ANTITRUST COMPLIANCE PROGRAMMES – CAN COMPANIES AND ANTITRUST AGENCIES DO MORE?

By Anne Riley and Margaret Bloom[*]

1. Antitrust Compliance Programmes: Can Companies and Antitrust Agencies do More? Introduction

A genuine compliance programme is a substantial, on-going commitment. It requires significant time and resources from individuals at all levels of the business if it is to be successful. The temptation, in the current climate, may be to regard such efforts as an expensive luxury. The reality is that compliance programmes have never been more necessary. Prudent organisations should see them not merely as a cost, but as an investment in risk management. This article suggests some practical steps that companies – and antitrust agencies – could take to promote and improve a genuine antitrust compliance culture.

2. An antitrust compliance programme as an enforcement tool

Antitrust agencies have repeatedly emphasised that deterrence is the key function of cartel fines imposed on undertakings. EU Commissioner Almunia repeated this position in a recent speech, and also stated that the ultimate aim of antitrust policy is not to levy fines, but to have no need for fines at all.[1] Thus the ultimate goal of antitrust policy should be to ensure effective compliance. The question is: are the antitrust authorities taking the appropriate steps to achieve this goal, or is there more they can and should be doing?

Many antitrust enforcement regimes focus on punishment without proactively encouraging compliance programmes. While active enforcement is essential for deterrence, the lack of sufficient incentives for serious compliance efforts can also allow unethical behaviour to flourish and ultimately create an unethical culture.

Scholarly evidence and regulatory best practice suggest that agencies should use a combination of regulatory styles or strategies to improve compliance, rather than relying on deterrence through fines alone.[2] Simple deterrence can fail to produce compliance commitment because it does not directly address

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1 Joaquin Almunia, Business Europe & US Chamber of Commerce. Competition conference, Brussels, 25 October 2010, Compliance and Competition policy http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/586&type=HTML.

2 CE Parker, 'The compliance trap: the moral message in responsive regulatory enforcement'. University of Melbourne Legal Studies Research Paper No 163. Available at SSRN: http://ssrn.com/abstract=927559. Parker argues that 'responsive regulation' (as part of an arsenal of antitrust measures and not as a substitution for punishment), seeks to build moral commitment to compliance with the law. Critics of 'responsive regulation' may say that by advocating co-operative compliance as a preferred enforcement strategy, business

business or societal perceptions of the morality of regulated behaviour – it merely puts a price on non-compliance. Understandably, there are many who argue that administrative fines on companies and compliance programmes by themselves are not enough to cut out cartels.[3] They advocate individual criminal liability. Introducing individual sanctions of this nature could help emphasise the moral responsibility for violations of antitrust law. Wouter Wils has pointed out that psychological research suggests that normative commitment is an important factor in explaining compliance with the law.[4]

The tools an antitrust agency uses should include the encouragement (or perhaps even the requirement) to introduce a credible compliance programme.[5] The agencies should not restrict their actions merely to fines, settlements, leniency and litigation. By positively encouraging compliance programmes, agencies can help companies improve ethical standards and ensure greater compliance in practice.

The debate about whether the existence of an antitrust compliance programme should merit a reduction in the level of a fine has somewhat muddied the waters on what the real objective of a compliance programme should be. While taking credible programmes into account in setting fines is undoubtedly very much welcomed by business, it is understandable that some agencies may find such an approach unpalatable. Some countries (eg the USA, Australia, Canada, the Netherlands and the UK) do give some degree of credit to a company if it has what is seen as an 'effective' or 'credible' antitrust compliance programme.[6] Others argue that the threat of heavy fines alone should provide sufficient

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offences are not appropriately treated as a 'real' crime subject to adversarial, punitive and interventionist forms of regulation. Parker suggests that antitrust enforcement can be suitable for 'responsive regulation' if it is combined with restorative justice (where the offender shows remorse and makes a substantive commitment to repair the harm caused). There is a tension here with the approach often taken by antitrust agencies, since restorative justice theory suggests that this is unlikely to be achieved 'where agency staff lecture and moralize' (Parker).

