of the program, (iii) the delivery of trainings, (iv) monitoring and audit.

[117] In particular, trainings have been updated so as to take into account both the requirements of the different countries in which the Aspen group operates, as well as the specific risks of the business areas.

[118] Ibidem, para. 400.

The subsequent case[119] in which this migrating factor was applied offers no new understanding of the requirements of an effective compliance program. The ICA granted a 5% fine reduction to six model agencies and their trade association involved in a price fixing cartel for having carried out, before the sending of the statement of objections, an antitrust training and having adopted a compliance program. It might be worth noting that the trade association made the attendance to an antitrust training as well as the adoption of an antitrust compliance program[120] compulsory in order to qualify as member of the association. Furthermore, the exchange of commercially sensitive information was included as a cause for exclusion from the association.

As indicated above, the ICA has finally clarified the approach towards *ex ante* compliance programs in its most recent case.[121] Indeed, in a bid rigging investigation against the main players active in the oxygen therapy sector the ICA clearly indicated that *ex ante* compliance programs which did not prevent the occurrence of the infringement are *per se* ineffective. However, the ICA made a distinction amongst companies already having implemented compliance programs by recognizing a 5% fine reduction only to those companies that had improved and updated their programs following the beginning of the investigation (but before the statement of objections).

What could be inferred from this decision is that companies willing to adopt and implement an antitrust compliance program should bear in mind that for fine

[119] Case I789 – Agenzie di modelle, decision of 26 October 2016, in Bull. 40/2016.
[120] For this purposes, the trade association provided its member with a standard compliance program which could be used as a model.
[121] Case I792 – Gare Ossigenoterapia e ventiloterapia, cit.

mitigating purposes it could prove advisable to improve the program in the event of an investigation being initiated against them at a later stage.

Finally, it seems that when the top management of the company (e.g., CEO, Board members, Senior managers) is involved in the violation, the ICA will be more reluctant to recognize any mitigating effect to a pre-existing antitrust compliance program.[122]

From a different perspective, the adoption of antitrust compliance programs has also been appreciated[123] by the ICA as part of commitments offered under Art. 14ter of Law No. 287/90 ("Italian Competition Law")[124]. In an abuse of dominance case involving the Italian Stock Exchange and one controlled company active in the financial information services market, the ICA closed the investigation without findings of infringement by accepting the commitments offered by the companies which included, *inter alia*, the adoption of a number of behavioral measures whose implementation and observance was also guaranteed through the adoption of an *ad hoc* compliance program.[125]

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[122] PEZZOLI A., *Fines, Discounts, Compliance Programs and Competition Culture*, cit.

[123] Case A482 – E-Class/Borsa Italiana, decision of 23 September 2015, in Bull. 35/2015.

[124] Article 14ter of Law No. 287/90 mirrors Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003") since it empowers the ICA, following the opening of an investigation for an alleged breach of Articles 101/102 TFEU or 2/3 of the Italian Competition Law to accept and make binding commitments offered by a company if these appropriately address the ICA's antitrust concerns.

[125] In particular, the program had all the features usually taken into account by the ICA as it provided (i) a top-down commitment to compliance, (ii) the written confirmation by the employees of having understood the content of the program and of their commitment to comply, (iii) the adoption of disciplinary measures in case of non-compliance with the program, and (iv) the delivery of trainings at least once a year.

g. Effective antitrust compliance programs in other countries

Several other jurisdictions have decided over the years to encourage antitrust compliance by providing for fine reductions for the existence or implementation of compliance programs.

In some cases, the authorities have done so by including new provisions in their guidelines on fines or by issuing specific guidelines on compliance programs. For example, the Competition Commission of India issued in 2011 a booklet on compliance programs,[126] illustrating the main features a compliance program should have and providing practical suggestions as to its structuring and implementation. The booklet also indicates that "[t]*he existence of a strong Compliance Programme reflecting the eagerness of the management to comply may temper the severity of the punishment that may be meted out for violation*" and in particular it "[h]*elps avoid fines or mitigate the level of the fine*".

The Competition Commission of Singapore has instead included specific provisions in its Guidelines on the Appropriate Amount of Penalty, stating that antitrust compliance programs, provided that they fulfill a number of requirements, can qualify as mitigating factor.[127]

Also, it is worth mentioning the Romanian Competition Council, which, as of December 2011, may grant a fine reduction of up to 10% of the basic level to

[126] Competition Commission of India, Competition Compliance Programme for Enterprise, available at http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf, accessed 17 February 2016.
[127] Competition Commission of Singapore, Guidelines on the Appropriate Amount of Penalty, para 2.12-2.13, available at https://www.ccs.gov.sg/legislation/~/media/custom/ccs/files/legislation/ccs%20guidelines/ccsguidelinepenalty20071033.ashx, accessed 17 February 2016.

companies having adopted and implemented an effective compliance program as well as the Brazilian CADE, which recognizes that effective compliance programs could be taken into consideration in the analysis of the defendant's good faith at sentencing.[128]

Following a public consultation launched in 2015, on 4 May 2016 CADE published its guidelines on the structuring and benefits of adopting competition compliance programs.[129] The guidelines clarify that "*the mere existence of compliance programs is not sufficient to hinder the application of administrative penalties, which include potentially substantial fines*". However, the existence of a strong compliance program, may be considered evidence of good faith on the part of the infringing company and of the reduction of the negative economic effects derived from the unlawful practice.

[128] Pursuant to Art. 45 of Law No. 12.529/2011.
[129] Available at http://en.cade.gov.br/topics/publications/guidelines/compliance-guidelines-final-version.pdf/view, consulted on 4 September 2016.

PART II

A. The main features of effective antitrust compliance programs

As anticipated, despite some differences in the approach taken, almost all authorities share the view that not every compliance program should be rewarded nor encouraged. Drawing from the experience in other field of corporate compliance, competition authorities have identified a number of features representing the core elements of an antitrust compliance program, although most authorities are sometimes reluctant to be overly prescriptive as to the requirements of an antitrust compliance program.

That said, those authorities that recognize a fine mitigating effect to antitrust compliance programs consider these features as the essential elements an antitrust compliance program needs to have in order to be considered effective for fine reduction purposes. In this sense, it is worth recalling that the idea here is that effective does not mean that the program is capable of preventing all infringements. Effective means that the efforts put by the company in designing, implementing and monitoring a program with such characteristics account for the company benefiting from a fine reduction in the event of an antitrust infringement being committed and sanctioned despite the program.

a. Top-down commitment to compliance

The prerequisite of any effective compliance program is that it represents the result of the top management's true commitment to compliance. For a program to be

effective, it is essential that antitrust compliance is spread at all company levels.[130] All managers first need to be clearly aware that to comply with competition law is in the company's interest, so that they will then pass the message on to their staff.[131] The reason is quite obvious, if an area manager does not clearly explain to his sales agents that antitrust compliance is of the utmost importance for the company, they could feel that the risk of antitrust wrongdoing might well worth the obtainment of sales targets, thus putting the whole company in danger of being sanctioned for an antitrust violation.[132] The ultimate goal of a compliance program is thus the internalization by employees of non-compliance as a deviant behavior, so that employees will consider non-compliance as a social cost within the context of the decision making process of being involved in an anticompetitive conduct.[133]

A clear and ambiguous commitment of the top management to antitrust compliance is the first ingredient of a widespread culture of compliance.[134] It has been noted that a strong competition culture also reduces monitor costs as employees will find it

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[130] As indicated by the OECD, Roundtable on Promoting Compliance with Competition Law, June 2011, available at http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf, accessed February 2016, "playing by rules" needs to become "business as usual".

[131] Studies show that top manager may perceive cartels as unavoidable, see SONNENFELD J., *Executive Apologies for Price Fixing: Role Biased Perceptions of Causality* Academy of Management Journal 24/1981, pp. 192-198, indicating that collusion may be illegal but is not considered as unethical. See also GEIS G., *The Heavy Electrical Equipment Antitrust Cases of 1961, White Collar Crime* (Geis G., Meier R. F., edited by), New York, 1967, pp. 139-156, where the Author reports declarations of the industry leaders involved in the cartels saying that their conduct was considered legitimate and compliant with industry standard.

[132] O'KANE M., *Does prison work for cartelists? – The view from behind bars*, interview of Bryan Allison, The Antitrust Bulletin, 56/2011, pp. 483-500, where Mr. Allison, UK executive who plead guilty and served a two-year jail sentence for his involvement in the marine hoses cartel, argues that "*the majority of people causing cartels are usually doing it not for personal gain but for their business, for their firms. I don't think from what I've seen that many individuals are doing it for their own ends. They are doing it because it's expected of them, because they've always done it, or because it's the only way they are going to survive*".

[133] SOKOL D. D., *Detection and Compliance in Cartel Policy*, CPI Antitrust Chronicle, September 2011.

[134] It appears difficult for an antitrust authority to assess (with an adequate level of certitude and at reasonable costs at least) that the compliance is boosted from the top when senior executives send out mixed signals, see STUCKE M. E., *In Search of Effective Ethics & Compliance Programs*, The Journal of Corporation Law, 39/2014.

easier to report behavior that they consider morally objectionable, thus ultimately raising the cost in participating to the cartel and fostering deterrence.[135] Also, research in several fields, from psychology to business behavior, demonstrates that the behavior of those enjoying some sort of authority serves as a role model to others.[136] It has been observed that long-lasting participation in a cartel requires, on the one side, some managements' involvement in the cartel and, on the other side, other employees' ignorance or willingness to turn a blind eye to the anticompetitive behavior of colleagues.[137]

From a practical perspective, this commitment needs to be firm, public and conveyed to all company levels and in all working languages adopted within the company.

Competition authorities have illustrated a number of ways in which the top management can transmit the importance of antitrust compliance and the seriousness of the company's commitment.

The top management of the company may want to provide a written brief introduction to the corporate antitrust compliance manual or guidelines, explaining how the document fits into the overall antitrust compliance strategy of the company and stressing how compliance with competition law is not only a legal obligation, but one core value to the company.

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[135] SOKOL D.D., *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, Antitrust Law Journal, 1/2012, pp. 201-240.

[136] MILGRIM S., *Obedience to Authority: An Experimental View*, Harper and Row, 1974; BAUMHART R., *An Honest Profit*, Holt, Rinehart and Wiston, 1968; CARROL, A. B., *Managerial Ethics: A Post Watergate View*, Business Horizons, April 1975, pp. 75-80.

[137] SOKOL, D. D., *Policing the Firm*, Minnesota Legal Studies Research Paper 13/13, pp. 785-848. See also ASHFORTH B. E. ET AL., *Re-Viewing Organizational Corruption*, Academy of Management Review, 33/2008, pp. 670-684 noting that "*senior leaders are often responsible for corrupt actions by setting unrealistic financial goals and modeling, condoning or simply turning a blind eye to the means underlings use to achieve them*".

Also, the top management may want to regularly send e-mails or other direct communications underlining the importance of competition law compliance,[138] and reminding all employees of the main features of the company's antitrust compliance program (e.g., what to do in case of doubts, incentives and disincentives linked to antitrust compliance, etc.).

In addition, if the company has already adopted some sort of code of conduct (e.g., code of ethics), the top management could clarify that any violation of competition law would imply a breach of the corporate code of conduct.[139] The adoption of a code of conduct may prove particularly useful in multinational companies, where the decentralization of functions and the multiplication of employees in a managerial capacity make it more difficult to maintain an uniform control over the company's daily activities and their compliance with competition law.[140]

That said, probably the most important feature of the top management's commitment is the appointment of one (or more) person in charge of antitrust compliance.[141] This role may well be given to a senior executive, an already existing compliance officer or to a member of the company's legal department.[142] The

[138] OFT, How your business can achieve compliance with competition law, cit., point 2.2.
[139] Ibidem.
[140] CADE, Guidelines for competition compliance programs, cit.
[141] OFT, How your business can achieve compliance with competition law, cit., point 2.2; Autorité de la Concurrence, Framework-Document of 10 February 2012 on Antitrust Compliance Programmes, cit.; CADE, Guidelines for competition compliance programs, cit., suggesting that "*if the company is simultaneously active in several countries or economic sectors, then the possibility of designating national and regional compliance leaders should also be considered*". In its recent decision in case I783 - Accordo tra Operatori del Settore Vending, cit., the ICA considered that a compliance program providing, *inter alia*, for the appointment of a Compliance Committee in charge of periodically assessing the implementation of the compliance program at all company levels was effective and could entitle the company to benefit of a fine reduction.
[142] PARKER C. E., ELI ROSEN R., LEHMANN NIELSEN V., T*he Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation*, Georgetown Journal of Legal Ethics, 22/2009, pp. 201-248. On the

important thing is that, due to the peculiarity of competition law, such compliance officer is familiar with competition rules. The compliance officer needs to fulfill a twofold role: within the company, he represents, on the one side, the person to liaise with in case of any antitrust doubt that may arise in the daily activity. On the other side, he acts as *trait d'union* between the company's top management and board and all the lower levels of the company.

In order to achieve the first objective, sufficient publicity needs to be ensured to the appointment of the compliance officer, as well as to his role within the company. All employees need to know who the compliance officer is and how he/she can be of help in their activity. Furthermore, the top management has to provide the compliance officer with adequate financial and (if needed) human resources so as to enable him/her to effectively implement and monitor the antitrust compliance program. Also the compliance officer should have the necessary powers in order to ensure the implementation and monitoring of the program.

As to the second objective, the compliance officer shall have direct access to the board and/or the top management of the company, by means of both recurring reports on the activities carried out to implement the program[143] and *ad hoc* reports in case a specific issue (e.g., the uncovering of an infringement) requires to be discussed. For the purposes of demonstrating the company's commitment to compliance, the delivery of such report should not be passively received by the board and/or the top management which should instead challenge the effectiveness

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pros and cons of either entrusting the general counsel with compliance functions or appointing two different positions, see GREEN B., WILSON D., *The Roles of General Counsel and Chief Compliance Officers*, in Corporate Compliance Insights, available at http://corporatecomplianceinsights.com/the-roles-of-general-counsel-and-chief-compliance-officers, accessed on October 2016.

[143] OFT, How your business can achieve compliance with competition law, cit., point 2.2. , ICA's case I783 - Accordo tra Operatori del Settore Vending, cit.

of the compliance measures undertaken by the compliance officer[144] by asking questions or requesting deeper analysis. In the event of the compliance officer discovering an infringement committed by a member of the board or a top manager, the compliance program should provide for alternative addressee(s) of this reporting activity (e.g., the audit committee) so as to avoid any conflict of interest.

As it will be detailed below, it is of the utmost importance that records of the reports detailing the activity carried out as part of the compliance program are kept by the company in the event that the latter is required to demonstrate the implementation of the program. Furthermore, a proper documentation policy "*ensures continuity of the rules and processes, regardless of the changes made to the group of people involved in implementation*".[145]

b. Risk assessment

One could say that, in a nutshell, antitrust compliance programs serve the purpose of managing the antitrust risks faced by the company. Indeed, there is a general expectation that a credible compliance program depends, ultimately, on being able to convincingly justify the rationale for one chosen approach to risk management.[146]Each company faces its own antitrust risks, depending on its corporate activities and market context. In order to be effective, an antitrust

[144] OFT, How your business can achieve compliance with competition law, cit., point 2.2.
[145] CADE, Guidelines for competition compliance programs, cit.
[146] International Chamber of Commerce, Antitrust Compliance Toolkit, available at file:///C:/Users/egrassi/Downloads/ICC%20Antitrust%20Compliance%20Toolkit_FINAL.pdf (consulted on 9 August 2016).

compliance program shall be tailor-made in light of the company's specific antitrust risks.[147]

Therefore, the first activity to be undertaken is to assess which antitrust risks the company is more likely to face in terms of possible antitrust infringements.[148] Once these risks are identified, the program will set forth a number of procedures to manage them. In order to identify the antitrust risks, account should be taken of:

1. the industry in which the company operates, for example the analysis of previous decisions of competition authorities sanctioning breaches of antitrust law in that market may help understanding which activities might prove more risky;
2. the market position of the company. In this respect, a market definition exercise should be first carried out so as to assess whether the company holds a dominant (or either quasi-dominant or above 30%) position on the market(s) in which it is active.[149] Should the company be found dominant (or quasi-dominant) in one or more relevant markets, particular care, in term of antitrust compliance, should be taken also in relation to several commercial

[147] European Commission, Compliance Matters, cit. point 4.1, OFT, How your business can achieve compliance with competition law, cit., point 3.1

[148] The importance of risk assessment within the context of an antitrust compliance program has been recently stressed in the Apple e-books case ((see final judgment in case *United States v. Apple, Inc. et al.*, (S.D.N.Y 2012) (No. 12-cv-2826) (Sept. 5, 2013) and *supra* footnote 48, where the appointed external monitor explicitly indicated that "[a]*n antitrust risk assessment is a fundamental component of any antitrust compliance program, and a systematic assessment of the risks that arise from Apple's business, the activities of its employees, and its third-party interactions will help ensure that its Antitrust Compliance Program makes sense for Apple. We believe that such an assessment is a key component in making Apple's Antitrust Compliance Program comprehensive and effective. Simply applying general compliance concepts in response to Final Judgment requirements, or adopting an off-the-shelf compliance program, without incorporating known or expected risks that specifically relate to Apple is unlikely to lead to an effective and comprehensive Antitrust Compliance Program for the company*".

