Antitrust Compliance Programmes & Optimal Antitrust Enforcement

Wouter P.J. Wils*

forthcoming in
Journal of Antitrust Enforcement, Vol. 1, No. 1, April 2013
and accessible at
http://ssrn.com/author=456087

Should companies that have antitrust compliance programmes be granted a reduction in the amount of fines or even immunity from fines when they are found to have committed antitrust infringements? Should the absence of a compliance programme constitute an aggravating factor leading to higher fines for antitrust infringements? Should the adoption of a compliance programme be imposed as part of infringement decisions or settlements? These are the questions which this paper examines, on the basis of an analysis of the nature of antitrust infringements, the rationale of company liability for antitrust infringements, and the possible positive and possible negative effects of compliance programmes.

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* Hearing Officer, European Commission; Visiting Professor, King's College London. I am grateful to Svend Albaek, David Bailey, Margaret Bloom, William Blumenthal, Theofanis Christoforou, Anthony Dawes, Kris Dekeyser, Eric Gippini-Fournier, Andreas Heinemann, Alison Jones, Frank Maier-Rigaud, Christine Parker, Anne Riley, Ewoud Sakkers, Maarten Pieter Schinkel, Daniel Sokol, Andreas Stephan, Mariana Tavares, Florian Wagner-von Papp, Gregory Werden, Richard Whish, Fabien Zivy and several participants at The Antitrust Enforcement Symposium (Pembroke College, Oxford, 22-23 September 2012) for helpful comments. All views expressed in this paper are strictly personal, and should not be construed as reflecting the opinion of the European Commission or any of the above mentioned persons. The paper was completed on 31 October 2012. Comments are welcome at Wouter.Wils@ec.europa.eu.

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I. INTRODUCTION

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These questions, while not new, have been much discussed recently.

In November 2011, the European Commission published a brochure, in which it reaffirmed its policy not to grant a reduction in the amount of fines because of the existence of a compliance programme:

"*The Commission welcomes and supports all compliance efforts by companies […]. For the purpose of setting the level of fines, the specific situation of a company is duly taken into account. But the mere existence of a compliance programme will not be considered as an attenuating circumstance. Nor will the setting-up of a compliance programme be considered as a valid argument justifying a reduction of the fine in the wake of investigation of an infringement*".[2]

The European Commission has never granted a reduction of a fine because of the existence of a compliance programme at the time of the infringement. In seven decisions, adopted between 1982 and 1992, however, the Commission granted a fine reduction

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1 An antitrust compliance programme is a set of measures adopted within a company or corporate group to inform, educate and instruct its personnel about the antitrust prohibitions (Articles 101 and 102 TFEU and similar prohibitions) and the company's or group's policy regarding respect for these prohibitions, and to control or monitor respect for these prohibitions or this policy. Antitrust compliance programmes are thus a type of organizational control system aimed at standardizing staff behaviour, specifically within the domain of antitrust compliance; see G.R. Weaver, L.K. Treviño and P.L. Cochran, 'Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors' (1999) 42 *Academy of Management Journal* 41 at 42, as well as C. Angelucci and M.A. Han, 'Monitoring Managers Through Corporate Compliance Programs', Amsterdam Center for Law & Economics Working Paper No. 2010-14, accessible at http://ssrn.com/abstract=1729135, and Chapter 2 of M.A. Han, *Vertical Relations in Cartel Theory* (PhD thesis, University of Amsterdam, ACLE Dissertation Series No. 4, September 2011), accessible at http://www.carteltheory.com.

2 European Commission, *Compliance matters – What companies can do better to respect EU competition rules* (November 2011), accessible at http://ec.europa.eu/competition/antitrust/compliance/, at 19-20; see also speeches by Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, 'Cartels: the priority in competition enforcement' (SPEECH/11/268; Berlin, 14 April 2011) and 'Compliance and Competition policy' (SPEECH/10/586; Brussels, 25 October 2012).

because the companies concerned had set up a compliance programme after the start of the Commission's investigations.[3] The Commission has never since granted any reductions because of compliance programmes.[4]

The EU Courts have consistently upheld this policy, pointing out that the implementation of a competition compliance programme "does not alter the reality of the infringement and does not oblige the Commission to grant a reduction in the amount of the fine".[5]

This policy, which is similar to the long-standing policy of the US Department of Justice Antitrust Division,[6] has been criticised by some authors calling for "a substantial fine reduction for firms with effective compliance programs".[7]

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3 Commission Decisions of 7 December 1982, *National Panasonic*, [1982] L 354/28; of 14 December 1984, *John Deere*, [1985] OJ L 35/58; of 16 December 1985, *Sperry New Holland*, [1985] OJ L376/21; of 18 December 1987, *Fisher-Price/Quaker Oats – Toyco*, [1988] OJ L 49/19; of 22 December 1987, *Eurofix-Bauco/Hilti*, [1988] OJ L65/19; of 18 July 1988, *British Sugar*, [1988] OJ L 284/41; of 5 June 1991, *Viho/Toshiba*, [1991] OJ L 287/39; and of 15 July 1992, *Viho/Parker Pen*, [1992] OJ L233/27; all these decisions concerned vertical agreements or abuse of a dominant position, which were the main types of cases the Commission prosecuted in those years. When *British Sugar* was later found to have committed another infringement, the Commission took the violation of the compliance programme, together with the fact of the recidivism, into account as an aggravating factor leading to a higher second fine; Commission Decision of 14 October 1998, *British Sugar*, [1999] OJ L 76/1; see further my paper 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 5.

4 In a decision in 2001 the Commission took into account the introduction of a compliance programme as one of a number of elements indicating that the infringement had been terminated and that there was thus no need for the Commission to order its termination; Commission Decision of 5 December 2001, *Interbrew and Alken*-Maes, [2003] OJ L 200/1, paragraph 291. More importantly, since 1996, the Commission grants fine reductions and even immunity from fines to companies that put an end or have put an end to their participation in a secret cartel and cooperate with the Commission in providing intelligence and evidence of the cartel under the conditions set out in the Commission's Leniency Notice; see text accompanying notes 97 to 99 below.

5 Judgment of the General Court of 6 March 2012 in Case T-53/06 *UPM-Kymmene* v *European Commission*, not yet reported in ECR, paragraphs 123-124; Judgment of the Court of Justice of 28 June 2005 in Joined Cases C-189/02 P etc., *Dansk Rorindustri and Others* v *Commission*, [2005] ECR I-5488, paragraph 373; Judgment of the General Court of 12 December 2007 in Joined Cases T-101/05 and T-111/05, *BASF and UCB* v *Commission*, [2007] ECR II-4959, paragraph 52; and Judgment of 13 July 2011 in Case T-138/07, *Schindler* v *Commission*, not yet reported in ECR, paragraph 88.

6 Under the US Sentencing Guidelines, which give the courts advice on sentencing (*United States* v *Booker*, 125 S.Ct. 738 (2005)), corporate fines are reduced if the company had in place at the time of the infringement an "effective compliance and ethics program", but this does not apply if "high-level personnel" or "substantial authority personnel" participated in the infringement, which is in practice always the case for antitrust infringements, as these categories include all individuals who within the scope of their authority exercise a substantial measure of discretion, for instance individuals with authority to negotiate or set price levels or to negotiate or approve significant contracts (§8C2.5(f) and §8A1.2 of the Guidelines Manual (November 1, 2011), accessible at www.ussc.gov/guidelines). The US Department of Justice Antitrust Division does not either take into account the existence of a compliance programme in its decisions whether or not to prosecute a case; see US Attorney's Manual 9-28.400 Special Policy Concerns, Comment B, accessible at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm, and 'Antitrust Compliance Programs: The Government Perspective', Address by W. J. Kolasky, Deputy Assistant

A few authors have gone further, arguing that, "if a company has made a reasonable effort to comply with the antitrust law, and an employee nevertheless engages in price-fixing, then it makes no sense to fine the corporation".[8] Their idea would thus be that a company with a compliance programme should not merely receive reduced fines for antitrust infringements, but immunity from such fines.[9]

While most of the literature focuses on granting fine reductions to companies that had a compliance programme in place when committing an antitrust infringement, some authors have suggested a number of other measures which competition authorities could also take to promote investment in compliance programmes, including: considering the absence of genuine antitrust compliance efforts as an aggravating factor in assessing the level of any penalty; and imposing a requirement on companies to adopt a credible compliance programme as part of infringement decisions or settlements.[10]

I am not aware of any competition authority granting immunity from fines to companies that have a compliance programme.

Among the national competition authorities of the EU Member States, there is however one authority, the UK Office of Fair Trading, which regularly grants fine reductions of

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Attorney General, before the Corporate Compliance 2002 Conference (San Francisco, July 12, 2002), accessible at http://www.justice.gov/atr/public/speeches/, and J.H. Shenefield and R.J. Favretto, 'Compliance Programs as Viewed from the Antitrust Division' (1979) 48 *Antitrust Law Journal* 73.

7 F. Brunet, 'The role of antitrust compliance programs in competition law enforcement', New Frontiers of Antitrust Conference (Paris, 10 February 2012), Concurrences N° 2-2012, www.concurrences.com, 16 at 22.