3 A Stephan, 'Hear no evil, see no evil: why antitrust compliance programmes may be ineffective at preventing cartels'. ESRC CCP Working Paper No 09-09 (10 July 2009). Available at SSRN: http://ssrn.com/abstract=1432340. This argument has some merit when one considers that fines – and even very high fines – for antitrust violations are often imposed years after the violation ended, when the individual employees involved in the violation have often left the company. Other commentators recommend barring individuals responsible for price-fixing from further employment in a position from which they could again violate or negligently enable their subordinates to violate the antitrust laws. See also DH Ginsburg, JD Wright, 'Antitrust sanctions' (2010) 6(2) *Competition Policy International* 3, autumn 2010; George Mason Law & Economics Research Paper No 10-60. Available at SSRN: http://ssrn.com/abstract=1705701.

4 WPJ Wils, 'Is criminalization of EU competition law the answer?' (2005) 28(2) *World Competition: Law and Economics Review* 117; 'Remedies and sanctions in competing policy: economic and legal implications of the tendency to criminalize antitrust enforcement in the EU Member States'. KJ Cseres, MP Schinkel, FOW Vogelaar, eds (Edward Elgar, 2005). Available at SSRN: http://ssrn.com/abstract=684921.

5 ICC Policy Paper: 'The fining policy of the European Commission in competition cases', Document No 225/659 (2 July 2009): Available at http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/pages/ICC_The%20fining%20policy%20in%20the%20EU%2002-07-09.pdf. See also the European Parliament resolution of 20 January 2011 on the Report on Competition Policy 2009, para 60. Available at .http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0023+0+DOC+XML+V0//EN&language=EN.

6 See K Hüschelrath, 'Competition law compliance programmes: motivation, design and implementation' [2010] Comp Law 481. Note that while the US Federal Sentencing Guidelines ostensibly provide some mitigation where a firm has had an 'effective' compliance programme in place, this has not been available since November 2004 in cases where 'high-level personnel' participated in the infringement. These are defined to include 'anyone within the undertaking with price-setting authority' – which is thought to preclude all hardcore cartel cases – see also Stephan, op cit n 4, above.

incentive for firms to take compliance seriously, and that infringing firms should not be rewarded for 'failed' compliance.[7]

Of course, credit given by agencies for companies introducing credible antitrust compliance programmes could have a very useful role in incentivising companies to invest the considerable resources required to put in place a credible and effective programme.[8] Offering mitigation from fines for a compliance programme could encourage a wider range of companies to adopt them – and companies which have such programmes to take credible steps to improve them. But a desire to mitigate fines alone should not be the main aim of such programmes. The proper role of an antitrust compliance programme should be to ensure compliance with the law and to promote ethical behaviour by and between companies.

There are a good number of other actions that an antitrust agency can take in addition to (or perhaps instead of) considering credible antitrust compliance programmes as potential mitigation for a company. These are described later in this article after discussing company motivation and practical guidance on compliance programmes.

3. What motivates companies to invest in compliance – fear of penalties or a desire to comply?

Some commentators assume that a company's motivation in having an antitrust compliance programme is to introduce some sort of 'smoke screen' or 'cosmetic compliance' by investing in just enough compliance efforts to avoid legal liability but not enough actually to detect or prevent a violation.[9] Given the fact that the existence of an antitrust compliance programme does not vitiate liability and is only taken into account as a mitigating factor by some agencies, this view of a company's motivation in adopting an antitrust compliance programme is perhaps a little simplistic. While the threat of high corporate fines undoubtedly provides an incentive for firms to maintain effective internal compliance efforts, companies have many other reasons for introducing antitrust compliance programmes, including avoiding reputational damage, avoiding costly investigations and follow-on litigation, and ensuring that they are viewed as ethically and socially responsible organisations.