[149] This exercise should consider the past decisional practice of national competition authorities and the European Commission as well as the market structure (e.g., number and dimension of competitors, existence of significant barriers to entry, etc.).

activities (e.g., rebate policy, tying practices, etc.) which might pose less or no antitrust risk if the company's market share is low; and

3. the type and frequency of contacts with competitors (e.g., within the context of trade association or fairs).

Once identified, the level of each risk will need to be assessed, in terms of high, medium or low (or by using other scales). The objective is to classify each employee's degree of exposure to the identified risks, and to categorize them so as to better structure the risk mitigation procedures. In so doing, companies will usually consider the likelihood of the risky behavior occurring and the estimated impact (in terms of sanctions, civil damages actions, reputational damages,[150] nullity of contracts, etc.) upon such occurrence.

The risk assessment is not a one-shot exercise. The antitrust risks faced by the company may indeed vary over time, for example as a result of a corporate acquisition (e.g., the company acquires an on-going concern active in a new different market), of a change in the structure of the market (e.g., a change in the relevant legislation imposing the award of supplies through public tenders), or of the market

[150] Reputational losses, considering legal costs and readjustment effect on profits, appear to have represented a more significant deterrent than the legal effect to Dutch listed companies subject to cartel and abuse of dominance cases in the period 1998-2008 (see VAN DER BROEK S., *Reputational Penalties to Firms in Antitrust Investigations*, Journal of Competition Law & Economics, 8/2012, pp. 231-258). Some studies at the EU level show that no (or almost none) reputation-specific effect on stock prices can be attributed to antitrust fines (see LANGUS G., MOTTA M., AGUZZONI L., *The Effect of EU Antitrust Investigations and Fines on a Firm's Valuation*, Journal of Industrial Economics, 61/2013, pp. 1-29), while GÜNSTER A., VAN DIJK M. A., *The Impact of European Antitrust Policy: Evidence from the Stock Market*, working paper, ETH Zurich, Erasmus University Rotterdam, 2010, pp. 1-37, analyzed 253 companies involved in 118 European antitrust cases over 1974-2004 and found a stock price reduction of almost 5% around the dawn raid and of 2% around the final decision, as well as a significantly positive response of up to 4% around a successful appeal. According to the study, these numbers correspond to a total market value loss of €24 billion around the raid and the decision, of which roughly 75% cannot be explained by fines and legal costs. See also the OFT Report, Drivers of Compliance and Non-Compliance with Competition Law, cit., indicating reputational damages among the key drivers for competition law compliance.

position of the company (e.g., the company becomes dominant as a result of internal growth or acquisitions).[151]

This implies that an effective antitrust compliance program should foresee a periodic (re)assessment of the antitrust risks faced by the company (as well as an *ad hoc* new assessment in the event of an acquisition) in order to verify that the risks already identified and tackled via the program are up to date.

Furthermore, not every employee or representative of the company is exposed to the same antitrust risks and to an analogous extent. While those responsible for the adoption of the company's strategic commercial decisions, the commercial divisions in charge of products sales, supplies and marketing, and the company's representatives within trade associations are among the most exposed to antitrust risks, staff with administrative and back office tasks certainly perform less risky activities.

From a practical perspective, the risk assessment can be carried out in many different ways, ranging from a theoretic review of the company's organizational chart to a more thorough analysis via interviews with the relevant employees and audits of the corporate e-mail inboxes.[152] Moreover, companies may well decide to align the antitrust risk assessment procedure to the ones already adopted in relation to other corporate risks, such as bribery.[153] Indeed, the rise of CSR policies among companies

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[151] International Chamber of Commerce, Antitrust Compliance Toolkit, cit.

[152] See for instance the method set forth by the UK Committee of Sponsoring Organizations of the Treadway Commission (COSO), available at http://www.coso.org/IC.htm, consulted on 4 September 2016, or the UN Guide for Anti-Corruption Risk Assessment, available at https://www.unglobalcompact.org/library/411, consulted on 4 September 2016.

[153] International Chamber of Commerce, Antitrust Compliance Toolkit, cit. On the importance of having an integrated compliance program addressing both competition and corruption issues, see RAB S., STEMPLER I., *Competition and Corruption, UK and EU competition rules and the new UK bribery legislation*

around the world[154] have led scholars to posit that companies should enlarge their portfolio of CSR activities, by including antitrust compliance.[155]First, the fact that anticompetitive behavior, in particular cartel conduct, is increasingly seen as immoral makes it comparable to other illegal or unethical behavior considered by CSR programs. Second, the same reasons underlying the adoption of CSR programs are applicable to the adoption of antitrust compliance programs insofar as both may improve corporate reputation[156] *vis-à-vis* customers[157] and employees as well as ultimately shareholders.[158]

Finally, specific considerations apply to large multinational companies, active in different jurisdictions. On the one side, it is important that the program assesses and deals with the antitrust risks faced by all the subsidiaries of the group, depending on their geographic area of operation. Risk assessment in large multinational companies thus implies the taking into consideration of multiple jurisdictions, each with its own

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share common goals and features, cit. In Italy, there are several reasons to argue that antitrust compliance programs should be integrated within Model pursuant to LD 231. In particular, as mentioned above, in order to adopt and implement a Model the company needs first to carry out a comprehensive risk assessment of the business and then to structure internal policies so as to mitigate these risks. Since the same activities are essential to the adoption of an effective antitrust compliance program, it would prove at least cost-efficient to carry them out together and to integrate both programs.

[154] Ten years ago over half of Fortune Global 250 companies already had active CSR programs and the number has now increased, see KOTLER P, LEE N., *Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause*, Wiley, 2005.

[155] RILEY A., SOKOL D.D., *Rethinking Compliance*, Journal of Antitrust Enforcement, 3/2015, pp. 1-46.

[156] FOMBRUN C. J., *Building corporate reputation through CSR initiatives: evolving standards*, Corporate Reputation Review, 7/2005, pp. 7-11.

[157] SERVAES H., TAMAYO A., *The Impact of Corporate Social Responsibility on Firm Value: The Role of Customer Awareness*, Management Science, 59/2013, pp. 1045-1061.

[158] According to the results of the 2016 Deloitte Millennial Survey, in order to get long-term success, businesses should put employees first, and they should have a solid foundation of trust and integrity. Customer care and high-quality, reliable products also ranked relatively high in importance. Attention to the environment and social responsibility were also mentioned by a significant number of respondents, the results of the survey are available at https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-millenial-survey-2016-exec-summary.pdf (accessed October 2016).

competition policy and peculiarities.[159] Global antitrust compliance can have significant practical implications, in particular when the multinational company pursues global competitive strategies which translate into trans-national business transaction and schemes. This means that a desired distribution system based on the allocation of exclusive territories to distributors may need to be reconciled with those jurisdictions that do not allow for territorial restrictions.[160] Analogously, while the provision of RPM clauses in distribution contracts may receive a more lenient treatment in the USA, the same clauses are by far more problematic in Europe.

On the other side, the implementation of a group-wide compliance program has been factored in by EU Courts when assessing the parent responsibility for the conduct of the subsidiaries. In the attempt of rebutting the presumption of they being liable for the conduct of their subsidiaries, parent companies have sometimes argued that since the adoption of the compliance program by the subsidiary was compulsory, any violation thereof was imputable to the subsidiary autonomous initiative, so that no liability for the conduct could be attributed to the parent company.[161] EU Courts rejected this argument stating that "*the deployment of formal written policies for compliance with competition law does not rebut the presumption that [parent companies] are liable for the conduct of their subsidiaries. The fact that such policies are deployed does not establish that those subsidiaries determined their commercial policy on the market*

[159] For a comprehensive overview of competition policy regimes in 43 jurisdictions worldwide see SOKOL D. D., CRANE D., EZRACHI A., *Global Antitrust Compliance Handbook*, Oxford, 2014.

[160] LIPSKY A. B. JR., *Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement*, Antitrust Law Journal, 75/2009, pp. 965-995, citing also other examples of differences among legal systems which need to be taken into account by multinational companies in their compliance programs such as the fact that communication between employees and in-house legal counsel are not protected by legal privilege under EU law (contrary to the US regime).

[161] See for instance arguments put forward by the applicants in joined cases T‑141/07, T‑142/07, T‑145/07 and T‑146/07, General Technic-Otis et al/European Commission, judgment of 13 July 2011, point 85.

independently".[162] The Court of Justice went even further by saying that "*the implementation of [a] code of conduct suggests rather that the parent company did in fact supervise the commercial policy of its subsidiaries. The fact that certain employees of its subsidiaries did not comply with the code of conduct is not sufficient to demonstrate independence of the commercial policy of the subsidiaries in question*".[163]

This position of the Court of Justice appears questionable for at least two reasons. First, because the link between the subsidiary's commercial policy and the order to comply with the law is definitely unclear.[164] Second, because if the mere fact of the parent company introducing a group-wide compliance program means that it exercises decisive influence over the subsidiaries, then, on the one side, the incentive to introduce compliance programs extended to the whole group would be reduced, while, on the other side, a compliance program limited to the parent company could hardly prove effective since it would likely be considered lacking a commitment to compliance at all levels of the group. That said, it may be that the peculiarities of that case had an influence on the reasoning of the Court of Justice. Both the General Court and the Court of Justice seem indeed to focus on the implementation of the compliance program, rather than the adoption itself, in particular in relation to

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[162] Ibidem. This judgment has been upheld by the Court of Justice, case C‑493/11 P, United Technologies Corporation/European Commission, order of 15 June 2012,

[163] Court of Justice, case C‑501/11 P, Schindler/European Commission, judgment of 18 July 2013 , point 114. See also the judgment of the General Court in case T-76/08,EI du Pont de Nemours and Company et al/European Commission, judgment of 2 February 2012, where the fact the parent companies of a JV, having been informed of an alleged infringement by the JV, carried out an internal investigation in order to assess whether the JV was involved in a cartel was considered as proof of the exercise of decisive influence by the parent companies over the JV.

[164] TEMPLE LANG J., *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary Be Resolved?*, Fordham International Law Journal, 37/2014, pp. 1481-1524; see also MICKONYT, A., *Joint Liability of Parent Companies in EU Competition Law*, LSEU, 1/2012, pp. 33-69.

monitoring activities and the circumstance that the Compliance Officer was an employee of the holding company.[165]

It goes without saying that the complete opposite reasoning would be far more desirable, with parent companies not being held liable for the conduct of their subsidiaries if they can demonstrate that they had an effective compliance program in place, which the subsidiary autonomously and deliberately violated.[166]

c. Risk mitigation

Once the risks have been identified, the core of the compliance program lies with the structuring of internal procedures and safeguards aiming at preventing and mitigating these risks, while at the same time becoming part of the company's culture.[167] While trainings and internal procedures are certainly focused on the prevention of antitrust infringements in the first place, other features, such as the adoption of internal whistleblowing mechanisms or periodic internal audits, are aimed at uncovering and managing actual or potential breaches of antitrust law in the most effective way.

Antitrust authorities share the view that trainings represent the ideal tool to spread a culture of compliance with antitrust law within the company. For its peculiarities, antitrust law is not always so clear-cut in what constitutes an infringement so that it

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[165] General Court, case T-138/07, Schindler Holding et a./Commission, , judgment of 13 July 2011, paragraph 88 observing that "[…] *the implementation within the subsidiaries of Schindler Holding of that code of conduct rather suggests that the parent company did in fact supervise the commercial policy of its subsidiaries, particularly since the applicants themselves have confirmed that compliance with the code of conduct was checked by means of regular audits and other measures taken by an employee of Schindler Holding responsible for compliance (a compliance officer)*".

[166] RILEY A., SOKOL D.D., *Rethinking Compliance*, cit.

[167] PARKER C., *The Open Corporation: Effective Self-Regulation and Democracy*, 2002.

might prove difficult for an employee to self-assess whether his behavior might entail an antitrust violation.[168] On the one side, trainings are intended to provide all employees exposed, to some extent, to antitrust risks with a general knowledge of the fundamental principles of antitrust law. On the other side, trainings should also illustrate (i) the "grey" areas of antitrust law, in relation to which a more detailed analysis from an antitrust specialist is required in order to assess the legitimacy of a specific behavior, and (ii) which are the instruments provided to the employees in order to allow them to seek guidance in relation to these grey areas (e.g., contacts of the compliance officer[169], FAQs, 24/7 hotline, etc.). In this respect, trainings aim at raising employees' awareness of antitrust law and the possible implications on their daily activity, thus ultimately preventing the occurrence of infringements.

While antitrust authorities have not identified a compulsory way to conduct trainings,[170] a number of possibilities are generally considered, whose actual adoption will depend on the size of the company as well as the amount of resources devoted to antitrust compliance. Face-to-face trainings may be delivered as an alternative to – or in combination with – computer-based trainings. Workshops or

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[168] A recent research study prepared for the CMA demonstrates that large proportions of businesses do not understand what constitutes illegal horizontal anti-competitive behaviors: only 56 per cent of businesses know that it can be illegal to attend a meeting at which competitors agree a price, 55 per cent of businesses think that it is ok for competitors to agree prices to avoid losing money, 47 per cent businesses think it is ok to discuss prospective bids with competitors and 40 per cent businesses think that they can agree to market share, IFF Research, UK businesses' understanding of Competition Law, 26 March 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses__understanding_of_competition_law_-_report.pdf (accessed on 10 September 2016).

[169] On the importance of direct contact between operating managers and the legal department in order to prevent infringements, see SONNENFELD, J. A., LAWRENCE, P. R., *Why Do Companies Succumb to Price Fixing?*, Harvard Business Review, July 1978.

[170] But see CADE, Guidelines for competition compliance programs, cit., indicating that relying on online training alone is not advisable.

mock cases might also prove useful in order to ensure more interaction and a clearer understanding of the practical consequences of antitrust principles.[171]

Furthermore, trainings should be tailored on the activity of the audience.[172] Sales agents for instance might not be interested in the antitrust risks linked to the participation to trade associations' meetings since they do not generally attend. Frequency of the training will generally depend upon the employees' turnover ratio as well as specific circumstances (e.g., after the acquisition of a new business[173] which may lead to new potential antitrust risks, or following the opening of an investigation by a competition authority), but it is important to ensure recurrent trainings so that notions are not easily forgotten.

Moreover, oral trainings should be coupled with some written materials (e.g., manuals, guidelines, dos and don'ts, etc.) summarizing the topics covered and which

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[171] In this regard, see KOLASKY W. J., *Antitrust Compliance Programs: The Government Perspective*, Corporate Compliance 2002 Conference, San Francisco, July 21st 2002, indicating that "[t]*he company should have an active training program that includes in-person instruction by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction. The instruction should be as practical as possible, including case studies drawn from the company's actual experiences. The instruction should also include education as to the consequences of antitrust violations, both for the company and the individual employee*".