8 D.H. Ginsburg and J.D. Wright, 'Antitrust Sanctions', *Competition Policy International*, Vol. 6, No. 2 (Autumn 2010), at 18. Judge Ginsburg and Professor Wright make this statement as part of a broader argument against continuously increasing the level of corporate fines and in favour of adding more individual penalties, with which I largely agree, and which indeed corresponds to arguments made in several publications of mine ('Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, In Particular Imprisonment?', in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart, 2002); *The Optimal Enforcement of EC Antitrust Law* (Kluwer, 2002), chapters 8 and 9; 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117; 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 183; *Efficiency and Justice in European Antitrust Enforcement* (Hart, 2008); 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 5). There is an important difference though between, on the one hand, adding individual penalties to corporate penalties (instead of further increasing corporate penalties), and, on the other hand, granting corporations immunity from fines and relying exclusively on individual penalties; see text accompanying notes 59 to 63 below.

9 See also K. Hofstetter and M. Ludescher, 'Fines against Parent Companies in EU Antitrust Law: Setting Incentives for "Best Practice Compliance"' (2010) 33 *World Competition* 55.

10 A. Riley and M. Bloom, 'Antitrust Compliance Programmes – Can Companies and Antitrust Agencies Do More?' (2011) *Journal of Competition Law* 21 at 39-40.

up to 10 % on the ground of "adequate steps having been taken with a view to ensuring compliance".[11]

Like the European Commission and most national competition authorities of the EU Member States, the French competition authority (*Autorité de la concurrence*) does not grant any reduction in the amount of fines to companies that had a compliance programme at the time of the infringement.[12] However, French law provides for a settlement procedure (*procédure de non-contestion des griefs*), under which companies that do not contest the statement of objections sent to them by the *Autorité de la concurrence* may obtain a fine reduction.[13] In the context of this specific procedure, the *Autorité de la concurrence* is willing to grant, in addition to a 10 % fine reduction corresponding to the settlement proper, and to a further 5 % reduction that may be awarded in return of other commitments, a fine reduction of up to 10 % to companies that did not have a compliance programme in place at the time of the issuing of the statement of objections and that commit to set up a compliance programme meeting the best practices set out by the *Autorité de la concurrence*. A similar fine reduction is available if the company already had a compliance programme that did not meet these best practices and commits to upgrade it according to these best practices.[14]

The purpose of this paper is to examine, from the perspective of optimal antitrust enforcement (taking into account considerations of cost and effectiveness as well as considerations of principle),[15] whether reductions in the amount of fines or immunity

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11 This policy was recently reaffirmed by the Office of Fair Trading (OFT) in *OFT's Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), at 2.15 and footnote 26; see also *How your business can achieve compliance with competition law* (OFT1341, June 2011), at 7.2. The OFT has indeed granted compliance discounts in many of the cases in which it imposed fines for antitrust infringements in the past decade (Arriva/First Group, Case CA98/9/2002; Hasbro and Distributors, Case CA98/18/2002; Replica Kit, Case CA98/6/2003; Toys, Case CA98/8/2003; West Midlands Roofing, Case CA98/1/2004; Desiccant, Case CA98/8/2004; Scottish Roofing I, Case CA98/1/2005; North East Roofing, Case CA98/2/2005; Scottish Roofing II, Case CA98/4/2005; England and Scotland Roofing, Case CA98/1/2006; Stock Check Pads, Case CA98/3/2006; Spacer Bars, Case CA98/4/2006; Construction Recruitment Forum, Case CA98/01/2009; Construction, Case CE/4327-04; Tobacco, Case CA98/01/2010; Gaviscon, Case CA98/02/2011; Dairy Retail Price Initiatives, Case CA98/03/2011).

12 *Framework-Document of 10 February 2012 on Antitrust Compliance Programmes*, accessible at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=260, paragraphs 24-28; see also *Cour d'appel de Paris* (Paris Court of Appeal), Judgment of 26 January 2010, *Adecco France*.

13 Article L.464-2, III of the French Commercial Code.

14 *Framework-Document of 10 February 2012 on Antitrust Compliance Programmes*, paragraphs 29-31, and *Communiqué de procedure du 10 février 2012 relatif à la non-contestation des griefs*, accessible at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=260.

15 See generally my books *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International, 2002) and *Efficiency and Justice in European Antitrust Enforcement* (Hart, 2008), and my papers 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 183, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 3 *World* Competition 335, and 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 5.

from fines should be granted to companies that have compliance programmes, whether the absence of a compliance programme should lead to higher fines, and whether the adoption of a compliance programme should be imposed as part of infringement decisions or settlements.

In order to do so, the following sections first examine the nature of antitrust infringements, the rationale of company liability for antitrust infringements, and the possible positive and possible negative effects of compliance programmes.

II. THE NATURE OF ANTITRUST INFRINGEMENTS

Antitrust infringements have the following characteristics:

A. Antitrust infringements involve employees that have been given substantial authority by their company

Antitrust infringements involve employees that have been given substantial authority by their company. Indeed, for an individual working in a company to be able to fix prices or share markets with other companies, or to make the company practice exclusionary rebates or predatory prices, the individual must have been given by the company substantial authority to set or negotiate prices or to conclude or negotiate contracts.

The empirical evidence from the population of antitrust infringements that have been detected and prosecuted by antitrust authorities is that most infringements involve senior management.[16]

The "rogue employee" explanation, a classic defence in cartel cases, does clearly not fit the many cases where the highest levels of the company are involved. In the remaining cases, where no involvement of senior management can be established, the "rogue employee" must be someone to whom the company has given substantial authority to set or negotiate prices or to conclude or negotiate contracts.

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16 See M. Berzins and F. Sofo, 'The inability of compliance strategies to prevent collusive conduct' (2008) 8 *Corporate Governance* 669 at 675 (finding that senior management were involved in 80 % of 69 publicly available cases from Australia, Canada, Denmark, the European Commission, Ireland, Japan, Korea, The Netherlands, New Zealand, the UK and the USA between 2000 and 2006); A. Stephan, 'Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels', University of East Anglia CCP Working paper 09-09 (July 2009) at 8-10 (listing the positions of individuals involved in 40 international cartels and named in decisions of the European Commission or press releases of the US Department of Justice between 1998 and 2008); J.C. Gallo, K. Dau-Schmidt, J.L. Craycraft and C.J. Parker, 'Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study' (2000) 17 *Review of Industrial Organization* 75 at 104-107 (69 % of of all individual criminal defendants in cases brought by the US Department of Justice Antitrust Division between 1955 and 1997 were corporate officers); W.J. Kolasky, as note 6 above, at 5; and J.M. Connor, *Global Price Fixing: Our Customers are the Enemy* (Kluwer, 2001) at 11-12.

B. Antitrust infringements are financially beneficial to the company

Unless they are detected and punished sufficiently heavily to take away the illegal gain, antitrust infringements are beneficial to the company, in that they increase profits or reduce losses, or, in some cases of marginal companies, prevent the company having to lay off staff or even going out of business. In the absence of detection and punishment, the company has thus a financial interest, and in some extreme cases even an existential interest, in antitrust infringements being committed on its behalf.

In the area of antitrust, there is thus no natural alignment of interests between companies and authorities, in that companies would naturally want to reduce the number of illegal acts engaged in by their staff.[17] This is an important difference with some other types of employee wrongdoing, such as embezzlement, that victimize the company or at least benefit no one else than the individual wrongdoer.[18]

C. Employees are primarily motivated by what they perceive to be their company's interest and/or by the incentives the company has set for them

All available studies of the motivations of employees engaging in antitrust infringements show that these employees are primarily motivated by what they perceive to be their company's interest, or what they think is expected from them, and/or by the incentives the company has set for them.[19] While it cannot be excluded in theory that employees may be primarily motivated by considerations disconnected from what they perceive to

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17 See M.H. Baer, 'Governing Corporate Compliance' (2009) 50 *Boston College Law Review* 1 at 35 and footnote 213, and compare with *How your business can achieve compliance with competition law*, as note 11 above, at 1.1, and T.R. Tyler, 'The psychology of self-regulation: normative motivations for compliance', in C. Parker and V. Lehmann Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 78 at 81.

18 See M.H. Baer, as note 17 above, at 48-49; A. Stephan, as note 16 above, at 11; and M.E. Stucke, 'Am I a Price Fixer? A Behavioural Economic Analysis of Cartels', in C. Beaton-Wells and A. Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2011) 263 at 267 and 274.

19 See J. Sonnenfeld and P.R. Lawrence, 'Why do companies succumb to price fixing?' (July-August 1978) *Harvard Business Review* 145; J. Sonnenfeld, 'Executive Apologies for Price Fixing: Role Biased Perceptions of Causality' (1981) 24 *Academy of Management Journal* 192; W.E. Baker and R.R. Faulkner, 'The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry' (1993) 58 *American Sociological Review* 837; J.M. Conley and W.M. O'Barr, 'Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct' (1997) 60 *Law and Contemporary Problems* 5; C. Parker, P. Ainsworth and N. Stepanenko, *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); Interview of B. Allison by M. O'Kane, 'Does prison work for cartelists? – The view from behind the bars', (2011) 56 *Antitrust Bulletin* 483 at 498; and W.J. Kolasky, as note 6 above, at 14; see also C. Parker, 'Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality', in C. Beaton-Wells and A. Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2011) 239; and M. Stucke, as note 18 above.

be their company's interest or the expectations towards them and from the incentives their company has set for them, for instance by the desire to help out a personal friend in a competing company,[20] there is no evidence that this happens with any frequency.