The purpose of an antitrust compliance programme is to help protect companies (and their shareholders) by reducing the scope for future infringements through training and uncovering potential infringements through the periodic auditing of company activities. Ultimately, the point of a compliance programme is to reduce the risk of a violation occurring at all. Although avoidance of the negative consequences of antitrust infringements is the natural starting point of a study of the drivers of compliance programmes, a broader perspective suggests that excellence in compliance can also have positive effects on the efficiency and efficacy of internal processes. For example, managers well trained in competition law are not only more likely to make correct decisions but they can expect to make these decisions more quickly and therefore free up resources for other activities.[10] Another driver for the adoption of compliance

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7 See Commissioner Almunia, op cit at n 2, above: 'To those who ask us to lower our fines where companies have a compliance programme, I say this: if we are discussing a fine, then you have been involved in a cartel; why should I reward a compliance programme that has failed?'.

8 See the report prepared for the Competition Council of France (Conseil de la concurrence) by Europe Economics in conjunction with Norton Rose: 'Etat des lieux et perspectives des programmes de conformité' (in French with Executive Summary in English) (September 2008). Available at http://www.autoritedelaconcurrence.fr/doc/etudecompliance_oct08.pdf.

9 See SW Waller, 'Corporate governance and competition policy' (23 September 2010). Available at SSRN: http://ssrn.com/abstract=1681673.

10 See Hüschelrath, op cit n 7, above.

programmes (including but not limited to antitrust programmes) is the dramatic spread over recent years in corporate governance requirements and expectations.[11]

4. Practical compliance for companies

This section provides some practical tips to assist a company in building a credible antitrust compliance programme. These suggestions are not intended to represent a comprehensive list of all possible elements of a compliance programme. They are intended rather to reflect what is commonly regarded as best or good practice for antitrust compliance programmes.

There is a vast amount of literature on what constitutes an effective or credible antitrust compliance programme. Some of the better and more usable publications have been produced by or on behalf of some of the antitrust agencies themselves.[12] These publications all rightly emphasise that there can be no 'one size fits all', and that the programme has to be designed bearing in mind the specific antitrust risks faced by the organisation in question.

The various publications on effective compliance programmes use numerous analogies or descriptions, ranging from the 'Compliance House'[13] through to the Office of Fair Trading's (OFT) 'virtuous circle' of (1) risk identification, (2) risk assessment, (3) risk mitigation and (4) review – all based on the central tenet of a commitment to comply from the top down.[14]

This article advocates '5 Cs in Compliance',[15] which essentially contain the same elements as proposed in these publications. The 5 Cs are considered under the following headings:

- Commitment
- Culture
- Compliance know-how and organisation
- Controls
- Constant monitoring/improvement

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11 Section 406 of the Sarbanes-Oxley Act requires an SEC regulated company to disclose whether it has adopted a code of ethics for its principal executive officer and senior financial officers. The UK Corporate Governance Code (2010) also requires the board to conduct an annual review of the effectiveness of the company's risk management and internal control systems.

12 See Canadian Competition Bureau Revised Enforcement Bulletin, *Corporate compliance programs* (27 September 2010), at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf; and see OFT report, *Drivers of compliance and non-compliance with competition law*, OFT 1227 (May 2010) at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft1227.pdf, and OFT consultation, *How your business can achieve compliance*, OFT 1278 (October 2010) at http://www.oft.gov.uk/shared_oft/consultations/OFT1278.pdf. See also the Australian ACCC Guidelines for Corporate Trade Practices Programmes available at www.accc.gov.au/content/index.phtml/itemId/54418.

13 Fundamentals of effective compliance management: Economie Suisse 'dossierpolitik' (12 April 2010).

14 See OFT, *Drivers of compliance*, op cit n 13, above.

15 The authors would like to acknowledge Fiona Carlin from Baker & McKenzie Brussels as the original author of this term.

4.1 Commitment

It may seem somewhat perverse to start the list with Commitment when all the publications emphasise that the key to having a credible compliance programme and avoiding window dressing is to ensure that the *culture* of the organisation supports compliance. But it is senior management that sets the culture and tone of an organisation. If a company does not have management commitment as the essential foundation of its compliance structure, the compliance programme simply will not work. The starting point in any good compliance programme is to obtain genuine management commitment and visible management support as this will drive culture. Successful compliance programmes are critically dependent upon the engagement and buy-in of employees and management right up and down the chain. Simply rolling out a training programme will not lead to full or sustainable compliance.