[172] Confindustria, Linee Guida per la Compliance Antitrust delle imprese, available at http://www.confindustria.it/wps/wcm/connect/www.confindustria.it5266/540600b0-7800-47d6-94e1-8cc7efc54041/LG+Confindustria+compliance+antitrust.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=540600b0-7800-47d6-94e1-8cc7efc54041 (accessed on 9 August 2016). It is of the utmost importance to involve in trainings all employees that are somehow exposed to antitrust risks. This means for example, that also administrative employees, such as personal assistants, should be adequately trained, for instance, as to how taking notes of meetings or travels of the managers. Also strategic planners and finance people in charge of preparing projections and financial models need to be aware of, for example, what language to avoid in presentation of new commercial strategy, see KEYTE J., SCHWARTZ K., VANDENBORRE I., *Antitrust Compliance Programs: A practical Perspective From the US*, forthcoming.

[173] See SONNENFELD, J. A., LAWRENCE, P. R., *Why Do Companies Succumb to Price Fixing?*, cit., indicating that companies have found that training new hires is helpful to reorient business practices, training sales personnel to sell product features rather than to sell for price.

could be left with the employee at the end of the training and/or made available on the company's intranet for future reference.

Finally, at the end of each training session a test should be run in order to evaluate the level of comprehension of the attendees.[174] In order to be able to demonstrate the actual implementation of the compliance program, of which trainings amount to a significant element, attendance to the trainings as well as the tests results should be duly recorded by the company.

In addition to trainings, employees shall also be informed about the other elements which should be included in the antitrust compliance program, such as the internal procedures set forth in relation to particularly risky situations, the existence of an hotline available to anonymously blow the whistle on possibly anticompetitive behavior or to seek guidance in case of doubt, the set of incentives and disincentives provided by the company in connection with compliance with the program.

Indeed, another important feature of an effective compliance program is the structuring of internal procedures aiming at "guiding" the employees and avoiding the adoption of rash decisions with regards to situations which may entail an antitrust risk.[175]

[174] CADE, Guidelines for competition compliance programs, cit.

[175] See BECKENSTEIN A.R., LANDIS GABEL H., *The Economics of Antitrust Compliance*, Southern Economic Journal, 52/1986, pp. 673-692, where the Authors indicates that internal procedures may aim at reducing the decision-making discretion of subordinates. This may be achieved in two ways. First, standard operating procedures may be imposed (e.g., detailed price books, rules that prices below competitors' are to be avoided, geographically uniform pricing policies, etc.). Second, the decision-making process can be centralized so that more responsible managers make all significant decisions.

For instance, negotiations of commercial contracts which deviate from standard forms – previously approved by the company's antitrust compliance officer or legal department – might foresee the inclusion of clauses which can raise antitrust concerns (e.g., resale price maintenance). It is thus important that internal procedures provide for the employee involved in such negotiations to seek guidance from the antitrust compliance officer (or the legal department, as the case may be) before commit to any new clause.[176] The importance of antitrust trainings is thus evident. Only a well-trained employee will recognize that the proposed new covenant may be problematic from an antitrust perspective and ask for guidance in accordance with the company's internal procedures.

Analogous procedures can be adopted in relation to other aspects of the corporate life, such as the attendance to meetings of the trade association. In this respect, internal procedures might for instance provide for both an *ex ante* review of the agenda of the meeting[177] as well as an *ex post* review of the minutes of the meeting, by the antitrust compliance officer (or the legal department, as the case may be). The review shall be aimed at (i) avoiding the company's participation (or providing specific safeguards[178]) to discussions of (even potentially) commercially sensitive information within the context of the trade association or to other anticompetitive practices, and (ii) taking the appropriate steps in case the minutes do not correctly reflect the content of the meeting, for example by making use of ambiguous language.

[176] OFT, How your business can achieve compliance, cit. point 5.12.
[177] Ibidem.
[178] For example, the company's representative may be accompanied to the meeting by the antitrust compliance officer.

Also in relation to the implementation of such internal procedures, it is of the utmost importance that the company keeps adequate record of how the internal procedures have been put in place (e.g., advice given in relation to commercial agreements under negotiation which led to the deletion of problematic clauses, decision to have the antitrust compliance officer participating to a specific meeting of the trade association in which potentially sensitive information could have been discussed). Such a track-record may indeed prove essential in order to demonstrate the effectiveness of the program in the event of the company being then investigated for an antitrust infringement.

For the purposes of providing adequate and prompt assistance to employees, effective antitrust compliance programs should also foresee the adoption of an hotline to call in the event of the employee facing doubtful situations or seeking guidance as to how to behave. In addition, the hotline could also serve the purpose of allowing employees to report, on a strictly anonymous basis, behavior which might entail an antitrust violation.[179] In order to guarantee legal privilege from the very first moment to all conversations and subsequent actions, the hotline can also be set up via an external counsel. Moreover, such hotline might represent an essential element within the company's overall periodic audit of the functioning of the compliance program.

[179] CADE, Guidelines for competition compliance programs, cit., indicating that hotlines "*bring two sorts of benefits: (i) since they protect anonymity, they also ensure security and safety to employees, who consequently participate more actively in the program, for they can report misconduct not to their superiors, but to a team or a compliance person specialized in that task; (ii) compliance with the rules is greatly incentivized, because potential offenders are aware that any given employee is a potential whistleblower*".

Attention should also be paid to the company's commercial relationships with third parties, either representing the company[180] (e.g., agents, service providers), or being merely customers.[181] Given that the company could end up being considered responsible for anticompetitive behavior carried out by such third parties, an effective compliance program should provide for specific monitoring measures, and/or require that these third parties commit to compliance with competition law.[182] For example, in order to prevent that company's commercially sensitive information (e.g., price lists) are transmitted to competitors, the compliance program could provide for a specific confidentiality clause being included in every communication sent to customers which includes commercially sensitive information, prohibiting the circulation of such information to third parties other than the direct customer of the company.

Finally, incentives and disincentives also play an important role in terms of risk mitigation as they can foster the culture of compliance within the company.

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[180] As recently clarified by the Court of Justice, an undertaking may, in principle, be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services only if one of the following conditions is met: (i) the service provider was in fact acting under the direction or control of the undertaking concerned, or (ii) that undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or (iii) that undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed, see case C-542/14, SIA 'VM Remonts'/Konkurences padome, judgment of 21 July 2016.

[181] Reference is here to so-called hub&spoke conspiracies where the horizontal collusion is realized through circulation of commercially sensitive information via common customers. Literature on hub&spoke agreement is vast, for a general overview see ODUDO O., *Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion*, European Competition Journal, 7/2011, pp. 205-242; LUBAMBO M., *Vertical Restraints Facilitating Horizontal Collusion: 'Stretching' Agreement in a Comparative Approach*, UCL Journal of Law and Jurisprudence, 4/2015, pp. 135-161.

[182] MURPHY J., KOLASKY W., *The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior*, Antitrust, American Bar Association, 26/2012, pp. 61-64.

While most antitrust authorities encourage the adoption of incentives linked to antitrust compliance[183] and consider them as an important feature of an effective program, contrary to other elements such as trainings, incentives have often been found controversial both in theory, as well as in their practical implementation.

Amongst the most common objections made to the use of incentives to promote compliance are that there would be no reason to reward an employee for having done what he was supposed to do, and that it is impossible to evaluate employees' virtue or ethics as this is an area which is not objectively measurable (contrary to sales or production).[184]

However, it is common belief that people tend to do what they are rewarded for. This is why appropriate incentives may help driving behavior towards compliance. Furthermore, by rewarding some employees for their compliance efforts, the company sets a standard which will be taken as an example by all other employees, thus ultimately spreading the culture of compliance at all levels. That said, in shaping the incentives it should always be borne in mind that rewarding the absence of reported infringements (or alleged infringement) may end up pressuring employees not to report suspected violations, thus undermining the effectiveness of the compliance program itself.

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[183] From a different angle, it has been argued that incentives in the form of granting equity stakes to employees may reduce the principal-agent problem (namely, that employees' interests differ from those of the shareholders). In this sense, agents having equity stakes may be incentivized to monitor the firm since illegal conduct may affect the company's returns, ALEXANDER C. R., COHEN M. A., *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, Journal of Corporate Finance, 5/1999.

[184] MURPHY, J. E., *Using Incentives in Your Compliance and Ethics Program*, White Paper for the Society of Corporate Compliance and Ethics, 2011, pp. 1-64, available at http://www.hcca-info.org/Portals/0/PDFs/Resources/library/814_0_IncentivesCEProgram-Murphy.pdf (accessed on 10 August 2016).

Putting aside monetary incentives which may pose "moral" issues, the most effective incentive would be to include compliance criteria in the employees' annual appraisal. In particular, part of the annual appraisal could take into account the employee's attendance to antitrust trainings, end-of-training test results, and/or compliance with internal procedures. Given that the outcome of the personal evaluation usually has a direct impact on the employee's compensation and career path (e.g., promotions, bonuses, etc.), this could represent an effective incentive for the employee to comply with the program. Along similar lines, it has also been suggested that incentives could take the form of a portion of the variable pay attributed to the employee on the basis of the structuring of organizational measures coupled with the absence of antitrust investigations or fines.[185] However, incentives of this kind do not appear to completely overcome the perverse effect mentioned above of possibly leading employees not to report suspected wrongdoing for fear of ultimately indirectly prompting an investigation or fines by antitrust authorities.

Also "softer" non-tangible incentives, such as public commendations for exemplary compliance-related conduct, have been envisaged, although their effectiveness could easily prove very limited.

On a different but connected aspect, due to the fact that competition law can directly influence the company's commercial strategy, particular care should be taken when designing other commercial incentives (e.g., bonuses depending on sales targets).[186] Indeed, these kind of incentives may convey the idea that the company cares more about its employees reaching the targets at whatever costs rather than ensuring that

[185] Confindustria, Linee Guida per la Compliance Antitrust delle imprese, cit.
[186] HODGES C. J. S., *A market based competition enforcement policy*, European Business Law Review, 2011, pp. 261-292; see also STEPHAN A., *Hear No Evil, See No Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels*, CCP Working Paper 09-09, 2009, pp. 1-16.

they always comply with competition law. Studies demonstrate that companies rewarding short-term profits more likely result with employees who may engage in unlawful conduct merely to reach the target.[187] Along the same lines, empirical works also suggest that misreporting of material information by CEOs is more likely to occur when their pay is incentive-based.[188]

An effective antitrust compliance program should thus provide for specific internal procedures aiming at avoiding the setting of too high or unrealistic sales or production targets. For example, compensation to sales personnel could be allocated on the basis of volumes sold rather than the price level. Also, direct salary compensation should be preferred over commission compensation systems.[189] In addition, as already indicated, the program should always make it very clear that compliance with antitrust law comes before any commercial interest and it is in the company very best interest that every employee never takes undue risks which could endanger the whole company.

As to disincentives, antitrust authorities generally consider that the effectiveness of the compliance program also lies with the setting forth of disciplinary sanctions in case of breach of the company's policy as to antitrust compliance. The provision of

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[187] With specific reference to cartel conduct, GONZÁLEZ T. A. ET AL., *Smokescreen: How Managers Behave When They Have Something to Hide*, National Bureau of Economy, Research, Working Paper No. 18886/2013, pp. 1-52, available at http://www.mccombs.utexas.edu/Departments/Finance/~/media/58DE66A4A00641698EB90FF6C982ED3B.ashx (accessed October 2016); see also SEIGEL M. L., *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, Boston College Law Review, 49/2008, pp. 1-54, available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2376&context=bclr (accessed October 2006).

[188] BERGSTRESSER D., PHILIPPON T., *CEO Incentives and Earnings Management*, Journal of Financial Economy, 80/2006, pp. 511-529; BURNS N., KEDIA S., *The Impact of Performance-Based Compensation on Misreporting*, Journal of Financial Economy, 79/2006, pp. 35-67.

[189] BECKENSTEIN A.R., LANDIS GABEL H., *The Economics of Antitrust Compliance*, Southern Economic Journal, cit.

penalties on the one side has a deterrent effect and encourages compliance with the program and, on the other side, reflects the seriousness of the company's commitment to compliance.[190] As safeguard, it has been indicated that implementation of such penalties should be effective and proportionate to the individual situation and conduct of the concerned person.[191] Furthermore, it has been noted that individual penalties should not only be imposed on the actual infringer, but also on those employees that were aware of the illicit conduct being committed and did nothing.[192]

In order to ensure proportionality, and subject to local employment law, disciplinary sanctions may range from informal or written warnings to non-promotion/loss of bonus or even dismissal. The idea should be to avoid delegation of authority to those employees that may get involved in anticompetitive behavior, based on prior conduct.[193] For the purposes of ensuring adequate publicity to the penalties mechanism, every disciplinary sanction, together with the infringement triggering it, should be clearly indicated in the antitrust compliance program.

As mentioned, some antitrust authorities, such as the DOJ, go as far as arguing that the company's decision to retain culpable individuals who do not accept responsibility for the antitrust infringement in key management positions will be

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[190] International Chamber of Commerce, Antitrust Compliance Toolkit, cit.

[191] Autorité de la Concurrence, Framework-Document of 10 February 2012 on Antitrust Compliance Programmes, cit.

[192] GHEZZI F., PINI G.D., *Le nuove linee guida dell'Autorità garante della concorrenza sulla quantificazione delle sanzioni antitrust: maneggiare con cautela*, in Rivista delle Società, 6/2015, pp. 1196-1304, observing that the final decision of the competition authority (a confidential version at least) should thus clearly indicate the name of the employees involved in the anticompetitive conduct so as to enable the company to actually enforce the disciplinary sanctions.. On the contrary, mere shareholders should not be sanctioned as they were not in a position to either prevent the infringement or to compel the board to notice, see GINSBURG D., WRIGHT J., *Antitrust Sanctions*, Competition Policy International, 6/2010.

[193] MURPHY J., KOLASKY W., *The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior*, cit.

considered in deciding whether the company demonstrates a commitment to effective compliance.[194] In this sense, the DOJ considers hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management who have refused to accept responsibility for their wrongdoings and who the companies know to be culpable.[195] In any event, at least in relation to the most serious antitrust infringements, it seems important that adequate publicity is given to the disciplinary measures taken against the employee,[196] so that the latter cannot easily change company (and even benefit from the possibly outstanding results achieved through the anticompetitive behavior).[197]

As a concluding remark, it should be noted that while the opportunity to provide for disciplinary sanctions, at least in case of serious antitrust violations, is not questionable, it has been observed that penalties also can have a perverse effect insofar as they can make the discovery of the infringement more difficult[198] due to the employees' fear of getting caught.

d. Audit and monitoring

[194] SNYDER B., *Compliance is a Culture, Not Just a Policy*, cit. Furthermore, the involvement of senior executives in the infringement also makes it less likely to be uncovered as other employees aware of suspicious (e.g., secretaries, personal assistants) may be more reluctant to come forward and report the alleged wrongdoing, see STEPHAN A., *Hear No Evil, See No Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels*, cit.

[195] BAER B., *Prosecuting Antitrust Crimes*, cit.

[196] Studies demonstrate that while rewarding unethical behaviour tends to increase its frequency, effective sanctions tend to decrease the frequency of such behaviour, see O'FALLON M. J., BUTTERFIELD K. D., *A Review of The Empirical Ethical Decision-Making Literature: 1996-2003*, Journal of Business Ethics, 2007, pp. 375-413.

[197] In this sense see GHEZZI F., PINI G.D., *Le nuove linee guida dell'Autorità garante della concorrenza sulla quantificazione delle sanzioni antitrust: maneggiare con cautela*, cit.

[198] Court of Justice, Case C‑501/11 P, Schindler Holding Ltd et al./Commission, Opinion of Advocate General Kokott, para 185.

Another feature of an effective antitrust compliance program is the provision of recurring internal audits and monitoring exercises.

While the program might be well designed and implemented, obedience by all employees cannot be ensured in all circumstances. It is thus essential that some mechanisms of internal audit are laid down so as to enable the compliance officer to assess actual compliance by the employees.