D. The importance of performance targets and incentives

The same studies referred to just above show that a particularly important factor driving employees to commit antitrust infringements is the pressure they feel from overly ambitious profit targets or performance goals or overly strong incentives set for them by the company.[21]

III. THE RATIONALE OF COMPANY LIABILITY FOR ANTITRUST INFRINGEMENTS

There are essentially three reasons that justify company liability for antitrust infringements. These reasons reflect the nature of antitrust infringements described just above.

A. Companies are generally best placed to prevent antitrust infringements, and to do so in the most cost-effective way

The first reason justifying company liability for antitrust infringements is that companies are generally best placed to influence the main factors which determine the likelihood of antitrust infringements being committed by their employees, and to do so in the most cost-effective way.[22] Indeed, companies select the employees they hire, and determine what authority they give them to set or negotiate prices or to conclude or negotiate contracts. They also define the profit targets or performance goals and the incentive

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20 See *The Optimal Enforcement of EC Antitrust Law*, as note 15 above, at 193.

21 See the literature referred to in note 19 above; see also D.D. Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201 at 224; M.H. Baer, as note 17 above, at 60-61 and 66; D.A. DeMott, 'Organizational Incentives to Care About the Law' (1997) 60 *Law and Contemporary Problems* 39 at 45; S.H. Elsen, 'Commentary' (1997) 60 *Law and Contemporary Problems* 87; A.R. Beckenstein and H.L. Gabel, 'The Economics of Antitrust Compliance' (1985) 52 *Southern Economic Journal* 673 at 676-677; and A. Riley and M. Bloom, as note 10 above, at 34.

22 See *The Optimal Enforcement of EC Antitrust Law*, as note 15 above, at 197.

structure under which their employees act. Through their internal culture they also influence the likelihood of infringements being committed.[23]

Companies are also best placed to determine, for their specific situation, which is the most cost-effective way to prevent antitrust infringements. As Stephen Calkins has pointed out:

> "A company has a wide array of ways to increase its compliance with various laws. It can emphasize the quality of its people, by hiring honest employees, encouraging them to lead healthy lives, and taking care of them in times of need. It can create good incentives, by tying compensation to long-term results, by refraining from exerting undue pressure, and by paying supra-competitive wages employees will not want to risk losing. It can teach and remind. It can monitor and audit. And it can threaten with whatever draconian consequences are in its powers […]. Some companies will be better at one approach, some at another, most at some mix; but it would be surprising were the same approach right for all. Accordingly, it would seem self-evident that government should set out penalties for violating the law and leave it to firms to determine how best to respond to those penalties".[24]

B. Avoiding perverse incentives

If companies were not liable for the antitrust infringements engaged in by their employees, serious incentive problems would result.[25] Because companies benefit from the antitrust infringements engaged in by their employees, companies would have an incentive to encourage violations. Companies would have an incentive to recruit those employees most likely to engage in antitrust infringements, and to give them the authority necessary to do so. Companies would have an incentive to set for their employees overly ambitious profit targets or performance goals and overly strong incentive structures that pressurize their employees into committing antitrust infringements. Companies would also have an incentive to develop internal cultures conducive to antitrust infringements.

C. Avoiding unfairness

Because companies, through the selection of, and authority given to, their employees, through the performance targets and incentive structures they set, and through their

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[23] See J.M. Conley and W.M. O'Barr, as note 19 above; and literature referred to in notes 19 and 21 above and notes 39 and 45 below.

[24] S. Calkins, 'Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties' (1997) 60 *Law and Contemporary Problems* 127 at 147.

[25] See *The Optimal Enforcement of EC Antitrust Law*, as note 15 above, at 198.

internal culture, influence the likelihood of antitrust infringements being committed, and because companies benefit from antitrust infringements, it would be unfair if companies were not liable for the antitrust infringements engaged in by their employees.[26]

D. Parent company liability

It should be noted that all three of the above reasons for holding companies liable for antitrust infringements committed by their employees equally justify holding parent companies liable for antitrust infringements engaged in by (employees of) subsidiaries under their control.[27]

Indeed, parent companies are generally well placed to influence the likelihood of their subsidiaries committing antitrust infringements, in particular through the setting of financial targets.[28] Given that parent companies, as shareholders, benefit from their subsidiaries' antitrust infringements, not holding parent companies liable would create a perverse incentive for parent companies to encourage their subsidiaries to engage in antitrust infringements, in particular by setting excessive financial targets or incentives that create pressure to commit infringements. Finally, as the EU General Court has recently held: "since any gains resulting from illegal activities accrue to shareholders, it is only fair that those who have the power of supervision should assume liability for the illegal business activities of their subsidiaries".[29]

IV. THE VALUE OF ANTITRUST COMPLIANCE PROGRAMMES

What is the value of antitrust compliance programmes for society or from the perspective of optimal antitrust enforcement?

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26 See also text accompanying notes 79 to 89 below.

27 See also my paper 'The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons' (2000) 25 *European Law Review* 99; and Chapter 7 of *The Optimal Enforcement of EC Antitrust Law*, as note 15 above.

28 See also I. Simonsson, *Legitimacy in EU Cartel Control* (Hart, 2010) at 172.

29 Judgment of 2 February 2012 in Case T-77/08 *Dow Chemical* v *Commission*, not yet reported in ECR, paragraph 101.

A. The value of compliance programmes depends on their effects and cost

From the point of view of society, antitrust compliance programmes only have value to the extent that they have positive effects for the enforcement of the antitrust prohibitions, that these positive effects outweigh possible negative enforcement effects as well as the cost of the resources spent on the compliance programmes, and that the net positive enforcement benefits cannot be obtained at lower cost in some other way.

B. Possible positive and possible negative effects of compliance programmes

Antitrust compliance programmes have positive enforcement effects in three situations:

i) when they (directly or indirectly, through their impact on company culture or norms) prevent the occurrence of antitrust infringements which would have taken place in the absence of the compliance programme;

ii) when they lead to an on-going antitrust infringement being terminated earlier than would have happened in the absence of the compliance programme;

iii) when they lead to an infringement being reported to the competition authorities, thus allowing the authorities to prosecute and punish the infringement and victims to obtain redress, and this would not have happened in the absence of the compliance programme or would only have happened at a later point in time or at a higher cost to the authorities or the victims.

On the other hand, antitrust compliance programmes can have two types of negative enforcement effects:[30]

i) A first type of negative effect can arise when employees inclined to engage in antitrust infringements learn from compliance training how to engage more effectively in antitrust infringements or how to avoid detection and punishment.

   For instance, a divisional manager who is afraid of not reaching his performance targets, and who is not yet engaged in cartel activity but knows that his counterparts in the competitor firms would be open to do so, may, after having sat a day in an antitrust compliance training, come to the insight that the probability of detection is low, that any detection will be only ten years later, by which time he will have retired, and will anyway only lead to fines for the company, and this may prompt him to start engaging in cartel activity.[31]

   The risk of perverse learning effects is particularly high with dawn raid training,

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[30] See M.P. Schinkel, 'Nalevingsprogramma's' (2011) *Markt & Mededinging* 231, as well as the literature referred to in note 1 above.

[31] Obviously the threat of personal penalties for the manager, in particular imprisonment, would substantially alter this risk calculation; see also text accompanying notes 59 to 62 and note 128 below.

especially through mock raids, as this may teach cartelists or prospective cartelists how to avoid detection.[32]

ii) Negative enforcement effects also arise where a compliance programme leads to the detection of an infringement but where, instead of reporting the infringement to the antitrust authorities, the company decides to conceal or destroy the evidence of the infringement.[33]

C. Empirical evidence

Do we have any empirical evidence indicating that generally the positive enforcement effects of antitrust compliance programmes outweigh the negative enforcement effects?

The answer is no: there is no such empirical evidence, and it may be impossible to obtain it.

There have been no attempts in the literature to estimate empirically the general effects, positive or negative, of antitrust compliance programmes.

There have been some empirical studies in the United States of the effectiveness of compliance programmes in preventing violations in other areas of the law, such as health and safety regulation. These studies have not shown positive results.[34]

The only evidence available in the antitrust area is evidence derived from cases which have been dealt with by competition authorities.

Obviously, those instances in which antitrust infringements have not happened thanks to compliance programmes will not show up in the cases dealt with by competition authorities. So we have no idea how often antitrust infringements are prevented by antitrust compliance programmes.

On the other hand, there are many examples of cases in which antitrust infringements were committed in (flagrant) disregard of compliance programmes.[35] A particularly

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[32] See, on the one hand, F. Brunet, as note 7 above, at 16 (listing dawn raid training as a normal element which antitrust compliance programmes can entail) and, on the other hand, A. Riley and M. Bloom, as note 10 above, at 36-37 and A. Riley, Seal Breaking – Practical Compliance Lessons from Recent Cases' (2012) 3 *Journal of European Competition Law & Practice* 141 at 147 (arguing convincingly that mock raids should not be part of compliance programmes since it dilutes the main message of the importance of real compliance).