Hence, internal audits serve a twofold objective. On the one side, they allow the company to verify whether the program is actually complied with (e.g., internal procedures are regularly followed, employees attend to trainings, the compliance officer is questioned for advice, etc.). On the other side, by running internal audits, the company may uncover past or ongoing antitrust infringements which the program itself has not been able to prevent in the first place. For obvious reasons this is of the utmost importance as it enables the company to take the most appropriate steps in a timely manner. This means not only being able to immediately put an end to any ongoing violation (thus reducing the length of the infringement itself), but also, and foremost, assessing whether to apply for leniency or otherwise report the behavior to the competent antitrust authority.

In this sense, it could be argued that, for instance, if a company took part in a long-run cartel, lasting for more than ten years, and never discovered it by means of internal audits, whatever compliance program it had put in place could hardly be considered effective for the purposes of fine reduction since an essential element of the program would have been missing.

From a practical perspective, there is no predefined way to carry out internal audits. These may take for example the form of corporate email audits and/or interviews with the relevant employees.[199] For the sake of efficacy, internal audits of corporate emails may be run without giving prior information to the employees. Also the frequency of internal audits may vary. If a company suspects the existence of an antitrust infringement, it may want to carry out an *ad hoc* audit, in addition to those already scheduled as part of the compliance program. The same holds true following the hiring of a significant number of new employees (e.g., as a result of a corporate acquisition or the opening of a new branch or subsidiary).

As mentioned, for the compliance program to qualify as effective and receive credit at sentencing not only it has to provide for recurrent internal audits, but it also has to ensure that adequate track record of such internal audits being carried out and of the results thereof are kept by the company. In order to do so, internal audits should be first ordered at top management/board level. Once completed, the outcome of the audit – with suggested further actions as the case may be – should be detailed in a specific report, the content of which should be illustrated to the company's top management/board. Due to the sensitivity of the subject matter, the use of an external legal counsel seems advisable so as for the content of the audit report to be covered by legal privilege. More sophisticated companies may also decide to invest in periodic market research to be carried out by specialized agencies. These research may well entail the interview of third parties acting for the company (e.g.,

[199] Personal assistants of executives should also be audited, since cartelists might chose to avoid direct contacts and/or use fictitious names, see KOLASKY W. J., An*titrust Compliance Programs: The Government Perspective*, cit.

distributors, consultants, sales agents) in order to assess whether they have been acting in compliance with the company's standards.[200]

The company should then keep records of the internal audit activities (e.g., decisions of the board, audit report, minutes of board meetings where the outcome of the report have been illustrated, etc.) in order to be able to use it to demonstrate to a competition authority the effectiveness of the compliance program in case of need.

As a last point, it could be argued that effective compliance programs should also provide for a general commitment to restitution or compensation for parties damaged by an antitrust violation committed by the company, at least in relation to the most serious infringements, such as cartels. This commitment could counterbalance the criticism that since the company already took advantage of the antitrust infringement[201] (e.g., by obtaining higher profits than those that it would

[200] CADE, Guidelines for competition compliance programs, cit.

[201] It has been argued that antitrust infringements are different from others types of corporate infringements, such as embezzlement, which are only detrimental to the company or benefit no one other than the wrongdoer, see STUCKE M.E., *Am I a Price Fixer? A Behavioural Economic Analysis of Cartels*, in Beaton Wells C., Ezrachi A., Criminalising Cartels: Critical Studies of an International Regulatory Movement, Hart, 2011, pp. 263-288, observing that "[…] *unlike other white-collar crimes where executives divert company funds to themselves, companies stand to gain in the short run with increased profits*" [arising from price fixing]. It is certainly true that, in some cases, antitrust infringements benefit the company as they increase earnings and/or allow the company to remain in the market. However, this does not mean that antitrust infringements have to be treated differently from other corporate infringement (e.g., bribery) when it comes to compliance programs. Indeed, the actual differences between antitrust infringements and other types of corporate infringements are not so deep. First, antitrust infringements might benefit the individual as well, for example when they allow the employee to reach a specific sales target and thus the salary bonuses linked to it, see LESLIE C.R., *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, William and Mary Law Review, Vol. 49/2008, SONNENFELD J, LAWRENCE P.R., *Why do companies succumb to price fixing?*, cit. Second, both antitrust infringements and bribing can also benefit the company, see THÉPOT F., *Antitrust v. Anti-Corruption Policy Approaches to Compliance: Why Such a Gap?*, CPI Antitrust Chronicle, June 2015, pp. 1-8, observing that the reason for the different regulatory approach to antitrust compliance and anti-bribery can be found in the different liability regimes applicable (administrative nature for antitrust infringements, criminal liability for bribery). Finally, investigative psychology studies, which do not distinguish among all kind of corporate fraud, including antitrust violations such as bid-rigging, demonstrate that the second most important driver of fraud are the pressures provided to employees for them to reach tough profit and budget target, see KPMG, Analysis of Global Patterns of Fraud,

have gained in the absence of the cartel), the fine reduction obtained thanks to the compliance program would end up enabling the company to ultimately keep the benefits of the antitrust infringement.[202]

It has already been stressed that, since the antitrust risks faced by each company vary over time, a risk assessment needs to be carried out on a periodic-basis so as to take into account changes in the corporate activities and/or market conditions.

Analogously, the implementation and adequacy of the program should be regularly monitored in order to adopt the required adjustments and preserve its effectiveness.[203] This means that if for instance an internal procedure has proven difficult or lengthy to be followed by the employees, it will need to be modified accordingly. Also, if the success rate in tests done after training sessions remains constantly low it may be that the training is too complicated or that more motivating activities can be envisaged. Therefore, for the monitoring activity to be effective, feedback from employees as to the more practical aspects of the implementation of the program has to be regularly gathered by the company.

2011, and PADGETT S., *Profiling the Fraudster: Removing the Mask to Prevent and Detect Fraud Account*, Wiley, 2015.

[202] WILS W.P.J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, Journal of Antitrust Enforcement, 1/2013, pp. 52-81.

[203] KOLASKY W. J., *Antitrust Compliance Programs: The Government Perspective*, cit.

PART III

A. The cost-benefit analysis of adopting an effective antitrust compliance program: missing the point

It has been argued that society will value antitrust compliance programs only to the extent that they have positive effects for the enforcement of antitrust prohibitions and that these positive effects, on the one side, outweigh possible negative enforcement effects and the cost of resources spent on the programs and, on the other side, cannot be obtained at a lower cost.[204]

This line of argument does seem questionable for a twofold reason.

First, it appears to mix up two perspectives, the one of public enforcers and the one of market players. In the authorities' view, the ultimate goal of competition compliance programs is to prevent the occurrence of antitrust infringements in the first place.[205] Therefore, competition authorities may want to encourage antitrust compliance so as to reduce the burden of antitrust enforcement by having to deal with fewer infringements or by obtaining more easily the companies' cooperation in enforcing antitrust provisions.[206] Antitrust enforcement-related considerations do not

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[204] WILS W.P.J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit.

[205] Or at least to enable the company to detect the infringement and timely stop it, see SNYDER B., *Compliance is a Culture, Not Just a Policy*, cit; European Commission, Compliance Matters, cit.; see also ITALIANER A., *Fighting cartels in Europe and the US: different systems, common goals*, speech at the Annual Conference of the International Bar Association (IBA), Boston, October 2013; ALMUNIA J., *Compliance and Competition Policy*, cit.

[206] GHEZZI F., PINI G.D., *Le nuove linee guida dell'Autorità garante della concorrenza sulla quantificazione delle sanzioni antitrust: maneggiare con cautela*, cit., observing that the spread of antitrust compliance programs could foster a culture of obedience with antitrust rules, leading to a spill-over effect on cartels that could have existed. In this sense, antitrust compliance programs would prevent the company's participation in new cartels, thus ultimately making it more difficult to reach (or maintain) collusive agreements among competitors.

apply to companies. In other words, companies do not implement antitrust compliance programs in order to facilitate antitrust enforcement,[207] but because they deem it convenient to do so.

And here comes the second reason why the above line of argument does not fully persuade.

It is certainly true that cost-benefit analysis is at the heart of most corporate decisions. No undertaking will ever decide to incur the significant costs of structuring, implementing, monitoring and updating an effective antitrust compliance program, unless being quite certain that the benefits arising from it will outweigh the costs.

Yet, any such cost-benefit analysis represents a gamble insofar as the benefits of an effective antitrust compliance program cannot be easily calculated. Whatever the impact on fines (immunity, reduction, shorter duration of the infringement) resulting from the adoption of an effective antitrust compliance program, it will prove very hard for a company to run an *ex ante* counterfactual analysis in order to calculate what the fine would have been in the absence of the compliance program (and thus what the actual benefit of having a compliance program is). If, thanks to the compliance program, company A uncovers that some employees are involved in a cartel, applies for leniency and obtains immunity, it cannot be automatically inferred that, absent the program, company A would have received the full amount of the fine. Maybe the competition authority would have never become aware of the cartel without company A's leniency application and the anticompetitive conduct would

[207] GERADIN D., A*ntitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils*, Journal of Antitrust Enforcement, 2013, pp. 325-346.

have remained concealed. Or possibly another cartel member would have applied for leniency and company A would have then decided to cooperate with the investigation in order to obtain a fine reduction. Moreover, if the antitrust compliance program is so effective that the company commits no antitrust infringements whatsoever, how can such a benefit be monetarily quantified?

Assessing the decision to adopt an effective compliance program through the lenses of a pure cost-benefit analysis thus seems somehow to be missing the point. While antitrust compliance programs can benefit companies in several ways, all of which ultimately leading to costs-savings,[208] it is difficult to actually measure how these cost-savings outweigh the costs of setting up an effective compliance program.

In terms of benefits, compliance programs can prevent the occurrence of antitrust infringements by introducing a culture of antitrust compliance at all level of the company. As mentioned, effective antitrust compliance programs do not merely foresee the delivery of trainings to employees, but also discourage wrongdoings by providing for incentives and disincentives, e.g., in terms of career progression, linked to antitrust compliance. The program should make it crystal-clear that the company's main interest is to comply with antitrust rules in any aspect of the business. Furthermore, a strong culture of antitrust compliance can positively influence the

[208] See American Bar Association, Corporate Compliance Programs, Materials from the 4th Annual ABA International & Israel Bar Association Joint Conference, May 2013, available at http://www.americanbar.org/content/dam/aba/events/international_law/2013/05/law_business_andsociety-usisraelglobalrelationships/corporate%20legal%20departments2.authcheckdam.pdf, accessed 22 February 2016, arguing that compliance programs can serve as a cost-saving device as employee misconduct generally imposes great "hard costs" (e.g., criminal or administrative fines or penalties resulting from enforcement actions, civil damage awards or settlements resulting from private litigation, shareholder derivative suits, lost opportunities to compete due to debarment, decreased sales due to damaged reputation, and substantial legal fees) as well as "soft costs" (e.g., lost employee productivity, disruptions to business operations, damage to employee morale, and future heightened scrutiny by, and accountability to, governmental agencies).

company's reputation *vis-à-vis* different stakeholders, such as actual and prospective shareholders, customers and suppliers.[209]While the positive impact of compliance programs on infringements prevention cannot be easily assessed, it could be maintained that this represents a sure benefit to the company. In other words, for companies keen to promote their image as a rules compliant market player or which are simply risk adverse, the adoption of compliance programs brings positive effects in itself.

Second, monitoring compliance through the program can enable the company to uncover antitrust infringements before the beginning of a formal investigation by the competition authority. Companies can thus terminate the misconduct and decide how to best handle it in a timely manner (e.g., whether to apply for leniency with the competent antitrust authority).[210]

Third, depending on the jurisdiction, the adoption or strengthening of an antitrust compliance program can be valued by antitrust authorities as a mitigating factor for fine calculation purposes.

Apart from the significant costs involved in the structuring, adoption and management of the program itself, in terms of possible negative enforcement effects it has been argued that antitrust compliance programs may enable employees to learn how to violate antitrust rules more effectively and/or avoid detection.[211]

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[209] European Commission, Compliance Matters, cit.

[210] As it will be illustrate below, being the scope of leniency programs generally limited to horizontal secret cartels, an effective policy aiming at encouraging the adoption of compliance programs should not only provide for them qualifying as a fine mitigating factor, but also for an additional fine reduction in case the company self-reports an antitrust infringement uncovered through the program and which is not covered by the leniency programs.

[211] WILS W.P.J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit., making reference to SCHINKEL M.P., *Nalevingsprogramma's*, Markt & Mededinging 231, 2011.

Furthermore, intensive training about regulations with which employees already comply or covering issues which are unrelated to their work, may ultimately reduce employees' incentives to comply with the regulations instead of encouraging compliance.[212]

While these negative effects might certainly happen, they seem quite the exception rather than the rule. In particular, the difference between whatever compliance programs and effective compliance programs should always be kept in mind. As mentioned above, effective antitrust compliance programs do not merely educate employees, but also provide for internal procedures aimed at regulating corporate decision-making processes that might be of relevance from an antitrust perspective. Employees are required to follow the procedures and to seek guidance when needed, thus ultimately enabling the company to prevent the occurrence of antitrust violations in the first place. Specific mechanisms of incentives and disincentives should encourage compliance with the internal procedures and ensure that those employees that do not respect them are duly and publicly punished. As to trainings, they should be carefully tailored on the employees' different jobs, and corresponding antitrust risks. Employees should thus get a clear picture of the actual antitrust risks they face in their every-day business life and of how the company expects them to react. The setting up of proper incentives and disincentives linked to antitrust compliance should ensure that the negative effects mentioned above remain merely theoretical.[213]

[212] WULF K., *Ethics and Compliance Programs in Multinational Organizations*, Springer Gabler, 2011.
[213] GERADIN D., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils*, cit.

Antitrust compliance programs thus represent the key instrument to prevent the occurrence of unintentional violations insofar as they adequately educate employees, reduce to employees the direct cost of compliance and foster the spread of a culture of compliance within the company. As to the prevention of intentional violations, compliance programs may serve the purpose of reducing the employees' incentives to infringe the law (e.g., by setting sales targets linked to volumes instead of prices). Also, by increasing the employees' awareness of the importance of complying with antitrust laws, compliance programs may help deter intentional infringements by making it more difficult for the infringer to find the complicity of other employees.[214] In this regard, the monitoring of the business activities that comes with the implementation of an effective compliance program may also prove particularly useful in Europe, where, since the entry into force of Regulation no. 1/2003, companies have to self-assess their commercial arrangements in terms of compliance with competition law.[215]

Some authors[216] have also argued that antitrust compliance programs enabling the company to discover the existence of an antitrust misconduct can lead the company to decide not to report the wrongdoing to the competent authority, but to destroy or hide the evidence in order to avoid the hefty consequences arising from an antitrust violation.

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[214] ARLEN, J., *The Failure of the Organizational Sentencing Guidelines*, University of Miami Law Review, 2012, pp. 321-362, concluding that whether corporate misconducts are intentional or unintentional, corporate policing is essential to optimal deterrence of corporate crimes. On the last point see also SOKOL D.D., *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, cit.

[215] TETI E., *Il self-assessment per le imprese dopo i recenti orientamenti dell'Autorità Antitrust italiana: quale futuro?*, Contributo per il XII Convegno "Antitrust fra Diritto Nazionale e Diritto dell'Unione Europea", Treviso, 19-20 maggio 2016.

[216] WILS W.P.J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit.

This does not sound fully convincing. First, it is not entirely clear the connection between the company's decision not to report the uncovered wrongdoing and to hide or destroy the relevant evidence and the antitrust compliance program. The latter is certainly one of the means to discover an antitrust infringement, but it has nothing to do with the following decision of the company as to how to react. If a company chooses to conceal or destroy evidence of an antitrust infringement discovered through the implementation of a compliance program, it is the result of a bad advice (or no advice at all) and not a consequence of having adopted an effective compliance program.[217] On the contrary, effective antitrust compliance programs should always strongly advise against employees concealing or destroying proofs of infringements as this may lead to a significant fine increase in the event of the competition authority later finding it out.