[33] Companies might even decide to reward the employees involved in the detected infringement; see M.P. Schinkel, as note 30 above, at 233, and M. Han, as note 1 above.

[34] See M. McKenndall, B. DeMarr and C. Jones-Rikkers, 'Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines' (2002) 37 *Journal of Business Ethics* 367; K.D. Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 *Washington University Law Quarterly* 487 at 510-515; and M.H. Baer, as note 17 above, at 29-30 and 63.

striking example of a case detected by the US Department of Justice was recounted as follows by William Kolasky:

> "A good example is the extent to which one executive of a corporation we recently prosecuted went to frustrate the efforts of the company's general counsel to enforce the company's antitrust compliance program. This general counsel had instituted a comprehensive antitrust compliance program, and had made sure that the senior executives were well schooled on the antitrust laws. He had laid out specific rules to follow and adopted stiff penalties for failure to follow those rules. When a top executive at his firm arranged a meeting with his chief foreign competitor to discuss exchanging technological information, the executive, as required by the policy, notified the general counsel's office of the meeting. The general counsel (perhaps suspecting the worst) insisted on accompanying the executive to the meeting and remaining at his side throughout the meeting -- never letting him out of his sight even when the executive went to the bathroom. He was certain that this way there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. Surely no antitrust problems could arise in such a setting. And the general counsel must have taken some comfort when he, the executive, and the executive from the competitor firm greeted one another at the start of the meeting and the two executives introduced themselves to each other, exchanged business cards, and engaged in small talk about their careers and families that indicated that the two had never met each other before. Imagine how that general counsel must have felt when he learned, during the course of our investigation, that the introduction between the two executives had been completely staged for his benefit -- to keep him in the dark. In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive worldwide price-fixing conspiracy for years. Furthermore, other employees at the company knew of this relationship and were instructed to keep the general counsel in the dark by referring to the competitor executive by a code name when he called the office and the general counsel was around".[36]

As to the positive effect which compliance programmes may have in detecting infringements and reporting them to the authorities, this appears to have happened in some cases.[37]

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35 See M. Berzins and F. Sofo, as note 16 above, at 675-678; C. Parker, P. Ainsworth and N. Stepanenko, as note 19 above, at 34, 35 and 60; and J. Kolasky, as note 6 above; see also the case of Intel, whose antitrust compliance programme was once heralded in the Harvard Business Review to have prevented antitrust infringements, but later turned out not to have: D.B. Yoffie and M. Kwak, 'Playing by the Rules: How Intel Avoids Antitrust Litigation' (2001) 79 *Harvard Business Review* 119 and C. Roquilly, 'Intel, dix ans après: Le mythe de la compliance revisité?' *Concurrences* N° 2-2010, 50.

36 W.J. Kolasky, as note 6 above, at 5-6.

37 See Study by Europe Economics for the French Conseil de la concurrence, *Etat des lieux et perspectives des programmes de conformité* (September 2008), at 3.20.

As to how often antitrust compliance programmes may have had perverse learning effects or may have led to the suppression of evidence of detected infringements,[38] we have again no empirical evidence, and we are unlikely ever to obtain it, irrespective of how often of how rarely these negative effects may in reality occur.

D. A tale of four companies

The fundamental difficulty of relying on empirical evidence to judge the value of antitrust compliance programmes should of course not prevent us from making judgments on the basis of reasonable argument, informed by the limited empirical knowledge we have and by what we can learn from research into corporate law-breaking and compliance more generally.[39]

I will do so by telling a tale of four companies, describing types of situations which can realistically arise, and which any public policy with regard to antitrust compliance programmes should thus take into account:[40]

- Company A has been run for several decades by its current chief executive, a strong and inspiring personality, who has moulded the company in his own image and who exerts close control over all the company's business. Strongly principled, the chief executive of company A could not even imagine ever engaging into any illegal activity. Indeed, he would rather see his company go bankrupt than betraying his moral principles.[41] The culture of the company reflects this attitude, which is shared by all staff. Company A has never committed any antitrust infringement. It does not have an antitrust compliance programme.

- Company B has been on the receiving end of several decisions imposing fines for cartel infringements. The chief executive, who was not involved in or aware of these cartels, and who is profoundly shocked by the discovery of illegal behaviour engaged in by some of his managers, decides at some point to make a clean break. The managers who were responsible for the illegal activities are replaced, and compliance counsel is recruited and given a large budget to set up a state-of-the-art compliance programme. The new chief compliance officer,

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38 See text accompanying note 33 above.

39 See in particular C. Parker and V. Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011); K.D. Krawiec, 'Organizational Misconduct: Beyond the Principal-Agent Model' (2005) 32 *Florida State University Law* Review 57; and the literature referred to in notes 19 and 21 above and notes 43, 45 and 46 below.

40 I am not making any claims as to which of these four types of companies are more common in the real world. I do not know this, and have strong doubts as to whether it is possible to know this. My only claim is that all four types are realistic, and that all four should thus be taken into account when designing policy in relation to antitrust compliance programmes.

41 See further text accompanying note 81 below.

assisted by reputable outside counsel, sets up a compliance programme containing all the elements listed in the guidance provided by the UK Office of Fair Trading and the French *Autorité de la concurrence*, the two EU Member State competition authorities that have given guidance as to what type of compliance programmes they would credit in their fining or settlement decisions.[42] The staff of company B perceives that the chief executive sincerely wants to put an end to any illegal activity, even if this may affect the company's profitability, and the new ethical culture spreads through the company. Since then, company B is not involved in any antitrust infringement anymore.

- Company C, like company B, has been on the receiving end of several decisions imposing fines for cartel infringements. The chief executive of company C was not involved in or aware of these cartels. Indeed, he would never know about such things, being a practitioner of management through delegation, who conceives his role as setting very ambitious and closely monitored financial targets for the different divisions of the company, with highly-powered incentives for the divisional managers, and letting the divisional managers swim or sink. However, the fines and the attendant negative publicity are a serious problem. The chief executive thus decides that something should be done. Exactly as in company B, compliance counsel is recruited and given a large budget to set up a state-of-the-art compliance programme. The new chief compliance officer, assisted by reputable outside counsel, sets up a compliance programme containing all the elements listed in the guidance provided by the UK Office of Fair Trading and the French *Autorité de la concurrence*. However, the chief executive of company C keeps setting the same very ambitious financial targets and highly-powered incentives for his divisional managers. The divisional managers perceive that, even if the chief executive clearly dislikes fines and negative publicity, fulfilling the financial targets is what really counts for the chief executive and for their own survival. The divisional managers continue engaging in cartel activities, but they now pay very careful attention to hiding their activities from the companies' compliance counsel and the chief executive, while projecting an image of dutiful compliance.

- Company D has a chief executive with substantial experience in cartel matters. Indeed, one of the factors explaining his rise to the top of the company is that, in the different divisions which he headed over the years, he always succeeded in obtaining excellent results through effective cartel arrangements that were never detected. Still today, the chief executive of company D personally manages a number of cartels in which his company is involved. In order to follow the general business trend, and to avoid attracting negative attention from the competition authorities, compliance counsel is recruited and given a large budget to set up a state-of-the-art compliance programme, exactly as in companies B and C. The new chief compliance officer, assisted by reputable outside counsel, sets up a compliance programme containing all the elements listed in the guidance provided by the UK Office of Fair Trading and the French *Autorité de la concurrence*. The chief executive of company D, who has over the years

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42 See (text accompanying) notes 11 and 14 above.

acquired substantial experience in avoiding detection, and actually rather enjoys this type of game,[43] weaves an elaborate net of deception around his company's compliance counsel, like the top executive in the example recounted by William Kolasky,[44] and continues successfully managing the various cartels in which company D is engaged.

E. Are formal compliance programmes a necessary or a sufficient condition for real compliance?

The above tale of four companies helps us answering the question whether having a compliance programme is a necessary or sufficient condition for real compliance (that is, absence of antitrust infringements).

The example of company A illustrates that real compliance with the antitrust prohibitions can also happen without any formal compliance programme, at least in smaller or relatively centralised companies.

On the other hand, the situation of company B, which has a history of cartel activity but honestly wants to make a clean break with this past, illustrates the potential usefulness of antitrust compliance programmes: at least for a large company or corporate group, with decentralised decision-making on prices and contracts, an antitrust compliance programme may be a necessary component in a change from a past of antitrust infringements to a new culture and practice of real compliance.

The comparison between company B and company C illustrates, however, that setting up a compliance programme, even if it contains all the elements listed in the guidance by those competition authorities that provide such guidance, is not a sufficient condition to bring about real change and achieve real compliance. The reason for this is that real compliance (absence of antitrust infringements) depends on a complex interaction between several factors, including formal compliance programmes, but also other incentives which the company sets for its staff, exemplary behaviour by the company's leading individuals, and wider corporate culture.[45] The compliance programme set up by company C is exactly the same as the one set up by company B, but it has no impact, because of the pressure created by the excessive performance targets and incentives and because the divisional managers correctly perceive that the chief executive's commitment

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43 Compare with C. Harding, 'An emotional issue: Why do cartelists do what they do and risk going to jail?', (29 July 2008) *Competition Law Insight* 9 at 10, and 'The Anti-Cartel Enforcement industry: Criminological Perspectives on Cartel Criminalisation', in C. Beaton-Wells and A. Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2011) 359 at 368-369.