Second, the above perverse effect does not seem to factor in the powerful incentive to blow the whistle of leniency programs.[218] By granting immunity from fines to the first cartel member denouncing the cartel, leniency programs encourage companies, which have discovered that some employees have been involved in cartel behavior, to come forward with antitrust authorities, rather than concealing or destroying evidence. In this sense, leniency programs alter the internal dynamics of cartels insofar as every cartel member knows that one whistleblower is enough to have all cartelist being convicted and that is essential that all cartelists stick together and conceal evidence.[219] This holds true also if the company finds out about the infringement at a later stage (e.g., following a dawn raid) and once another cartel

[217] GERADIN D., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils*, cit.
[218] ANGELUCCI C., HAN M.A., *Monitoring Managers Through Corporate Compliance Programs*, cit.
[219] GHEZZI F., PINI G.D., *Le nuove linee guida dell'Autorità garante della concorrenza sulla quantificazione delle sanzioni antitrust: maneggiare con cautela*, cit.

member had already denounced it to the competent authority, since substantial fine reductions may still be available to the company.

Being cartels the most serious infringements of competition law, and those punished with the highest fines, leniency programs alone should suffice to neutralize the perverse effect illustrated above.

That said, antitrust infringements other than cartels are usually not included within the scope of leniency programs[220] since they are considered to be less difficult to detect and investigate by competition authorities, even without the cooperation of the undertakings directly involved.[221] Therefore, even in relation to these infringements, companies should have no incentive in lowering the level of monitoring and/or destroying or concealing evidence of misconducts, since they are more easily detected and investigated by competition authorities and the risk of exposure is higher.

Yet, it is no secret that the fight against cartel generally is competition authorities' number one priority, so that fewer resources are devoted to the detection of other type of infringements.[222]

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[220] If thanks to an effective antitrust compliance program a company uncovers, for instance, that some of its sales managers regularly engage in resale price maintenance practices with distributors, it will generally not be entitled to benefit from the leniency program.

[221] European Commission, Notice on Immunity from fines and reduction of fines in cartel cases, cit., point 3; ICA, Comunicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'articolo 15 della legge 10 ottobre 1990, n. 287, point 1-ter; Autorité, Questions-réponses sur le programme de clémence français, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=372&id_article=1371#2, accessed 23 February 2016.

[222] In 2014, out of 16 decision issued by the European Commission on antitrust matters, 10 related to cartel cases (of which 8 settlements) and the remaining 6 to other infringements (of which 2 cases closed with commitments), see European Staff Working Document Accompanying the Document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Competition Policy 2014, available at

Being antitrust infringements other than cartels ultimately less investigated and sanctioned by antitrust authorities, companies could consider that corporate compliance programs, and monitoring efforts, should focus on cartels only. This could obviously leave the door open to the negative enforcement effect illustrated above, where companies end up hiding evidence of "minor" wrongdoings, trusting that their conduct will not come under the radar of competition authorities.

This is why the provision of a fine reduction for companies having adopted and implemented an effective antitrust compliance program could represent a significant incentive to implement a comprehensive monitoring activity. Furthermore, if an additional fine reduction was to be envisaged in the event of the company reporting wrongdoings outside the scope of the leniency programs also the possible negative enforcement effect of the company being tempted to conceal evidence of non-hard core infringements, possibly uncovered via the implementation of the compliance program, would be further reduced.

In conclusion, to underestimate the value of antitrust compliance program by applying a pure cost-benefit analysis somehow creates a straw man to the extent that the benefits arising from having adopted and implemented an effective compliance program cannot be easily quantified.[223] The best outcome of any compliance program, namely no antitrust violation whatsoever, cannot be monetized as the typical counterfactual analysis cannot be applied. A successful compliance program

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http://ec.europa.eu/competition/publications/annual_report/2014/part2_en.pdf, accessed 23 February 2016.

[223] In this sense see also ARLEN, J., *The Failure of the Organizational Sentencing Guidelines*, cit., observing that corporation cannot be sure of the amount of the sanction with or without the compliance program due to judges' discretion in the setting of the fine.

brings cost-savings which are almost impossible to calculate. Therefore, it is in the worst case scenario of the infringement being committed, detected and sanctioned, notwithstanding the existence of the program, that companies need to see the actual benefit of investing significant resources in compliance.

This does not mean that whatever compliance efforts should receive credit and leads us to the heart of the issue. First, are antitrust authorities in a position to differentiate between effective and sham antitrust compliance programs?[224] Second, if antitrust authorities can identify an effective (yet defective in the investigated case) antitrust compliance program, to what extent should they reward the company albeit the program's failure to prevent an infringement?

B. Original or replica: hard to tell. Hard to tell?

Despite the different views amongst authorities as to the consideration to be given to antitrust compliance programs, there is a general consensus[225] on the fact that a one-size fits all model cannot be identified, nor it would be significantly useful for companies and enforcers. Every company faces its own antitrust risks which vary according to the company's activity, its size and the characteristics of the markets in which it operates. First of all, this means that the program might change over time, and will likely do so, in order to reflect changes occurred in the life of the company. Second, each company will structure the compliance program in accordance with its own internal procedures and way of doing business. Antitrust training in classes can

[224] It goes without saying that the fundamental assumption here is that a compliance program cannot be considered automatically ineffective only because it did not prevent the occurrence of an antitrust infringement.
[225] OECD, Roundtable on Promoting Compliance with Competition Law, cit.

be paired with one-on-one sessions, or online based courses,[226] or both. There is no preset appropriate amount of resources to devote to compliance programs. Programs featuring identical characteristics on paper, might prove profoundly different when it comes to actual compliance with antitrust provisions by employees. Most importantly, infringements are acts of men and the product of a complex interaction of different factors, such as personal inclination, performance targets, and (mis)understanding of the company's *desiderata*.[227]

It is thus certainly true that it is not possible for outsiders, such as competition authorities' officials, to predict how compliance programs will be implemented and understood in practice.[228] As mentioned, there is no set of compulsory elements which will ensure effectiveness of an antitrust compliance program in all cases. In other words, there are too many unpredictable variables influencing the ultimate success of a compliance program for anyone but the company itself to at least try to anticipate them all. Antitrust authorities can certainly provide some useful guidelines as to those characteristics that they will be looking at when evaluating a compliance program,[229] but their contribution cannot go much farther than this.

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[226] For an accurate description of how online antitrust training should be designed, see O'MEARA B., *Insights into Successfully Managing the In-house Legal Function: An Insider's View*, Thorogood Professional Insights, 2004.

[227] See PARKER C., AINSWORTH P., STEPANENKO N., *ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases*, Australian National University, Centre for Competition and Consumer policy, May 2004, pp. 1-119; BAKER W. E., FAULKNER R. R., *The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry*, American Sociological Review, 58/1993, pp. 837-860; SONNENFELD J., *Executive Apologies for Price Fixing: Role Biased Perceptions of Causality*, cit.; SONNENFELD J., LAWRENCE P. R., *Why do companies succumb to price fixing?*, cit., O'KANE M., *Does prison work for cartelists? – The view from behind the bars*, Interview of B. Allison, cit.; CONLEY J.M., O'BARR W. M., *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, Law and Contemporary Problems, 60/1997, pp. 5-21.

[228] PARKER C., GILAD S., *Internal corporate compliance management systems: structure, culture and agency*, in Parker C., Lehmann Nielsen V., Explaining Compliance: Business Responses to Regulation, Edward Elgar, 2011, pp. 1-46.

[229] OECD, Roundtable on Promoting Compliance with Competition Law, cit.

However, this does not mean that antitrust authorities cannot assess the effectiveness of already existing antitrust compliance programs *ex post*, once an infringement has occurred. Contrary to what has been argued by some authors, antitrust authorities do not appear to be driven by hindsight bias[230] nor are particularly badly placed[231] to identify those characteristics that made one antitrust compliance program effective and another one a mere sham program.[232] More specifically, competition authorities may well distinguish not only between good and sham programs, but also among "good" programs, between enforced and not enforced programs and, within the first category, between coherently enforced and badly enforced programs.

First, the burden of proof on the effectiveness of the compliance program would be on the investigated company.[233] The latter is able to provide (and has every incentives to do so) the authority with as many evidence as available concerning the adoption and implementation in good faith of a compliance program aiming at reflecting the company's genuine interest in complying with antitrust provisions and preventing the occurrence of wrongdoings. Furthermore, antitrust authorities have extensive investigatory powers of their own, which allow them to have access to a significant number of corporate documents (e.g., email, presentations, reports, etc.) which can either support or contradict the evidence provided by the company.[234]

Second, it has been observed that competition authorities could never see the full picture as "*they never see the cases where the compliance programmes have successfully*

[230] BAER M.H., *Governing Corporate Compliance*, Boston College Law Review, 2009.
[231] WILS W.P.J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit.
[232] STUCKE M. E., *In Search of Effective Ethics & Compliance Programs*, cit.
[233] MURPHY J., *Promoting compliance with competition law: do compliance and ethics programs have a role to play?*, note presented to the OECD Roundtable on Promoting Compliance with Competition Law, cit.
[234] GERADIN D., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils*, cit.

prevented infringements, only the cases where this has not happened".[235] This argument does not seem to consider the importance of keeping records of all the activities carried out in order to implement the compliance program. As indicated under sections II. A. a., and II. A. d. above, a well-designed reporting policy should foresee the collection of periodical reports detailing all the activities (e.g., trainings, internal procedures, etc.) carried out by the company as part of the implementation of the program.[236] In case of need, such a policy shall enable the company to provide an investigating authority with evidence, for example, of internal advice given by the compliance officer on specific contractual covenants which the business units wanted to include in a contract but could have had an anticompetitive effect. By demonstrating that the relevant employees (i) had sufficient knowledge of antitrust rules to doubt the compatibility with antitrust rules of an envisaged RPM clause, (ii) in accordance with the corporate internal guidelines, sought proper advice from the compliance officer, (iii) as a result of the advice provided by the compliance officer, did not include the RPM clause in the agreement, a company could show that its antitrust compliance program is effective in the sense that it prevented other infringements to be committed in the past. Analogous examples (e.g., internal procedures demonstrating that the company strongly and clearly indicated to a competitor its intention not to discuss any future commercial strategies) can be

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[235] WILS W.P.J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit.

[236] It cannot be excluded that such reports might end up reflecting a false image of a compliant company in the event of a structured top-down cheating mechanism; see KOLASKY W. J., *Antitrust Compliance Programs: The Government Perspective*, cit., where the Deputy Assistant Attorney General provides an example of an organized cheating uncovered during an investigation. In that case, a top executive of a firm had organized a meeting with the main foreign competitor to discuss exchanging technological information. The top executive duly followed the corporate internal policies and notified the general counsel of the meeting. The general counsel decided to accompany the executive to the meeting and never lost his sight. Customary exchanges of business cards took place at the beginning of the meeting and the two executives acted as that was the first time they met. Later on, during the investigation, the DOJ uncovered that the introduction between the two executives had been staged in order to keep the general counsel in the dark of the ongoing worldwide price-fixing conspiracy the two executives had been involved in for years. Furthermore, also other employees of the company had been instructed to use code names for the competitor when the general counsel was nearby.

imagined in relation to other type of risky situations where the adoption and implementation of an effective antitrust compliance program avoided the occurrence of antitrust infringements.

To conclude, any meaningful assessment of the effectiveness of an antitrust compliance program needs to go beyond its mere appearance. In this sense, antitrust authorities are in a position not only to evaluate whether the program submitted by a company is good on paper, but also to get evidence of how the program enabled the company to effectively prevent wrongdoings in the past and was actually implemented.

On the one side, based on their experience and the best practices developed at the international level, antitrust authorities can identify a number of requirements and characteristics that antitrust compliance programs should have in order to increase the probability of preventing antitrust infringements and spread a true culture of compliance within the company.

On the other side, antitrust authorities can evaluate whether the program was actually implemented by the company, so that it can be reasonably argued that the company under investigation did whatever it could to prevent the infringement. Providing evidence of the actual efforts made by the company so as to ensure compliance with antitrust laws to the maximum extent possible - both in terms of fostering a culture of compliance at all levels and of monitoring the implementation and adequacy of the program - is certainly a significant burden. However, such a burden would lie on investigated companies and antitrust authorities have extensive investigative powers to prove the companies wrong. It will thus be in companies'

best interest to keep record of the implementation of programs so as to be able to demonstrate their *bona fide* in case an infringement occurs despite their best efforts.

C. Immunity or nothing: In medio stat virtus

As demonstrated above, antitrust authorities can well assess whether a compliance program adopted and implemented by an investigated company was effective, in the sense of it being expression of a true commitment to compliance, so that the occurrence of the infringement can be considered as an exception rather than the rule and does not affect the effective nature of the program.

The first question thus becomes whether to reward companies for the efforts undertaken to adopt and implement the program, even though it actually failed in preventing the wrongdoing under investigation, or to simply refuse any form of credit. If the answer is to reward (as it will be argued below), the issue will then be to define the extent of any such reward, i.e., in terms of either immunity or fine reduction.

a. Why doing nothing is not a viable option

An idea which has been growing stronger and stronger during the past years is that prevention is better than cure. Facing undeniable financial constraints, competition authorities have gradually approached antitrust enforcement by re-evaluating the importance of prevention. The basic idea is that to provide guidance to companies as to how to comply with competition law can ultimately lead to fewer infringements, thus enabling competition authorities to focus on their enforcement priorities. Also

fines' aim is thus twofold, punishment as well as deterrence[237] with the ultimate goal being to make sure that forming a cartel is never a risk worth taking.[238] In this sense, antitrust fines do not differ from criminal fines, whose purpose is not to ration the activity, but to extirpate it so far as possible.[239] Consistently, it has been argued that cartel activity is never efficient or otherwise socially desirable and should be prohibited rather than being merely "taxed".[240]

The past decade has been characterized by a steady increase in the level of fines imposed by competition authorities for cartels. In the period 2005-2014, the European Commission has imposed a total of Euro 18,345 billion[241] for infringements of Art. 101 TFEU, which represents a huge increase compared to the amount of Euro 3,756 billion imposed in the period 1995-2004 for analogous infringements. During the same time intervals, the number of cartel cases decided by the European Commission rose from 40 (in the period 1995-2004) to 63 (in the period 2005-2014).[242]

That said, has such a tough fining policy obtained the desired results in terms of cartels' detection and reduction?

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[237] Court of Justice, case C-41/69, Chemifarma, judgment of 15 July 1970, para 173, where the Court indicated that the object of fines "*is to suppress illegal activity and to prevent its recurrence*", see also European Commission, factsheet "Fines for breaking EU Competition Law", available at http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf, accessed 2 March 2016. As to deterrence, a further distinction is made between specific and general deterrence, by which it is meant that fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behavior that is contrary to antitrust law (general deterrence), see EU Guidelines on setting fines. This view is also shared by Italian Courts, see for instance, TAR Lazio, judgment no. 3029/2012.

[238] VESTAGER M., *Perspectives on Europe*, Speech given at London School of Economics, 20 November 2015.

[239] POSNER R. A., *An Economic Theory of the Criminal Law*, Columbia Law Review, 85/1985, pp. 1193-1231.

[240] WERDEN G. J., *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, European Competition Journal, 2009, pp. 19-36; SHAVELL S., *The Optimal Use of Nonmonetary Sanctions as a Deterrent*, American Economic Review 77/1987, pp. 584-592.

[241] Please note that this figure does not take into account subsequent adjustments made by EU Courts.

[242] http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

While the prevailing view is that high corporate fines are a must-have in the antitrust enforcers' toolbox, there is no general consensus as to the optimal level of fines or even as to the ability of any level of fine to effectively deter antitrust infringements.[243]

On the one side, it has been suggested that the optimal level of fines should be equal to 150 percent of the company's turnover in the relevant market[244]. In particular, there appears to be empirical evidence suggesting that collusive gains outweigh the costs of collusion (i.e., sanctions) so that, in order to fulfill a deterrent purpose, fines should amount to more than twice the annual turnover of the companies involved.[245] Indeed, studies indicate that while the median cartel overcharge is 27.0% of the relevant sales, the average cartel fine is 10.2% of the volume of affected commerce[246]. This means that, taking into account the usually highly profitable and long-lasting nature of cartels, in order to deprive the convicted company of all illicit gains, fines should be set at such a high level that they would risk end up disrupting the business, which is certainly not the final aim of antitrust policy.[247] Furthermore, it cannot be excluded that very high fines would end up being over-deterrent, in the sense that companies could over-invest in monitoring and compliance, thus chilling

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[243] BUCCIROSSI P., SPAGNOLO G., *Optimal Fines in the Era of Whistleblowers: Should Price Fixers Still Go to Prison?*, The Political Economy of Antitrust (Goshal V., Stennek J., edited by) 2007, pp. 81-122.