44 See text accompanying note 6 above.

45 See C. Parker and S. Gilad, 'Internal corporate compliance management systems: structure, culture and agency', in in C. Parker and V. Lehmann Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 170.

to antitrust compliance is not genuine, or at least entirely subordinate to the company's financial objectives.

F. Is it possible for authorities to identify a set of characteristics of formal compliance programmes that ensure real compliance?

The comparison between company B and companies C and D illustrates that ostensibly identical antitrust compliance programmes can be part of a culture and practice of real compliance, an irrelevant side-show, or part of a calculated attempt to project a misleading image of compliance.[46] Merely by observing the characteristics of the compliance programmes, for instance whether they correspond to the guidance provided by the UK Office of Fair Trading and the French *Autorité de la concurrence*, or any other check lists of 'effective' compliance programmes, it would not be possible to distinguish between the situations of company B and of companies C and D. Indeed, even the compliance counsel of companies C and D may have exactly the same impression as to whether their compliance programmes are working as company B's compliance counsel.

This problem cannot be solved by making a better, more complete check list of what characteristics compliance programmes should have to be credited, because the multiple and complexly interacting factors of structure, culture and agency that determine real compliance cannot be reduced to a set of characteristics that can be reliably measured or observed by outsiders, at least not at reasonable cost. Indeed this is a key finding of compliance research. In the words of Christine Parker and Sharon Gilad:

> "it is certainly possible that regulation (whether official and governmental or private and voluntary) can directly influence the adoption of formal compliance systems, […]. However it does not make sociological sense to suppose that regulation can directly engineer how these systems are implemented and understood in practice, nor how they interact with the motivations and commitments of various actors throughout the organization";
>
> "The influence of regulator-mandated formal compliance systems on culture and agency – how they are implemented and understood in practice, and how they interact with pre-existing motivations and commitments – cannot be engineered or predicted in detail";
>
> "To merely measure implementation of a formal compliance management system is to grasp at an epiphenomenon".[47]

Even if it were possible, at least to some extent, to identify characteristics of compliance programmes that ensure real compliance, competition authorities would be particularly

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46 See further K.D. Krawiec, as note 34 above; and M.H. Baer, as note 17 above; and more generally C.E. Parker, R.E. Rosen and V. Lehmann Nielsen, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation' (2009) 22 *Georgetown Journal of Legal Ethics* 201.

47 C. Parker and S. Gilad, as note 45 above, at 178, 189 and 189-190.

badly placed to develop such insight. Indeed, competition authorities never see the full picture: they never see the cases where compliance programmes have successfully prevented infringements, only the cases where this has not happened. They can thus not compare between the two situations so as to learn better to distinguish between successful compliance programmes and symbolic or cosmetic compliance, otherwise than on the basis of the finding that an infringement has been committed.[48]

V. DISCUSSION OF THE DIFFERENT QUESTIONS

A. Should companies that have antitrust compliance programmes be granted immunity from fines?

1. The answer is negative

On the basis of our analysis above, the answer to the question whether companies that have an antitrust compliance programme matching some best practices determined by the legislator, the competition authorities or the courts should be granted immunity from fines is clearly negative. As explained above,[49] it is not possible to identify a list of characteristics of formal compliance programmes that ensure real compliance and that can be applied at reasonable cost. It is thus not possible for authorities and courts to distinguish reliably and at reasonable cost between situations where antitrust compliance programmes are part of a culture and practice of real compliance and situations of symbolic or cosmetic compliance.[50]

Granting immunity from fines to companies that have a compliance programme would create perverse incentives for companies: Given that antitrust infringements can bring great financial benefit to companies,[51] that a company can easily encourage antitrust

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48 See also M.H. Baer, as note 17 above, at 50, and G.R. Weaver, L.K. Treviño and P.L. Cochran, as note 1 above, at 46.

49 Text accompanying notes 46 to 48 above.

50 See also J. Harrington, 'Comment on Antitrust Sanctions', *Competition Policy International*, Vol. 6, No. 2 (Autumn 2010) at 48-49; K.D. Krawiec, as notes 34 and 39 above; W.S. Laufer, 'Integrity, Diligence, and the Limits of Good Corporate Citizenship' (1996) 34 *American Business Law Journal* 157; and M.H. Baer, as note 17 above.

51 See text accompanying note 17 above; OECD, 'Report on the Nature and Impact of Hard Core Cartels and Sanctions under National Competition Laws', DAFFE/COMP(2002)7 (9 April 2002), at 9 (median overcharge in 14 price-fixing cases between 15 and 20 per cent); L.M. Froeb, R.A. Koyak and G.J. Werden, 'What is the effect of bid-rigging on prices?' (1993) 42 *Economics Letters* 419 (finding that a fairly typical bid-rigging scheme had raised prices by over 20 % for over 4 years); *The Optimal Enforcement of EC Antitrust Law*, as note 15 above, at 191-201; and *Efficiency and Justice in European Antitrust Enforcement*, as note 15 above, at 178-179.

infringements, notwithstanding any antitrust compliance programme, in particular by setting excessive financial targets and incentives, and that the cost of setting up a compliance programme is low compared to the potential benefits from antitrust infringements, companies would have a clear incentive to set up a compliance programme so as to obtain immunity from fines, while maximising antitrust infringements through excessive performance targets and incentives.[52]

Granting immunity from fines to companies that have a compliance programme thus encourages companies to behave like company C in the above tale of four companies.[53] It also immunizes from fines companies like company D, or the company in the example reported by William Kolasky,[54] in which the top management deliberately engages in cartel activity while concealing this activity from the company's own legal or compliance counsel.

Having an antitrust compliance programme then becomes a cheap insurance policy against antitrust liability.[55] This is not only problematic from a narrow deterrence perspective, but also from a broader normative perspective.[56] By granting immunity from fines to companies that have an antitrust compliance programme (but that have nevertheless committed antitrust infringements – otherwise the issue of immunity from fines does not arise), the law would send the message that antitrust infringements are some sort of natural accidents, part of the normal course of business, and that companies have no responsibility for avoiding such infringements.

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52 See also J. Harrington, as note 50 above, at 49.

53 See text in between notes 42 and 43 above.

54 See text accompanying notes 43 and 36 above.

55 See also W. S. Laufer, as note 50 above, at 3.

56 Law and law enforcement have both deterrent and norm-generating effects, which are both important; see generally *Efficiency and Justice in European Antitrust Enforcement*, as note 15 above, at 52 and 185; K.G. Dau-Schmidt, 'An Economic Analysis of the Criminal Law as a Preference-Shaping Policy' (1990) *Duke law Journal* 1; C.R. Sunstein, 'On the Expressive Function of the Law' (1996) 144 *University of Pennsylvania Law Review* 2021; D.M. Kahan, 'Social Influence, Social Meaning, and Deterrence' (1997) 83 *Virginia Law Review* 349; N.K. Katyal, 'Deterrence's Difficulty' (1997) 95 *Michigan Law Review* 2385; G.E. Lynch, 'The Role of Criminal Law in Policing Corporate Misconduct' (1997) 60 *Law and Contemporary Problems* 23; R.A. Kagan, N. Gunnigham, and D. Thornton, 'Fear, duty, and regulatory compliance: lessons from three research projects', in C. Parker and V. Lehmann Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 37; R. Paternoster and S. Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' (1996) 30 *Law & Society Review* 549; C. Parker, 'Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality', in C. Beaton-Wells and A. Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2011) 239; and S.S. Simpson and M. Rorie, 'Motivating compliance: economic and material motives for compliance', in C. Parker and V. Lehmann Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 59.

Granting immunity from fines to companies that have an antitrust compliance programme would also be unfair, as companies would keep the financial benefit of the antitrust infringements while escaping liability.[57]

Finally, granting immunity from fines to companies that detect infringements through a compliance programme but that do not report the infringement to the competition authorities would undermine the important incentives, created by the competition authorities' leniency programmes, to report infringements to the competition authorities as quickly and as fully as possible.[58]

2. Punishing individuals instead of the company is not the solution

These problems cannot be resolved by punishing instead of the company the individuals within the company that have engaged in the antitrust infringement. As I have argued elsewhere,[59] it would be good from the perspective of optimal antitrust enforcement to add to company liability for antitrust infringements also penalties for individuals, for several reasons, the most important of which being that in order effectively to deter antitrust infringements corporate fines would often need to be so high as to be impracticable or to cause significant negative effects.[60] Having a realistic threat of individual punishment would also be helpful for those companies, like company B in the above tale of four companies,[61] that sincerely want to avoid their staff engaging in antitrust infringements, as it would allow compliance counsel, as part of compliance training, to attract attention to this risk.[62] It is, however, a bad idea to have only individual liability for antitrust infringements.

Indeed, under a regime of individual liability only, companies, parent companies and other shareholders would still have the perverse incentive to encourage antitrust infringements through excessive profit targets and performance incentives. Moreover, the unfairness of companies profiting from antitrust infringements while escaping liability would actually be exacerbated if individuals within the company that were pressurized

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57 See text accompanying note 26 above.

58 See further text accompanying notes 97 to 99 below.

59 See my publications 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, In Particular Imprisonment?', in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart, 2002); *The Optimal Enforcement of EC Antitrust Law* (Kluwer, 2002), chapters 8 and 9; 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 World Competition 117; and *Efficiency and Justice in European Antitrust Enforcement* (Hart, 2008), chapter 6.

60 See my publications cited in note 59 above, as well as J. Harrington, as note 50 above, at 43-44.

61 See text accompanying note 42 above.

62 See also note 31 above and text accompanying note 128 below.

by excessive performance targets and incentives into engaging in antitrust infringements were punished.[63]

B. Should companies that had a compliance programme at the time of the infringement be granted a reduction in the amount of the fine?

1. The answer is again negative

Granting a fine reduction to companies that had a compliance programme at the time of their infringement has the same negative effects as granting immunity from fines to such companies,[64] only to a lesser extent, depending on the size of the reduction of the fine.

Indeed, the more the fine is reduced on account of the compliance programme, the more the incentive for companies to avoid infringements by all possible means so as to avoid being fined is replaced by an incentive to set up a compliance programme so as to obtain the fine reduction, while maximising antitrust infringements through excessive performance targets and incentives.[65]

The higher the fine reduction, the more compliance programmes thus become a cheap insurance policy against full antitrust liability.[66]

The negative normative effects of fine reductions are also the same as the negative normative effects of immunity, only of a lesser degree, depending on the size of the reduction.[67] Indeed, the higher the reduction of the fine given to companies that have a compliance programme but nevertheless committed infringements, the stronger the message that antitrust infringements are part of normal business and that companies have no full responsibility for avoiding such infringements.

Fine reductions also create the same unfairness as immunity from fines,[68] only to a lesser degree, depending on the size of the reduction. Indeed, the higher the reduction, the more companies can keep the financial benefit of the antitrust infringements while escaping liability.

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63 For further reasons why individual penalties should be a complement to corporate penalties, not a substitute, see *The Optimal Enforcement of EC Antitrust Law*, as note 15 above, at 217-218.

64 See text accompanying notes 49 to 58 above.

65 See text accompanying note 52 above.

66 See text accompanying note 55 above.

67 See text accompanying note 56 above.

68 See text accompanying note 57 above.

Finally, granting a fine reduction to companies that detect infringements through a compliance programme but that do not report the infringement to the competition authorities would undermine the important incentives, created by the competition authorities' leniency programmes, to report infringements to the competition authorities as quickly and as fully as possible.[69]

2. Subsidies for compliance programmes should not be conditional upon an antitrust infringement being committed

It is often argued that granting a fine reduction to companies with compliance programmes is a way to encourage the adoption of compliance programmes. Indeed, granting a fine reduction to companies that had an antitrust compliance programme at the time of the infringement comes down to the state giving a subsidy (equal to the amount of the reduction of the fine) to companies that have set up antitrust compliance programmes, but only to those companies that have also committed an antitrust infringement. Whatever view one may have as to the question whether the state should give financial aid to companies to set up compliance programmes,[70] it cannot possibly make sense to condition such aid upon the company committing an antitrust infringement.

C. Response to some concerns

Having thus come to the conclusion that it is a bad idea to grant fine reductions or immunity from fines to companies that had an antitrust compliance programme when committing an antitrust infringement, it may be useful to respond to some of the concerns which may have led others to argue in favour of such reductions or immunity.

1. Current antitrust enforcement policy is not working

Some of the recent discussion about whether antitrust authorities and courts should credit compliance programmes in their fining decisions appears to have sprung from a concern that current antitrust enforcement policy, based on imposing fines on companies in the EU, and corporate fines combined with imprisonment in the US, may not be working.[71]

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69 See further text accompanying notes 97 to 99 below.

70 In my view the answer to this question is negative, for reasons of principle. Indeed, by defining antitrust infringements as infringements committed by companies (or groups of companies forming a single undertaking), the legislator has made a legislative choice that companies are responsible for avoiding antitrust infringements. By subsidizing the adoption of compliance programmes, the government would go against this legislative choice, and undermine its normative message.

71 See OECD, *Roundtable on Promoting Compliance with Competition Law – Issues Paper by the Secretariat*, DAF/COMP(2011)4 (1 June 2011).

These doubts as to the effectiveness of current policies are based on the observation that, notwithstanding the imposition of high fines in the past years, many antitrust infringements, in particular cartels, are still detected.[72]

One should be very cautious with inferring from the number of infringements currently detected any conclusions as to the effectiveness of current policies. When an enforcement policy is strengthened at some point in time, by increasing the level of the fines, improving leniency programmes, and/or increasing detection and prosecution capacity, the normal effect in a first period is that more cartels are detected than before, because a category of cartels that could survive under the previous weaker enforcement policy can no longer survive under the new stronger enforcement policy. The effect of the new stronger enforcement policy on the formation of new cartels can only show up many years later in the enforcement statistics. If, as has been the case in the EU in the past fifteen years, there is a continuous or repeated strengthening of the enforcement policy through improved leniency policies, increased fines and increased detection and prosecution capacity, the first-period effect of increased detection of cartels may continue to predominate in the enforcement statistics.

I have personally no doubts that large financial penalties on companies have an influence on the behaviour of companies and managers,[73] in that it changes incentives and affects prevailing norms,[74] and that there is less cartel activity in Europe today than there would have been in the absence of the enforcement actions of the European Commission and the competition authorities of the EU Member States.

At the same time, I am also convinced that the US enforcement policy of not only imposing financial penalties on companies but also imprisoning individuals has a stronger deterrent and normative effect.[75]

Finally, completely eliminating antitrust infringements is an unattainable objective.[76] Indeed, even if the competition authorities managed at some point in time to detect so many violations and to impose such high fines that all companies will be deterred from

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72 Idem, at 2. John Connor has in particular attracted attention with his claim that recidivism would be increasing rapidly; see J.M. Connor, 'Recidivism Revealed: Private International Cartels 1990-2009', (Autumn 2010) *Competition Policy International* 101 at 116. However, this claim has since been shown to be significantly overstated; see G.J. Werden, S.D. Hammond and B.A. Barnett, 'Recidivism Eliminated: Cartel Enforcement in the United States Since 1999' (October 2011) *CPI Antitrust Chronicle* 1, and my paper 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 5.

73 See also J. Harrington, as note 50 above, at 47.

74 Law enforcement has both deterrent and norm-generating effects; see the literature mentioned in note 56 above., and in particular R.A. Kagan, N. Gunnigham, and D. Thornton, 'Fear, duty, and regulatory compliance: lessons from three research projects', in C. Parker and V. Lehmann Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 37.

75 See my publications mentioned in note 59 above.

76 See my publications 'Optimal Antitrust Fines: Theory and Practice', as note 15 above, at 188 and 194, and *Efficiency and Justice in European Antitrust Enforcement*, as note 15 above, at 53-54 and 60.

committing new violations, this situation will not last, as over time the memory of those successful prosecutions will fade, and violations will thus again be committed.[77]

In any event, whatever one may think about the effectiveness of current enforcement policies, changing these policies by granting reductions in the amount of fines imposed on companies that had a compliance programme at the time of the infringement could only make matters worse. Indeed, as explained above, such a change would, in proportion to the size of the reduction, replace the incentive for companies to avoid infringements by all possible means so as to avoid being fined by an incentive to set up a compliance programme so as to obtain the fine reduction, while maximising antitrust infringements through excessive performance targets and incentives. It would also send the normative message that antitrust infringements are part of normal business and that companies have no full responsibility for avoiding such infringements, and allow companies unfairly to keep the benefit of antitrust infringements while escaping liability.[78]

2. It makes no sense to punish a company which has "done everything it could"

It is sometimes argued that lower fines or even no fines should be imposed on companies with compliance programmes because it makes no sense to punish companies which have "done everything they could".

The problem with this argument is that is based either on a much too narrow conception of what it is that companies can do to encourage or prevent antitrust infringements, or on unrealistic assumptions as to what competition authorities and courts can investigate and assess at reasonable cost, or a combination of both. As explained above,[79] and illustrated by the above tale of four companies,[80] whether or not antitrust infringements are engaged in by a company's employees depends on much more than the presence or absence of a compliance programme. In particular performance targets and incentives are crucial. For

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77 See also W. Eucken 'The Competitive Order and Its Implementation' (Autumn 2006) 2 *Competition Policy International* 219 (English translation of 'Die Wettbewerbsordnung und ihre Verwirklichung' (1949) 2 *Ordo – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 1), at 222 ("There is an omnipresent, strong and irrepressible urge to eliminate competition and to acquire a monopolistic position."); S. Wilks and I. Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (January 2002) 25 *Western European Politics* 148 at 152 ("Since abuse of market power is endemic in every market economy and is indeed a major component in the competitive strategies of most large companies, the elimination of anti-competitive practices (rather like the elimination of racial intolerance) is an impossible goal. Yet, as with racial equality, it is essential for governments to confirm support for free competition".); and D.D. Sokol, 'Antitrust in 2025: Cartels, Agency Effectiveness, and a Return to Back to the Future' (December 2010) 2 *CPI Antitrust Journal*, accessible at http://ssrn.com/abstract=1733246, at 2 ("In many cases the same industries are recidivists because, as a new generation retires, the next generation relearns how to coordinate with competitors. This illustrates the social norm within society and within the industry.").