[244] WILS W. P.J., *Is Criminalization of EU Competition Law the Answer?*, World Competition: Law and Economics Review, 28/2005, pp. 117-159.

[245] BOLOTOVA Y, CONNOR J., *Cartel Sanctions: An Empirical Analysis*, in SSRN Electronic Journal, April 2008, pp. 1-31.

[246] The average cartel sanction increases to 18.9% of affected sales if private damages are considered.

[247] JENNY F., *Optimal Antitrust Enforcement: From Theory to Policy Options*, in The Reform of EC Competition Law: New Challenges (Ioannis Lianos & Ioannis Kokkoris, eds. 2010), pp. 121-138; the Author mentions a study demonstrating that, if an optimal fine was to be imposed, companies would need assets accounting for as much as six times their annual sales to be able to pay; see also WERDEN G., SIMON M., *Why Price Fixers Should Go to Prison*, Antitrust Bulletin 32/1987, 917-937. According to WILS W. P.J., *Optimal Antitrust Fines: Theory and Practice*, World Competition, 29/2006, pp. 183-208, fines should be defined so as to exceed the gain deriving from the colluding activity independently of the presence of any harm. See also, BECKER G., *Crime and Punishment: An Economic Approach*, Journal of Political Economy, 76/1968, pp. 1-54.

competition for fear of engaging in anticompetitive conduct which actually are not illegal.[248] However, in more general terms, it has been noted that, at a certain point, making already high financial fines even higher won't increase deterrence.[249] Some researchers have also shown that "*the factors that make the most difference to compliance behaviour are the perceived likelihood of detection and enforcement, rather than the objective severity and subjective fearsomeness of the sanctions imposed*".[250] Furthermore, in setting the optimal level of fines, it should also be considered that not all competition authorities can fine companies for the whole duration of the infringement if it lasted for more than a certain amount of years, which is often the case in cartel cases.[251]

On the other side, it has been noted that an increase in total fines can be explained in many ways, not necessarily implying a subsequent reduction in the number of cartels. For instance, it might be the result of an improvement in the competition authorities' ability to uncover cartels, or of a more systematic and effective use of leniency programs. As a matter of fact, "*we do not have any evidence that a still higher corporate fine would deter price-fixing more effectively. It may simply be that corporate fines are misdirected, so that increasing the severity of sanctions along this margin is at best irrelevant and might counter-productively impose costs upon consumers in the form of higher prices as firms pass on increased monitoring and compliance expenditures*".[252]

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[248] RILEY A., SOKOL D. D., *Rethinking Compliance*, cit.

[249] See comments made by the Business and Industry Advisory Committee at the OECD Roundtable on Promoting compliance with Competition Law (summary of discussion), cit.; see also HAMDANI A., KLEMENT A., *Corporate Crime and Deterrence*, Stanford Law Review, 61/2008, pp. 271-310.

[250] PARKER C., *Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality*, in Beaton-Wells C., Ezrachi A., Criminalising Cartels: Critical Studies of an International Regulatory Movement, Hart 201, pp. 239-262.

[251] VESTAGER M., *Perspectives on Europe*, cit; Commissioner Vestager also noted that in some EU Member States fines can be avoided by merely restructuring the company that took part in the cartel.

[252] GINSBURG D., WRIGHT J., *Antitrust Sanctions*, cit.

Furthermore, it should also be noted that financial penalties for antitrust violations are usually levied on the companies rather than the employees who actually committed the wrongdoing. This means that the employees' decision making process will generally be far more influenced by business circumstances (e.g., reaching a target or closing a deal so as to get bonuses), rather than by the fear of paying fines. In addition, employees will hardly carry out a sophisticated assessment of the amount of fines that could be imposed on the company and the actual risk of being caught before engaging in an anticompetitive conduct.[253] A (surprisingly) quite common thinking among cartelists is that they are either too smart to get caught or part of industries which will not come under the competition authorities' radar (because of limited economic dimensions or because not directly interacting with consumers).[254] As a result, lacking personal sanctions, the deterrent effect of corporate financial penalties alone is quite limited.[255] Finally, effective deterrence through financial penalties needs to be constantly nourished. A huge fine imposed on a company can deter competing players for an initial period of time, but will likely be forgotten in a few years.[256] This is mainly due to the fact that "*in the probability estimates they make, people tend to rely disproportionately on those incidents which can easily be brought to mind*".[257]

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[253] MURPHY J., *Promoting compliance with competition law: do compliance and ethics programs have a role to play?*, cit.
[254] O'KANE M., *Does prison work for cartelists? – The view from behind bars*, interview of Bryan Allison, cit.
[255] STONE C., *Where the Law Ends: The Social Control of Corporate Behavior*, cit.
[256] SOKOL D. D., *Antitrust in 2025: Cartels, Agency Effectiveness, and a Return to Back to the Future*, CPI Antitrust Journal, 2010, pp. 2-4, observing that "[i]*n many cases the same industries are recidivists because, as a new generation retires, the next generation relearns how to coordinate with competitors*"; see also EUCKEN W., *The Competitive Order and Its Implementation*, Competition Policy International, 2006; WILKS S., BARTLE I., *The Unanticipated Consequences of Creating Independent Competition Agencies*, Western European Politics, 2002, pp. 148-172.
[257] WILS W. P. J., *Optimal Antitrust Fines: Theory and Practice*, cit.

It thus proves difficult to measure the impact of the level of fines alone on cartel detection and cartel activity as any reduction in the number of infringements uncovered may be the result of many factors. Higher fines do not imply a higher probability of being caught; as well as do not automatically mean less infringements. Furthermore, a decrease in the number of cartels detected can be the result of either a more effective enforcement (possibly coupled with higher fines) or the companies' increased ability to hide their misconduct.

In this sense, leniency programs have certainly represented an important enforcement tool. By granting immunity from fines to the first company denouncing the existence of a cartel (and fine reductions to further companies coming forward), leniency programs undermine cartels' internal stability by making it more profitable to cheat on the cartel.[258] Furthermore, leniency programs allow competition authorities to uncover cartels more easily and at lower costs.

While the actual impact of leniency policies depends on several factors such as (i) the profitability of cartels, (ii) the level of enforcement and punishments by the authority outside the scope of leniency programs, and (iii) the treatment granted to the applying firms, leniency programs certainly show an impressive track record in terms of cartel detection.[259] Moreover, leniency programs serve a deterrent purpose

[258] There is a vast literature on leniency. As to the point made here, see, *inter alia*, BUCCIROSSI P., SPAGNOLO G., *Antitrust Sanction Policy in the Presence of Leniency Programs*, Concurrences, 4/2006, pp. 25-30; WILS W. P.J., *Leniency in Antitrust Enforcement: Theory and Practice*, World Competition, 30/2007, pp. 25-64; MOTTA M., POLO M., *Leniency Programs and Cartel Prosecution*, International Journal of Industrial Organization, 21/2003, pp. 1-40; HINLOOPEN J., *An Economic Analysis of Leniency Programs In Antitrust Law*, De Economist 2003, pp. 415-432; HINLOOPEN J., *Internal Cartel Stability with Time-Dependent Detection Probabilities*, International Journal of Industrial Organization, 2006, pp. 1213-1229; MONTCHENKOVA E., VAN DER LAAN R., *Strictness of Leniency Programs and Cartels of Asymmetric Firms,* 2005, pp. 401-431; SPAGNOLO G., *Leniency and Whistleblowers in Antitrust,* in Buccirossi P. (ed.), Handbook of Antitrust Economics, The MIT Press, Cambridge MA 2008.

[259] In this respect, Italy represents somehow an exception as leniency programs do not appear to have achieved a huge success. In the period 2007-2015, out of 25 cartel fining decisions, the leniency

insofar as they hinder the incentive of the cartelists to stick with the cartel.[260] Fearing that the other conspirators might cheat on the cartel and blow the whistle with the competition authority, and benefit from immunity, companies should be disincentivized from forming a cartel in the first place.

Despite all the issues mentioned above, high fines (of any type) certainly are powerful drivers of compliance with competition law.[261] But is deterrence enough to achieve spontaneous compliance? The empirical evidence of cartels and antitrust infringements still being on the daily agenda of competition authorities leads to a negative answer.[262] Indeed, the vast majority of the literature agrees that many factors, other than fear of fines, act as drivers of compliance with competition law. As it has been rightly pointed out, deterrence alone can fail at leading to compliance as it does not address the societal perception of the morality of the behavior that is being regulated.[263] In this sense, the traditional fining policy "*merely puts a price on non-compliance*"[264] while the optimum would be "*to engender a culture of compliance and merely a fear of non-compliance*".[265] Other factors acting as drivers of compliance include:[266] fear of damages to individual (both in terms of financial penalties[267] and

program was applied in 6 cases only. This may imply that other factors (e.g., culture and social perception of leniency policies) may have an influence on the actual success of this policy instrument within a given country.

[260] BUCCIROSSI P., SPAGNOLO G., *Antitrust Sanction Policy in the Presence of Leniency Programs*, cit.

[261] See the OFT Report, Drivers of Compliance and Non-Compliance with Competition Law, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf, accessed 4 March 2016.

[262] STEPHAN A., *Why the UK's New Approach to Competition Compliance Makes for Good Enforcement*, CPI Antitrust Chronicle, February 2012, pp. 1-12.

[263] See comments made by A. Riley at the OECD Roundtable on Promoting compliance with Competition Law (summary of discussion), cit.

[264] RILEY A., SOKOL D. D., *Rethinking Compliance*, cit.

[265] Ibidem.

[266] The list is taken from the he OECD Roundtable on Promoting compliance with Competition Law (Issues Paper), cit. See also VAUGHAN D., *Controlling Unlawful Organizational Behavior, Social Structure And Corporate Misconduct*, University of Chicago Press, 1985, where the Author considered that corporate misconduct could be explained on the basis of a tripartite model taking into account (i) the

moral/reputational individual consequences[268]) or corporate reputation,[269] morality,[270] good training, incentives and disincentives for employees linked to compliance,[271] desire to avoid the diversion of the company's attention that competition investigations and litigation cause,[272] and a culture of competition within the firm,[273] industry, and/or country.[274]

If deterrence alone cannot ensure compliance with competition law, other tools should be (and have been) considered by competition authorities.[275] Corporate

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competitive environment in which the company is active (competition, resources, norms), (ii) the company's characteristics (structure, process, transactions), and (iii) the regulatory environment.

[267] Empirical studies have for example demonstrated that penalties levied on board members for lack of adequate monitoring are generally low, BLACK B. ET AL., *Outside Director Liability*, Stanford Law Review, 58/2006, pp. 1055-1159.

[268] Authors have identified social costs for individuals linked to wrongdoings, such as stigma, see RASMUSEN E., *Stigma and Self-Fulfilling Expectations of Criminality*, Journal of Law & Economics, 1996, pp. 519-544.

[269] GRAAFLAND J. J., *Collusion, Reputation Damage and Interest in Codes of Conduct: The Case of a Ducth Construction Company*, Business Ethics European Review, 13/2004, pp. 1-24, showing how the share price of companies involved in a cartel fell by ten percent following a TV show about the cartel was aired.

[270] PATERNOSTER R., SIMPSON S., *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, Law and Society Review, 30/1996, pp. 549-583, demonstrated that the intention to commit a crime is significantly influenced by individual moral beliefs. The higher the moral inhibitions, the weaker other costs-benefits considerations. See also SIMPSON S., *Corporate Crime, Law and Social Control*, Cambridge University Press, 2002; WRIGHT B.R.E., CASPI A., MOFFITT T.E., SILVA P.A., *Low self-control, social bonds, and crime: Social causation, social selection, or both?*, Criminology, 37/1999, pp. 479-509; KAHAN D., *What Do Alternative Sanctions Mean?*, University of Chicago Law Review, 1996/63, pp. 591-653.

[271] MURPHY, J. E., *Using Incentives in Your Compliance and Ethics Program*, cit.

[272] Reference is here to the costs involved in competition investigations (both before the antitrust authorities and in Courts) as well as in follow-on damage actions. Also possible claims brought by private parties have to be taken into account.

[273] JACKALL R., *Moral Mazes*, Oxford University Press, 1988; AGUILERA R. V. ET AL., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, Academy of Management Review, 32/2007, pp. 836-863.

[274] When national or industry specific norms push toward collusion, the probability of cartels is higher, see SOKOL D.D., *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, cit.

[275] See paragraph 60 of European Parliament resolution of 20 January 2011 on the Report on Competition Policy 2009, available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0023, accessed 5 March 2016, where the Parliament observes that "[...] *the use of ever higher fines as the sole antitrust instrument may be too blunt, not least in view of the job losses that may result from an inability to make payments, and calls for the development of a wider range of more sophisticated instruments covering such*

compliance programs are amongst these tools. The idea posited here is that optimal deterrence necessitates companies to be adequately incentivized to engage in prevention, monitoring and *ex post* policing within the frame of a compliance program.[276] As already mentioned, being the adoption and implementation of an effective compliance program expensive, companies will make the necessary investments only to the extent that they can reasonably estimate that their expected profits are higher (and expected cost are lower) if they undertake the investments rather than if they do not.[277]

As already mentioned under Section III. A., compliance programs, if effectively adopted and implemented, serve multiple objectives. First, compliance programs help spreading a culture of compliance with competition law at all levels within the company, thus increasing the chances of preventing antitrust infringements in the first place. Tailor-made trainings do not merely inform employees of risky situations which they may face in their day-to-day business and of the reaction that the company expects from them in dealing with such situations, but also introduce corporate internal procedures aiming at increasing the efficiency of the company's decision-making process. Second, by providing for internal whistleblowing mechanisms and periodical audits, they facilitate the company in uncovering - and dealing with - possible wrongdoings at an early stage.

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issues as individual responsibility, transparency and accountability of firms, shorter procedures, the right of defense and due process, mechanisms to ensure the effective operation of leniency applications (in particular to overcome the interference caused by discovery processes in the US), corporate compliance programmes and the development of European standards".

[276] RILEY A., SOKOL D. D., *Rethinking Compliance*, cit.

[277] ARLEN, J., *The Failure of the Organizational Sentencing Guidelines*, cit.; see also ARLEN J., KRAAKMAN R., *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, New York University Law Review, 72/1997, pp. 687-779.

This may obviously prove essential in the rush for leniency, but also in order to allow the company to effectively cooperate with an already ongoing investigation. Finally, the adoption of an effective compliance program clearly signals the company's commitment in putting its best efforts in doing business ethically. The violation of the internal compliance program may also expose the employee, whatever the level within the corporate hierarchy, to liabilities towards the company and its shareholders. This can be positively evaluated by stakeholders, thus ultimately benefiting the company's reputation.

From a more general perspective, being antitrust violations less "popular" than other corporate crimes, as it seems demonstrated by the fact that they tend to receive less media coverage,[278] the spread of compliance programs can increase both the employees' and consumers' awareness of the seriousness of such infringements, with positive effects in terms of deterrence. It has been suggested that, compared to other corporate crimes such as accounting fraud, cartels do not generate strong hostility since the public does not empathize with the victims[279]. Furthermore, antitrust violations may appear somehow ambiguous insofar as the behavior might be facilitated to a certain extent by the public authority.[280] Finally, the benefits of competition are generally difficult to be appreciated and take time to be seen by consumers.

On the other side, compliance programs of this kind are costly. They require significant resources not only to be designed and adopted, but also to be

[278] SOKOL D.D., *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, cit.
[279] MOOHR G. S., *An Enron Lesson: The Mosdest Role of Criminal Law in Preventing Corporate Crime*, Florida Law Review, 55/2003, pp. 937-975.
[280] SOKOL D.D., *What Do We Really Know About Export Cartels and What Is The Appropriate Solution?*, Journal of Competition Law & Economics, 4/2008, pp. 967-982.

implemented and monitored in their implementation over time. Furthermore, they cannot guarantee to the company that no infringements will ever occur or that the company will always qualify as first leniency applicant and obtain immunity. In addition, the benefit of avoiding infringements cannot be easily calculated as the consequences of non-compliance can be estimated only to a limited extent. Therefore, for a company to decide to seriously invest in the adoption and implementation of a compliance program, there should be a sufficiently certain reward even in case an infringement occurs despite the existence of the program, especially in those countries in which a compliance culture is still undeveloped.

But why should competition authorities incentivize these investments? The answer is quite straightforward. Compliance programs may facilitate the public enforcement of competition law in many ways.

First, they educate market players on competition law, increasing the awareness of what may constitute an antitrust infringement and how serious the consequences may be. To comply with competition law is an obligation of all those who are subject to it and ignorance of the law will in no case shield from responsibility.[281] However, competition law is not like other areas of corporate criminal law when it comes to identifying what constitutes an infringement. For example, without proper training, it is far from clear-cut for most employees that merely chatting with a competitor while drinking a cup of coffee about future price intentions may amount to a cartel for EU antitrust purposes. Notwithstanding this, cartelists are often aware of the illicit nature of their conduct,[282] so that it would be naïf to think that training alone

[281] European Commission, Compliance Matters, cit.

[282] See KOLASKY W. J., *Antitrust Compliance Programs: The Government Perspective*, cit.; O'KANE M., *Does prison work for cartelists? – The view from behind bars*, Interview of Bryan Allison, cit.; HARDING C., *An*

would suffice to prevent all infringements. However, trainings coupled with adequate incentives, disincentives and internal monitoring may certainly reduce the occurrence of "involuntary" infringements.

Second, antitrust compliance programs may lessen the investigative burden lying on competition authorities. By carrying out periodical audits as part of their programs, companies may obtain proofs of committed antitrust wrongdoings. These evidence can then be submitted to the competition authority within the context of either a leniency application or an ongoing investigation and thus help the authority in proving the existence of the infringement. Furthermore, as mentioned above, what is here suggested is not only to grant a fine reduction on the account of an effective compliance program, but also to provide for an additional reduction in case of self-reporting to the competition authority of an antitrust infringement uncovered through a compliance program and not included within the scope of leniency programs.

Mainly two lines of arguments are put forward by those who are against the granting of credit for the adoption and implementation of a compliance program.

The first one is linked to the last point made above.[283] It has been argued[284] that one (the only one) reward that companies can get from compliance programs is

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emotional issue, Why do cartelists do what they do and risk going to jail?, Competition Law Insight, 29 July 2008, pp. 1-3; STEPHAN A., *Hear No Evil, See No Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels*, cit.

[283] It could also be maintained that the very first reward companies should obtain from antitrust compliance programs is that they allow companies to fully comply with antitrust rules, thus preventing the occurrence of (unintentional) infringements in the first place.

[284] SNYDER B., *Compliance is a Culture, Not Just a Policy*, cit.; CALDWELL L.R., *Remarks at the 22nd Annual Ethics and Compliance Conference*, Atlanta, 2014; WILS W.P.J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit.

represented by the possibility to uncover antitrust violations at an early stage and thus possibly to apply for leniency. In this sense, compliance programs "*maximize the chance for a company guilty of price-fixing to find out about the conspiracy early enough to qualify for corporate leniency or otherwise cooperate with* [the] *investigation*".[285]

It is certainly true that compliance programs may enable the discovery of antitrust infringements before the beginning of a formal investigation by a competition authority so as to allow the company to qualify for immunity. This can be the case, for instance, when after a training an employee reports a suspected infringement to the compliance officer which concludes that the conduct may in fact amount to a cartel, asks for advice from external counsel, starts an in-depth internal audit and ultimately urges the company's board to apply for leniency before any other cartelist. But this is only the best case scenario and the reality may be much more complicated than that.

For instance, it may happen that either before sharing his/her doubts with the compliance officer, or immediately after, an employee of company A talks to his/her counterpart and co-conspirator in company B in order to agree on how to behave. Despite whatever agreement between the conspirators, the employee of company B immediately confesses the wrongdoing internally and promptly provides company B with sufficient evidence so as to enable the latter to apply for leniency before company A.[286] In this scenario, even though the compliance program allowed company A to uncover the existence of an infringement (either by encouraging the spontaneous confession of an employee or by means of a periodical audit), it did not

[285] BAER B., *Prosecuting Antitrust Crimes*, cit.
[286] MURPHY J., *Promoting compliance with competition law: do compliance and ethics programs have a role to play?*, cit.

prevented company A from being beaten by another conspirator in the race for leniency/immunity.[287]

As a different scenario, let's imagine that, via the program, the company finds out that one or more employees have been engaged in a price-fixing collusion with competitors. The company then starts an internal investigation and gather documental evidence proving the existence of the cartel, but also demonstrating that the company's employees acted as originators of the conspiracy, in the sense that they actively coerced the other competitors to participate in the cartel. Most jurisdictions prevent ringleaders from the possibility to apply for leniency.[288] While such exclusion is completely understandable from a policy perspective, this means that a sound compliance program may actually enable the company to uncover the occurrence of a cartel, but leaves the company with the dilemma of whether to come forward with the competition authority anyway, even knowing that it won't be able to get immunity.

A compliance program will thus never guarantee that the company will be in a position to qualify for immunity in the event of an antitrust infringement being committed by its employees, no matter how seriously the program will be adopted and implemented by the company nor the amount of resources devoted to it. There are too many variables which have a direct influence on the company's possibility to get immunity (e.g., the behavior of other conspirators, etc.) but which are outside the company's control.

[287] Timing is of the essence as only the first leniency applicant will get immunity from fines.
[288] EU Leniency Notice, points 13 and 22; US DOJ Corporate Leniency Program, lett. A(6).

From a different perspective, it is contended that leniency programs are better way to incentivize companies to detect and report cartel behavior than granting credit for antitrust compliance programs.[289] Of course in the best-case scenario, where the compliance program allows companies to uncover cartels and come forward with the authority in a timely manner so as to ultimately benefit from immunity, there is no need to further incentivize detection and reporting via compliance programs in the first place. Getting immunity from fines does not leave room for any other reward and companies could not expect anything more.

However, as indicated above, leniency is not always a viable alternative for companies discovering their involvement in cartels. It may be that the company is not fast enough to go in as first applicant or that the company acted as ringleader of the collusion. Furthermore, leniency is not available for all kind of infringements, but only for cartels, at least in most jurisdictions. This of course significantly limits the concrete possibilities of obtaining fine reductions, let alone immunity, as a result of a leniency application. Furthermore, saying that leniency programs are a better tool to incentivize detection and reporting seems to overlook that the main purpose of compliance programs is the prevention of infringements in the first place.[290]

It could be argued that, even outside the scope of the leniency program, companies can still benefit from fine reductions within the context of settlement procedures (at least in those jurisdictions that provide for such instruments).[291] It could thus happen

[289] WILS W. P. J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit.
[290] SNYDER B., *Compliance is a Culture, Not Just a Policy*, cit.
[291] On settlements procedures under EU Law, see, *ex multis*, WILS W.P.J., *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003*, World Competition: Law and Economics Review, 3/2006, pp. 345-366; WILS W.P.J., T*he Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*, World Competition: Law and Economics Review, 3/2008, pp. 335-352; LAINA F., BOGDANOV A., *The EU Cartel Settlement Procedure: Latest Developments*, Journal of European Competition Law & Practice, 7/2016, pp. 72-84.

that through an effective compliance program, a company uncovers the existence of an antitrust infringement that does not qualify for leniency and decides to self-report it to the competition authority, The idea here is that, if the company decides to settle the proceedings with the competition authority (basically by agreeing not to contest the charges), it could benefit from three kind of mitigating factors: first, a reduction for the existence and implementation of an effective compliance program, second, a reduction for having self-reported the infringement, and third, one for having reached a settlement agreement with the competition authority. In this case, it should be provided that, while each mitigating factor could lead to a fine reduction of up to a certain percentage, the cumulative fine reduction could not exceed, for instance 50-60% of the fine. That said, for the reasons explained in more details below, it is of the utmost importance that such a fining policy does not end up reducing too much the imposed fines, thus conveying the message that antitrust violations are not serious.

In addition, to reward companies for reporting wrongdoings to the competition authority outside the scope of leniency programs could also mitigate the "perverse" incentive effect of companies hesitating to monitor their employees for fear of being then investigated and sanctioned by competition authorities.[292] Indeed, some authors[293] have indicated that the provision of a strict liability for companies for the conduct of their employees can booster the implementation by companies of preventive measures aiming at avoiding the occurrence of infringements but, on the other hand, foster a perverse effect to the extent that companies may be incentivized not to put too much efforts in monitoring their employees fearing that this could lead

[292] HOFSTETTER K., LUDESCHER M., *Fines against Parent Companies in EU Antitrust Law: Setting Incentives for "Best Practice Compliance"*, World Competition, 2010, pp. 55-76.
[293] ARLEN J., KRAAKMAN R., *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, cit.; ARLEN, J.H., *The Potentially Perverse Effects of Corporate Criminal Liability*, Journal of Legal Studies 23(2), pp. 833-867.

to the competition authorities investigating and fining the companies. Such a perverse incentive would certainly be mitigated if, in addition to leniency programs (which already counterbalance it by rewarding the reporting of most serious antitrust infringements to competition authorities), companies could be entitled to a specific credit for having closely monitored their employees as part of an effective antitrust compliance program.[294]

Finally, from a different - but connected - angle, it has been argued that there is no reason to grant any consideration to companies which have infringed competition law simply because they had previously implemented a compliance program given that the program fell short of preventing the infringement. In this respect, saying that if a violation occurred then the program is by definition ineffective and does not deserve any reward seems to somehow miss the point. Rewards (in terms of fine reduction) are not intended for the program itself, but for the company and its efforts in ensuring compliance via the design, adoption and implementation of an effective compliance program. The fact that one or more employees cheated on the program and committed an antitrust infringement does not reduce the value of the company's efforts. Furthermore, it seems quite unfair to imply that the program is not effective because it did not prevent that specific infringement, while it may have prevented the occurrence of many other infringements in the past and the company can demonstrate it.

As it will be further detailed below, the suggestion here would not be to extend the scope of immunity also to companies which do not qualify for leniency but had put in place an effective compliance program. However, with the possibilities of

[294] Of course this possibility of getting credit would be particularly valuable to companies when immunity is not available to them.

applying for immunity or for fine reductions within the context of leniency programs being limited in practice, companies may see too low incentives to invest in an effective antitrust compliance program if there is no specific fine reduction for its implementation. Given the benefits that effective compliance programs can bring in terms of public enforcement, competition authorities cannot afford to disincentivize their adoption by not rewarding the high costs involved in their setting up and implementation.

b. Is it immunity too much?

Having showed that competition policy cannot merely encourage the adoption of effective compliance programs, without actually recognizing any credit for them, the question is now to what extend should competition authorities reward convicted companies for having implemented an effective compliance program.

First of all, it is worth recalling that not every compliance program would deserve a recognition, but only those programs that can be considered as effective in the sense illustrated under section II. A., above. Granting credit to whatever compliance program, irrespective of its features and of the seriousness of the company's commitment, would reduce the incentives on companies to invest in real compliance, and would send the wrong message that it takes even a little effort to get a more lenient treatment. Even though no one-size-fits-all definition of effective compliance program exists, competition authorities are in a position to assess whether the investigated company has adopted and implemented a compliance program of a certain kind. They can distinguish between those compliance programs that are true expression of the company's commitment to compliance and those that are a mere

façade of cosmetic compliance. It will be in the company's best interest to provide the authority with every available evidence as to the effectiveness of the compliance program, also with regard to previous instances in which the program actually "worked" in preventing antitrust infringements.

With reference to the EU legal system, some authors[295] have argued that since the setting up of a compliance program is the only tool that companies have in order to prevent their employees from engaging in anticompetitive activities, once they have implemented an effective compliance program, no fault-based liability can be imposed on them (and thus no fine) in the occurrence of an infringement. The underlying idea is that a company that has implemented an effective compliance program has done everything it possibly can to prevent the infringement so that no fine should be imposed on it. While fascinating in theory, it does not seem quite realistic to argue that by merely implementing a compliance program fulfilling a number of best practices the company can avoid being fined as it did all it possibly can. No compliance program, whatever its characteristics, will be able to prevent all infringements. Therefore, there will always be something more that could have been done or something that could have been done differently so as to maybe prevent the infringement in the first place.[296] Let's just think for instance about how the reporting

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[295] HOFSTETTER K., LUDESCHER M., F*ines against Parent Companies in EU Antitrust Law: Setting Incentives for "Best Practice Compliance"*, cit.; PERA A, CODACCI PISANELLI G., *Compliance e deterrenza: Un rapporto da co-struire*, in Diritto del commercio internazionale, 2012, pp. 1047-1074; GINSBURG D., WRIGHT J., *Antitrust Sanctions*, cit. In the US, a due diligence defense, according to which a company that can prove "*the existence of a reasonably diligent corporate compliance program by a preponderance of the evidence should be entitled to acquittal*" from criminal liability, has been envisaged. In particular, reasonably diligent corporate compliance programs have to fulfill the following eight factors, which recall those indicated above: (i) adequate duration, (ii) implemented by upper management, (iii) targeted at the criminal behavior at issue, (iv) tailored to fit the company's culture, (v) clear about the company's desire to comply with the law, (vi) communicated to employees, (vii) enforced, (viii) periodically reviewed and updated, see WALSH C. J., PYRICH A., *Corporate Compliance Programs As a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, cit.

[296] GERADIN D., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils*, cit.

mechanisms to seek advice from the compliance officer are designed. If they had been different (e.g., allowing for a prompter reply), maybe the employee who was contacted by a competitor would have been effectively able to refrain from sharing commercially sensitive information. In general, any *ex post* analysis of the company's approach to compliance will identify something that could have been performed better or differently, so that there will hardly be any company that actually did all it possibly can to prevent the infringement.

That said, to grant immunity from fines by way of recognition for the implementation of an effective compliance program does not seem an appropriate solution for a number of reasons.

It has been pointed out that providing for immunity would create a perverse incentive for companies insofar as the latter (i) significantly benefit from antitrust infringements, (ii) can easily encourage antitrust infringements by setting excessive financial targets and incentives, and (iii) bear a cost for compliance programs which is low compared to the potential benefits of antitrust infringements. Indeed, facing the possibility to obtain immunity, companies would have the incentive to set up compliance programs while at the same time encouraging their employees to engage in antitrust infringements.[297]

The bottom line of this argument is certainly true. However, some of the assumptions do not seem fully embraceable. For instance, there are no doubts that too high financial targets and incentives can push employees to disregard antitrust rules by fostering the idea that the company cares more about the achievement of

[297] WILS W. P. J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit.

these targets at whatever costs than about competing fairly. Nevertheless, it is for this very reason that how financial targets and incentives are designed is one of the elements that need to be taken into account when assessing a compliance program. An effective compliance program will have to provide for the setting of financial targets and incentives so as to avoid them to be deceptive (e.g., by linking sales targets to quantities instead of revenues). Only those programs that can be considered effective also in this sense should qualify for getting credit at sanctioning. Therefore, the possibility to incentivize employees via the setting of particularly high financial targets and incentives should not be factored in when assessing the appropriateness of providing immunity for companies having implemented a compliance program.

Furthermore, to consider that the costs to set up an effective compliance program are low compared to the potential benefits of antitrust infringements appears to overlook the fact that antitrust infringements bring about substantial costs as well in terms of fines, civil damages, reputation, etc.. Also these potential costs are certainly taken into account by companies when deciding whether or not to set up a compliance program and the amount of resources to devote to it. Even more importantly, as indicated under section III. A. above, these costs cannot be exactly quantified in advance so that any pure costs-benefits analysis as to the adoption of compliance programs cannot lead to reliable conclusion. To represent the company's decision-making process by saying that the costs of implementing a compliance programs are low compared to the benefits of infringements thus catches only part of the whole picture.