78 See text accompanying notes 64 to 69 above.

79 See text accompanying notes 16 to 21 and 46 to 48 above.

80 See text accompanying notes 40 to 44 above.

a company to do everything it could do to avoid antitrust infringements, it would, like the chief executive of company A,[81] have to adopt wholeheartedly the attitude that it would rather go bankrupt than violate the antitrust prohibitions, and the company's performance targets and incentives would have to reflect this. Also important is the company's internal culture, which makes it more or less likely that unethical behaviour, including cartel activity, takes place.[82] Finally, companies control whom they recruit and how much authority to negotiate and set prices or to negotiate and conclude contracts they give to which of their employees. All these elements should be considered before concluding that a company has "done everything it could". It is not possible for competition authorities or courts reliably to investigate and assess all these elements at reasonable cost.[83]

Given the many and complex ways in which companies can influence the likelihood of antitrust infringements being committed by their employees, the impossibility of reliably capturing all these ways in a list of characteristics of supposedly 'effective' compliance programmes that can be applied by competition authorities or courts at reasonable cost,[84] and the fact that companies financially benefit from antitrust infringements irrespective of how exactly they were committed, company liability for all antitrust infringements engaged in by their employees is both efficient and fair.[85]

It has been argued that "it seems strange to penalise a company whose top management deliberately and systematically planned its cartel activities in the same fashion as a company whose vigorously-communicated compliance policy was ignored by several employees in one department of one wholly-owned subsidiary".[86]

Again this ignores the various ways in which companies can encourage antitrust infringements. In the above tale of four companies,[87] company C has a vigorously-communicated compliance policy that is ignored by divisional managers because of the excessive performance targets and incentives which the company sets for them.[88] It is far from obvious that company C should be punished less than company D, where the chief executive personally manages the antitrust infringements. In both cases fines on the company are fully justified. Otherwise companies would be incentivised to behave like

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81 See text accompanying note 41 above.

82 See (text accompanying) note 23 above.

83 See text accompanying notes 46 to 48 above

84 See text accompanying notes 46 to 48 above.

85 See text accompanying notes 22 to 29 above.

86 I. Forrester, 'Due process in EC competition cases: A distinguished institution with flawed procedures' (2009) 34 *European Law Review* 817 at 826.

87 See text accompanying notes 40 to 44 above.

88 Whether or not the divisions are set up as parts of the same company or as wholly-owned subsidiaries does not make any relevant difference, neither from a deterrence perspective nor from a fairness perspective; see (text accompanying) note 27 above.

company C, and would be able unfairly to benefit from antitrust infringements while escaping full liability.[89]

3. Current policy neglects the need to create proper incentives for companies to monitor, investigate and report employee wrongdoing

Some authors have, in support of their arguments in favour of fine reductions or even immunity from fines for companies with compliance programmes,[90] referred to the academic work by Jennifer Arlen and Reinier Kraakman on the potentially adverse effects of strict vicarious liability of companies for the wrongdoing of their employees.[91]

What Jennifer Arlen and Reinier Kraakman have pointed out is that strict vicarious liability of companies for the wrongdoing of their employees, in addition to its positive incentive effect in that companies are incentivized to use all means at their disposal to prevent such wrongdoing, may also have a perverse incentive effect, in that companies may hesitate to monitor too closely their employees' behaviour and to detect wrongdoing for fear that this will lead to detection by the government and punishment for the company. This potential perverse effect can be reduced by mitigation rules under which the company is punished less if it effectively monitors its employees' behaviour and reports wrongdoing to the government.

I entirely agree with this point. However, I do not think that it can support an argument for modifying the current enforcement policy of the European Commission or the US Department of Justice Antitrust Division by adding fine reductions or immunity from fines for companies with compliance programmes, for two reasons:

First, Jennifer Arlen and Reinier Kraakman's argument is about liability of companies for "the wrongdoing of their employees".[92] The starting assumption is that employees "commit crimes to benefit themselves".[93] This would appear an adequate assumption for certain types of wrongdoing by employees, such as embezzlement or harassment, which are committed by employees solely for their own benefit, without any benefit for the company, so that there is a natural alignment of the interests of the government and the company to prevent such wrongdoing.[94] It is, however, not an adequate assumption in the

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89 See text accompanying note 68 above.

90 See in particular K. Hofstetter and M. Ludescher, as note 9 above, at 67-68.

91 J. Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23 *Journal of Legal studies* 833, and J. Arlen and R. Kraakman, 'Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes' (1997) 72 *New York University Law Review* 687; see also S. Oded, 'Inducing Corporate Compliance: A Compound Corporate Liability Regime' (2011) 31 *International Review of Law & Economics* 272.

92 J. Arlen and R. Kraakman, as note 91 above, at 687.

93 J. Arlen, as note 91 above, at 834.

94 See text accompanying notes 17 to 18 above.

case of antitrust infringements.[95] As explained above, the characteristics of antitrust infringements are that they are financially beneficial to the company, that employees engaging in them are primarily motivated by what they perceive to be their company's interest and/or by the incentives the company has set for them, and that in particular performance targets and incentives play a crucial role.[96]

Second, the enforcement policies of both the European Commission and the US Department of Justice Antitrust Division already contain leniency programmes under which companies that are the first to detect cartel activity engaged in by their employees and report it to the authority can obtain immunity from fines, and other companies involved in the same cartel can obtain fine reductions if they are the first to provide additional information that has significant additional value for the authority.[97]

These leniency programmes are a much better way to incentivize companies to detect and report cartel behaviour engaged in by their employees than granting fine reductions or immunity to all companies that have a compliance programme. Indeed, under the leniency programmes, companies are only given immunity from fines or reductions in the amount of fines if they report the infringement to the authority and assist the authority in prosecuting it. This is essential. Indeed, as explained above, the detection of infringements through a compliance programme actually has negative effects from the perspective of optimal enforcement if it leads to the company concealing or destroying the evidence of the infringement, whereas it has only positive enforcement effects if it leads to the infringement being reported to the authority, thus allowing the authority to prosecute.[98]

The requirement under the leniency programmes that the company must be the first to report the infringement to the authority so as to obtain immunity is also very important, because it leads to infringements coming to an end more quickly (given the requirement for immunity applicants to put an end to their participation in the infringement) and being punished more quickly. Similarly, the requirement to be the first to provide information that has significant added value in order to benefit from fine reductions is important in order to incentivize companies to assist the authorities as quickly and as fully as possible.[99]

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95 See also J. Harrington, as note 50 above, at 48.

96 See text accompanying notes 17 to 18 above.

97 See European Commission, Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17; US Department of Justice, Corporate Leniency Policy (10 August 1993), accessible at http://www.usdoj.gov/atr/public/guidelines/0091.pdf and S.D. Hammond, 'Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations', address to the 54th Annual American Bar Association Section of Antitrust Law Spring Meeting (Washington D.C., 29 March 2006), accessible at http://www.usdoj.gov/atr/public/speeches/215514.pdf; and my paper 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25.

98 See text preceding note 30 and text accompanying note 33 above.

99 See further my paper 'Leniency in Antitrust Enforcement: Theory and Practice', as note 97 above.

4. Current antitrust enforcement policy is not in line with enforcement policies in other areas of the law

It is sometimes argued that the absence of immunity from fines or reductions in the amount of the fine for companies that had an antitrust compliance programme at the time of the infringement is not in line with enforcement policies in other areas of the law where such immunity from fines or such fine reductions are granted or are said to be granted in some jurisdictions. I am not convinced by this argument, for two reasons:

First, antitrust enforcement policy should be informed by, and adapted to, the nature of antitrust infringements. As explained above, the characteristics of antitrust infringements are that they are financially beneficial to the company, that employees engaging in them are primarily motivated by what they perceive to be their company's interest and/or by the incentives the company has set for them, and that in particular performance targets and incentives play a crucial role.[100] This distinguishes antitrust enforcement from some other types of wrongdoing by employees, such as embezzlement or harassment, which are committed by employees solely for their own benefit, without any benefit for the company, so that there is a natural alignment of the interests of the government and the company to prevent such wrongdoing.[101]

Cartels have the further distinguishing characteristic that they are conspiracies between several wrongdoers (several companies or employees in several companies).[102] This specific characteristic explains the use by competition authorities of leniency programmes.[103] As explained above, these leniency programmes provide better incentives for detecting and reporting infringements than could be provided by granting immunity from fines or reductions of the fine to companies with compliance programmes,[104] and granting immunity from fines or reductions of the fine to all companies that have compliance programmes would undermine the superior incentives created by these leniency programmes.[105]

Second, to the extent that in some jurisdictions immunity from fines or reduced fines for companies with compliance programmes are granted for types of wrongdoing that are comparable to antitrust infringements, the above analysis indicates that such policies are misguided. These policies may not have been sufficiently thought through, and/or may result from lobbying by the beneficiaries of such policies.[106] Indeed, large companies,

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100 See text accompanying notes 16 to 21 above.

101 See text accompanying note 94 above.

102 See N.K. Katyal, 'Conspiracy Theory' (2003) 112 *Yale Law Journal* 1307.

103 See (text accompanying) note 97 above.

104 See text accompanying notes 98 and 99 above.

105 See text accompanying notes 58 and 69 above.

106 See K.D. Krawiec, as note 34 above, at 498.

which can afford compliance programmes, no doubt benefit from such enforcement policies, as such policies limit their liability, and deflect prosecution to smaller companies and to individuals.[107] The compliance industry also obviously benefits from such enforcement policies.[108]

D. Should companies that did not have a compliance programme at the time of the infringement be fined more heavily?

Some authors have suggested, as an alternative to giving a reduced fine to companies with a compliance programme, to consider the absence of genuine compliance efforts as an aggravating factor in assessing the level of any fine.[109]

Increasing fines for companies without antitrust compliance programmes does indeed not have the same disadvantages as reducing fines for companies with antitrust compliance programmes: Unless the baseline level of the fine is lowered correspondingly (in which case the incentive and fairness effects would be the same as those of granting a reduction to companies with a compliance programme), increasing fines for companies without antitrust compliance programmes does not weaken the incentives for real compliance and does not allow companies unfairly to benefit from infringements while escaping liability.[110] In any event, it does not undermine the normative message that companies are responsible for avoiding antitrust infringements.[111]

On the other hand, increasing fines because of the absence of a compliance programme comes down to adding to the existing obligation for companies not to commit antitrust infringements a second, implied obligation to have a compliance programme. It is difficult to see what would be the justification for adding such an obligation, given that compliance programmes are not a necessary condition for real compliance.[112]

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[107] See W.S. Laufer, as note 50 above, at 6, K.D. Krawiec, as note 34 above, at 533-537, and L.B. Edelman and S.A. Talesh, 'To comply or not to comply – that isn't the question: how organizations construct the meaning of compliance', in C. Parker and V. Lehmann Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 103.

[108] See K.D. Krawiec, as note 34 above, at 528-532.

[109] A. Riley and M. Bloom, as note 10 above, at 38.

[110] See text accompanying notes 64 to 66 and 68 above.

[111] See text accompanying note 67 above.

[112] See text in between notes 44 and 45 above, and the example of company A in the tale of four companies, text accompanying note 41 above.

E. Should companies that set up compliance programmes after the detection of an infringement be granted a reduction in the amount of the fine?

As mentioned above, between 1982 and 1992 the European Commission granted fine reductions to companies that had set up a compliance programme after the start of the Commission's investigations,[113] and the French *Autorité de la concurrence*, in the context of its specific settlement procedure (*procédure de non-contestation des* griefs), is willing to grant 10 % additional fine reductions to companies that commit to set up a compliance programme or to upgrade their compliance programme according to the authority's best practices.[114]

Compared to granting fine reductions to companies that had an antitrust compliance programme when they committed the infringement, granting fine reductions to companies that commit to adopt or upgrade a compliance programme so as to reduce the risk of recidivism is indeed a better idea. Whereas the former sends the normative message that antitrust infringements are part of normal business and that companies have no full responsibility for avoiding such infringements, the latter sends the normative message that companies are responsible for avoiding antitrust infringements, and, when found to have committed an infringement, should take measures to avoid repeat infringements.

I can, however, see two possible risks or drawbacks to granting fine reductions to companies that commit to adopt or upgrade a compliance programme.

The first risk is that by lowering the fine, and by making this fine reduction conditional upon the company not having a compliance programme at the time of the infringement, the incentive to avoid infringements in the first place and the incentive to adopt a compliance programme before a first infringement is committed are weakened. However, this risk may be remote, at least if the reduction remains low.

The second risk is that companies would adopt or upgrade a compliance program so as to benefit from the reduced fine, but continue to engage in antitrust infringements, either by maintaining or introducing excessive performance targets or incentives that pressurize staff into committing infringements, like company C in the above tale of four companies,[115] or by deceiving the company's compliance counsel, like company D.[116] For the reasons explained above,[117] competition authorities or courts are unlikely to be able to distinguish between, on the one hand, companies that genuinely want to make a clean break with their past of antitrust infringements, like company B in the above tale of four

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[113] See (text accompanying) note 3 above.

[114] See text accompanying note 14 above.

[115] See text in between notes 42 and 43 above.

[116] See text accompanying notes 43 and 44 above.

[117] See text accompanying notes 46 to 48 above.

companies,[118] and that may thus merit a reduced fine, and, on the other hand, companies that cynically exploit the possibility of obtaining a reduced fine.

Because of this second risk, it may make sense to make the fine reduction conditional upon the company not contesting the first infringement, as this may be a (no doubt imperfect) indicator that the company is genuinely committed to changing its behaviour. This is the situation in France, where the fine reduction is only offered in the framework of a settlement procedure (*procédure de non-contestation des griefs*) which requires precisely that, upon being notified by the *Autorité de la concurrence* of the statement of objections, the company does not contest these.[119]

Another way to reduce the second risk would be to specifically increase the fine for any second or later infringement committed notwithstanding the compliance programme for which a fine reduction was granted.[120]

F. Should the adoption of a compliance programme be imposed as part of infringement decisions or settlements?

Some authors have suggested that antitrust authorities could impose the adoption of a compliance programme as part of an infringement decision or a settlement.[121]

Adopting this suggestion would not weaken incentives for real compliance, nor undermine the normative message that companies are responsible for avoiding antitrust infringements, nor allow companies unfairly to benefit from infringements while escaping liability.[122]

However, one may object that, as explained above, compliance programmes can have negative enforcement effects of two types: employees may learn how to engage more effectively in antitrust infringements and to avoid detection, and companies may decide to conceal or destroy the evidence of infringements they detect through the compliance programme.[123] The risk of such negative effects is no doubt higher when the compliance

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118 See text accompanying note 42 above.

119 See text accompanying note 13 above.

120 This is what the European Commission did in the *British Sugar* case; see note 3 above. To counter the second risk, this increase would have to come on top of the normal increase for recidivism; see generally my paper 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 5.

121 A. Riley and M. Bloom, as note 10 above, at 38. In a recent case in the US, a company was sentenced to adopt an antitrust compliance programme; see Department of Justice, 'Taiwan-based AU Optronics Corporateion sentenced to pay $ 500 million criminal fine for role in LCD price-fixing conspiracy' (press release, 20 September 2012), accessible at http://www.justice.gov/atr/public/press_releases/2012/287189.htm .

122 See text accompanying notes 52 to 57 and 64 to 68 above.

123 See text accompanying notes 30 to 33 above.

programme has not been introduced as part of a company's own voluntary decision to improve its respect for the antitrust prohibitions, but has been imposed on the company by a competition authority or court.

On the other hand, it may be possible to reduce to some extent the risk of perverse learning effects by prohibiting the elements of compliance programmes that are most likely to have such perverse effects, in particular dawn raid training through mock raids.[124] As to the risk that companies may conceal or destroy evidence of infringements detected through the compliance programme, this risk would appear to be neutralised by leniency programmes such as those operated by the European Commission and the US Department of Justice Antitrust Division.[125]

G. What else could or should be done?

What else could or should competition authorities, courts or legislators do to encourage genuine compliance efforts by companies, without creating perverse incentives or undermining the normative message of the antitrust prohibitions?

First, antitrust authorities should prosecute and punish many infringements, not just deal with a low number of high-profile cases. As has been pointed out by Christine Parker, "empirical deterrence research persistently finds 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".[126] To generate normative commitment to the law, it is equally important to detect and punish as many infringements as possible, as many companies and individuals may be willing to comply with the law on condition that those who do not are caught and punished.[127]

Second, as already mentioned above, adding individual penalties to fines for companies would help companies that sincerely want to avoid their staff engaging in antitrust infringements, as it would allow compliance counsel, as part of compliance training, to attract attention to this risk.[128]

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124 See (text accompanying) note 32 above.

125 See (text accompanying) note 97 above.

126 C. Parker, 'Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality', in C. Beaton-Wells and A. Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2011) 239 at 250; see also, for a discussion of the reasons why a strategy of infrequently imposed very high penalties is not optimal, my paper 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 183 at 196-199, and, for a discussion of the risks of excessive prioritisation, my paper 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 *World Competition* 353 at 381-382.

127 See R.A. Kagan, N. Cunningham and D. Thornton, as note 56 above, at 46.

128 See note 31 and text accompanying note 60 above.

Third, antitrust authorities should ensure that the content of the antitrust prohibitions is sufficiently clear and is clearly communicated to the business community, so that companies that want to respect the law can figure out at reasonable cost what they can and cannot do.[129]

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[129] See also A. Riley and M. Bloom, as note 10 above, at 39; D. Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (2012) 49 *Common Market Law Review* 559 at 566; and B.J. Rodger, 'A Study of Compliance Post-OFT Infringement Action' (2009) *European Competition Journal* 65 at 95.