That said, as anticipated, to grant immunity to companies that infringed competition law despite the existence of a compliance program, even an effective one, does not seem to be an appropriate solution. In particular, this would create an imbalanced incentive for companies as it would indeed risk to send the message that companies bear no responsibility for what they have done and that antitrust infringements are somehow less serious and more tolerated violations. Any such message would obviously undermine the effectiveness of whatever deterrence policy for antitrust enforcement.[298]

Under EU law, fines can be imposed when a company either intentionally or negligently commits a violation of competition law.[299] In this sense, the imposition of fines serves the purpose of ensuring compliance with the EU treaty provisions on anticompetitive behavior.[300] Given such central role granted to fines within the deterrent policy of EU competition law enforcement, granting immunity to companies having infringed competition law solely on the grounds of them having adopted and implemented an effective compliance program seems to go beyond the

[298] This risk could be at least in part mitigated if a personal criminal liability for the author(s) of the infringement was to be introduced. On the opportunity to add personal criminal liability to corporate liability for antitrust infringements see WILS W. P. J., *Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, In Particular Imprisonment?*, in Ehlermann C.D., Atanasiu I., European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law, Hart 2002, pp. 409-450; WILS W. P. J., *Is Criminalization of EU Competition Law the Answer?*, cit. However, it should be recalled that corporate interests are often different from those of the individuals involved in the anticompetitive conduct. While companies try to reduce the gap between the individual's incentives and the company's ones through monitoring, such balance might be cracked if the employee faces criminal sanctions of its own. In this sense, it has been argued that "[c]*riminal sanctions erode trust between employer and employee, possibly creating a chilling effect for compliance purposes if the employee fears that the employer may not legally support him if criminal sanctions are possible*", SOKOL D.D., *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, cit.; PODGOR E.S., *Educating Compliance*, American Criminal Law Review, 46/2009, pp. 1-16.

[299] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 4 January 2003, Art. 23(2).

[300] TFEU, Art. 103.

purpose of fines and to send a somehow contradictory message as to the seriousness of antitrust infringements and competition law provisions more in general.

Moreover, if confronted with the probability of detection, it would significantly disincentive the use by companies of leniency programs. Indeed, companies would very likely find it more convenient to invest in an effective compliance program and not to report uncovered cartel conduct to the competition authority, knowing that they could always benefit from immunity thanks to the compliance program. The only alternative to avoid such perverse effect would be to include an obligation to report any wrongdoing within the characteristics of an effective compliance program. However, by making the granting of immunity for having implemented an effective compliance program conditional upon the company reporting to the competition authority any uncovered wrongdoing, leniency programs would lose any reasons to exist as the two instruments would have the exact same scope and effect, at least for the most serious infringements, such as cartels.[301]

Furthermore, from the same normative perspective, immunity for companies having implemented an effective compliance program does not seem an appropriate solution in terms of deterrence, even if coupled with personal sanctions for the

[301] As a new policy measure, it has been suggested that the first leniency applicant should receive no sanction and no private damages, if the company can demonstrate the adoption and implementation of an effective compliance program that led to the uncovering of the cartel, see SOKOL, D. D., *Policing the Firm*, cit., naming this solution Super Leniency. This policy measure would certainly create stronger incentives to invest in *ex ante* effective compliance programs, while at the same time reducing the costs of detection. Also, a Super Leniency of this kind would enhance the destabilizing-effect of leniency programs, by increasing the appeal for cartelist of cheating on the cartel and applying for leniency. However, such a Super Leniency seems at least questionable in terms of fairness as it would enable the company to keep the illegal gains and not to face almost any consequences for its anticompetitive conduct. The risk would be somehow analogous to the one just described in relation to the granting of immunity for having an effective compliance program. Indeed, it seems that a Super Leniency of this kind would convey a too weak message of disapproval for cartel conduct, thus ultimately endangering the deterrent effect of antitrust enforcement policies.

author(s) of the infringement. Indeed, despite all possible considerations as to the opportunity to introduce personal liability for competition law infringements at the EU level,[302] this would not alter the corporate set of incentives to comply with competition law, as personal sanctions (both in terms of financial penalties and imprisonment or other form of personal sanctions) will by definition have no deterrent effect on the board or on the company's shareholders[303] which ultimately benefit from the infringement.

c. Fine reduction for already existing effective compliance programs? Yes, please

Providing immunity for compliance programs, thus recognizing somehow a due diligence defense (i.e., having adopted a reasonably diligent compliance program), would certainly provide a strong incentive to implement programs. However, liability provides a greater incentive to prevent wrongdoings. Therefore, it is important to balance the need for providing adequate incentives to adopt compliance programs with the importance of maintain alive the threat of liability as a deterrent factor.[304]

Moving from the idea that a compliance program can be effective even though it did not prevent all infringements, what is posited here is that corporate efforts to set up and implement an effective compliance program should be rewarded in case of an antitrust infringement by means of a specific fine reduction. Of course not all compliance programs would qualify for receiving fine credit, but only those

[302] See Authors cited under footnote 298 above.
[303] Except for the case in which the author(s) of the infringement is/are also board member(s) or shareholder(s) of the company.
[304] HUFF K. B., *The role of corporate compliance programs in determining corporate criminal liability: a suggested approach*, cit.

programs that demonstrate a serious top-down commitment to compliance, in particular by providing for the features indicated under section II. A. a., above. Competition authorities are indeed in a position to assess the quality of the compliance program put forward by the investigated company, on which the burden of proving the applicability of the fine mitigating factor would lie. Also, the adoption and implementation of an effective compliance program should entitle the companies to benefit from a fine reduction whose percentage can vary within a specific range. This means that the exact quantification of the reduction will remain in the competition authorities' full discretion, based on the actual characteristics of the program.[305]

To provide for a fine reduction linked to the existence of an effective compliance program, in the sense mentioned above, would have a number of positive effects, from both an "internal" corporate, as well as a public enforcement perspective. Furthermore, internal audits and monitoring by companies could be even more incentivized by providing for an additional fine reduction in case of the company reporting to the competition authority the occurrence of an antitrust infringement outside the scope of leniency programs.

From the corporate perspective, the possibility of benefiting from a fine reduction for an effective compliance program in the event of an infringement being committed would incentivize companies to invest in compliance. As noted above, the benefits of having an effective compliance program are difficult to calculate in the context of a pure cost-benefit analysis. Being these benefits mainly represented by the possibility

[305] It has been correctly pointed out that "[t]*he non-predictability of the fine reduction helps counteract the incentive to implement "cosmetic" compliance programmes*", THÉPOT F., *Can Compliance Programmes contribute to effective antitrust enforcement?*, in Paha, J., Competition Law Compliance Programs: An Interdisciplinary Approach, Springer 2016, pp. 191-202.

to prevent the occurrence of infringements, or detect violations at an early stage, a counterfactual analysis of what would have happened in the absence of the program would need to take into account so many variables which are beyond the company's control (e.g., the behavior of other conspirators or of the competition authority, the amount of the fine, etc.) that no significant conclusion could be reached. On the contrary, having some degree of certainty as to the possibility to benefit from a fine reduction in the event of an infringement can incentivize companies to seriously invest in compliance. The possibility of a fine reduction is something more tangible which can act as a real enticement to justify a significant investment, especially in a long-run perspective.

Furthermore, it does not seem that such incentive would replace the one to avoid infringements in the first place in the sense that this would lead to companies being more motivated "*to set up a compliance programme so as to obtain the fine reduction, while maximising antitrust infringements through excessive performance targets and incentives*".[306] First, as mentioned, targets and incentives are an important feature of an effective compliance program, so that no fine reduction should be granted when the company cannot demonstrate that the rationale applied in the setting of performance targets and financial incentives aims at avoiding them ending up being excessive. Second, the granting of a fine reduction does not allow the company to escape all other negative consequences of having committed an antitrust infringement. The reduction of the fine imposed by the competition authority has no impact on the company's exposure to reputational damages, third parties' private damages actions, actions by shareholders for *mala gestio*, etc.. The threat of these detrimental consequences would be in no way diminished by the granting of a fine

[306] WILS W. P. J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit.

reduction for the existence of an effective compliance program so that companies would still be strongly incentivized to avoid infringements by all possible means in the first place.

Contrary to the concerns voiced by many commentators, granting such a fine mitigation seems to bring about positive effects also from a public enforcement angle.

It has been argued that to reward companies for having set up and implemented an effective compliance program, notwithstanding the occurrence of an infringement, would send the message that antitrust infringements are part of normal business.[307] While this argument has merit in relation to the granting of immunity on the account of the compliance program,[308] it does not fully convince with reference to the granting of a mere fine reduction for the following reasons. First and foremost, infringing companies would always be fined, albeit at a reduced level. If antitrust violations were normal business there would be no reason nor grounds to impose any fine. Second, as just mentioned, companies would still be exposed to all other detrimental consequences arising from the wrongdoing (e.g., follow-on damage actions, reputational damages). The fact that a company sanctioned for having violated antitrust law, even when benefiting from a fine reduction for its compliance program, might then, for instance, be sued for damages demonstrates that the mitigation of the fine does not alter the negative value of antitrust infringements.

[307] Ibidem.
[308] See section III. C. b., above.

In terms of fairness, the approach here suggested would appear more respectful of the principle of equal treatment,[309] in the sense that it would result in companies which ended up in infringing competition law despite the existence of an effective compliance program being treated differently from those companies that deliberately violated competition law.[310] In addition, in particular in relation to long-running infringements, it may well happen that the management of the company, and/or the shareholders owning the company, at the time of the infringement being detected and sanctioned are different from those in charge when the wrongdoing was first committed. When setting the level of the fines, it thus seems fair to take into account that those who are bearing the consequences of the infringement (and which have demonstrated a serious commitment towards compliance) may be different from those who benefited from the infringement in the first place. Furthermore, as already indicated, there might be arguments to maintain that effective compliance programs should provide for forms of restitution or compensation for damaged parties, so that the benefit of a fine reduction would not tantamount to the infringer ultimately keeping the benefits of antitrust infringement.[311]

Finally, as mentioned above, the provision of such fine reduction would encourage the adoption of compliance programs by companies. Far from resulting in a "*cheap insurance policy against full antitrust liability*",[312] this policy measure would not only

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[309] Pursuant to the principle of equal treatment comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified, see *ex multis*, Court of Justice, Guardian Industries v Commission, C-580/12 P, 12 November 2014, Akzo Nobel Chemicals and Akcros Chemicals v Commission, C‑550/07 P, 14 September 2010.

[310] In this sense, see FORRESTER I., *Due process in EC competition cases: A distinguished institution with flawed procedures*, European Law Review, December 2009, pp. 817-843; see also GERADIN D., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils*, cit.

[311] As argued by WILS. W.P.J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit. In relation to corporate compliance programs more in general see KOLASKY W. J., *Antitrust Compliance Programs: The Government Perspective*, cit.

[312] WILS. W.P.J., *Antitrust Compliance Programmes & Optimal Antitrust Enforcement*, cit. As already explained, effective antitrust compliance programs require significant investments.

help spreading a culture of compliance, but it would also ease public antitrust enforcement insofar as it would allow companies to uncover and end infringements as well as to possibly apply for leniency, thus ultimately reducing public enforcement's costs. Furthermore, if coupled with an additional reduction, it could incentivize companies to report every antitrust infringements (and provide the relevant evidence), even beyond the scope of leniency programs.

While all the above arguments call for the granting of fine reductions to antitrust compliance programs adopted before the occurrence of the infringement (or at least the opening of the investigation by the antitrust authority), the same does not necessarily hold true in relation to compliance programs adopted after the beginning of an investigation by the competition authority.

Indeed, a number of reasons come out in favor of denying any fine reduction to companies implementing an effective compliance programs, or improving an already existing compliance program, after the detection of the infringement by the competition authority.

First, this would undermine the incentive effect of providing a fine mitigation for the existence of an effective compliance program. Indeed, knowing that they could benefit from a fine reduction even if they decide to set up an effective compliance program only after being investigated, companies would be significantly less encouraged to invest in compliance before getting caught by a competition authority.

Moreover, if a fine mitigation were to be granted also to companies adopting a compliance program for the first time after the detection of the infringement, or

improving their compliance program so as to make it effective, the competition authority's assessment as to the effectiveness of the program could necessarily be carried out only on the basis of companies' present and future intentions. Indeed, companies would not be in a position to demonstrate their true commitment to compliance nor that their program actually worked in the past. They could merely indicate how they plan to set up and implement (or improve) a compliance program in the future. On the contrary, the purpose of granting fine reductions for compliance programs is to reward companies' efforts towards compliance over time, as long as companies can show that they have adopted and implemented an effective compliance program and that it did actually work in preventing infringements and increasing antitrust awareness among employees over time.

Finally, the setting up of an effective compliance program should not become compulsory,[313] in that companies shall always remain free to decide whether to adopt or improve their compliance program in accordance with the hallmarks identified by competition authorities so as to possibly benefit from a fine reduction if (another) infringement is uncovered. Of course, the spontaneous adoption of an effective compliance program by companies sanctioned for an antitrust infringement can be further encouraged by setting forth increased fines in case of recidivism.[314]

[313] For this reason, it would not seem advisable to increase penalties for companies not having in place a compliance program at the time of the infringement, as this would amount to a *de facto* obligation to set up a compliance program.

[314] WILS W. P. J., *Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis*, World Competition, 2012, pp. 5-26.

Conclusion

Cartels are unavoidable. So are most other antitrust infringements which are perceived as less serious and/or more difficult to detect. The deterrent effect of pecuniary fines is limited. So are the financial resources devoted to public antitrust enforcement. Antitrust authorities cannot take the luxury of not effectively promoting corporate self-regulation as this is the only tool at their disposal to actually spread a culture of compliance, prevent the occurrence of infringements and detect those already occurred. For companies to be really incentivized to invest in compliance programs they need to see a real advantage, which could only come from a concrete saving in the event of a fine being imposed.

Antitrust authorities have nothing at all to lose in recognizing credit to existing effective compliance programs. On the contrary, they have all to lose if they do not do it.

Enforcement policies would not be impaired by such a fine reduction as it would not reward the infringement under investigation, but the efforts put by the company towards compliance over time and the company's commitment for the future. Also, effective compliance programs, if adequately implemented, will prevent the occurrence of infringements in the first place and ease early detection by the company itself. As a result, the limited resources of antitrust authorities could be devoted more effectively to public antitrust enforcement.

No wrong message would be sent as infringements would still be hefty sanctioned and companies would keep on facing the other consequences stemming from antitrust violations in terms of, for instance, follow-on damage actions and reputational damages. Companies would not be rewarded for having done what they are expected to do. They are expected to comply with the law, and this is the reason why non-compliance should always be fined. They are rewarded for having done something different. They are rewarded for having modeled their internal processes in order to comply with antitrust law even in more ambiguous instances, for having invested time and resources in order to train their employees, for having constantly monitored the functioning and adequacy of the program, and for having made the required adjustments so as to take into account changes in the antitrust risks faced by the company.

Absent the possibility of getting a fine reduction, companies would unlikely spend money for effective compliance programs. The benefits arising from effective antitrust compliance programs are less evident for companies than for competition authorities. Or they are not easily quantifiable at least. By the same token, if the fine reduction was available also to companies adopting and implementing an effective compliance only after being investigated, the incentive to invest in compliance programs would be significantly reduced, with the result of the positive effects of compliance programs in terms of prevention of antitrust infringements getting lost.

Companies are more and more used to self-regulating their behavior in order to comply with the specific rules applicable to their business activities. Also, the positive effects of voluntary CSR policies are now well established and appreciated. Reputational benefits of operating in compliance with antitrust law are gradually

being valued by stakeholders, with the main (or probably the only) obstacle to the adoption of antitrust effective compliance programs remaining the level of financial investment required, compared to the expected return on it.

The time is ripe for competition authorities worldwide to recognize credit to effective *ex ante* antitrust compliance programs, thus boosting antitrust compliance once and for all.

The hope is that this chance will not be missed.

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