There is no one single answer about how one goes about achieving management commitment to antitrust compliance. It may come about in a number of ways:

- Increased focus on good corporate governance has increased management's awareness of and interest in the need to comply.
- Increasing compliance requirements in other fields, such as in anti-bribery and corruption, have drawn attention to compliance issues generally and the importance of compliance.
- Compliance incidents (either in the antitrust field or in other compliance areas) often focus the minds of management and can be leveraged to obtain support for the programme.[16]

4.1.1 Practical tips

- Obtain senior management support, accountability and real commitment. Consider asking a director or very senior manager to act as a 'Compliance Champion'.
- Tone at the (very) top of the organisation is essential. This needs *visible* management support. Encourage management to incorporate antitrust compliance messages in their presentations and talks to staff. Encourage management not to give mixed messages to staff.[17]
- But the efforts cannot stop there. Visible management support and commitment in the middle and lower levels in the organisation is also essential. The commitment to compliance needs to permeate the organisation and become part of the way the company does business. If this is seen to be 'just a legal initiative' rather than a business driven and management supported initiative it will fail.

One of the big challenges for all companies is keeping compliance on the corporate agenda, particularly in an economic downturn when resources are scarce, management has many other issues to worry about and employees within the organisation may be suffering from compliance fatigue. This is

16 As an aside, it is ironic that some agencies view compliance incidents as 'failed' compliance, when it is precisely those incidents that can trigger a change (or further improvement) in corporate culture and compliance commitment by focusing the minds of senior management on the need to comply and the serious consequences of compliance violations.

17 See D Sokol, 'Cartels, corporate compliance and what practitioners really think about enforcement', forthcoming in the *Antitrust Law Journal* symposium on Neo-Chicago Antitrust. Sokol comments that some non-compliance may be caused by mixed messages that employees or executives receive from a company. On the one hand employees may be asked to behave ethically, while on the other hand there might be conflicting employee performance goals. See also Y Mishina et al, 'Why "good" firms do bad things: the effects of high aspirations, high expectations and prominence on the incidence of corporate illegality' (2010) 53 Acad Mg J 701.

perhaps where agencies can help most in undertaking compliance advocacy in society at large to promote an understanding of the need for constant vigilance.

4.2 Culture

Corporate culture is a multi-layered concept that includes beliefs, values or corporate ideologies, behavioural norms and expectations, patterns of behaviour and corporate organisational processes. Compliance commentators describe compliance culture mostly in terms of values: a culture that promotes ethics, integrity, respect, trust and accountability. Compliance commitment must be built into the very marrow of the organisation, so that integrity and ethical behaviour become not only a business policy but a way in which business is actually done.

The key to a change in corporate culture is to ensure active and visible support from senior management. Policies, procedures and training are, on their own, insufficient to ensure compliance. To be effective, all policies, procedures and training must be part of a larger culture that instils compliance as a fundamental value. Rules are meaningless if they go against the grain of the organisation as a whole: in other words, if there is a culture of non-compliance. Senior management must articulate a vision of compliance that goes well beyond the compliance function itself and then drive the process on delivering that vision. The responsibility for compliance must be embedded throughout the organisation from the most junior to the most senior person.[18]

4.2.1 Practical tips

- The company (with the support of the board) should adopt and communicate standards of ethical behaviour and policy at group level (eg through a code of conduct, code of ethics, group business principles). This can and usually does cover more than simply antitrust compliance, and would normally cover such things as anti-bribery and corruption, anti-money laundering, export controls and other compliance topics relevant to the company's business.
- Ensure that very senior people are the 'champions' of compliance – in what they say *and* what they do. Management at all levels needs to be knowledgeable about the risks of non-compliance. Management needs to provide appropriate resources (funding and organisational support) for the compliance programme. These should obviously be suited to the specific needs, size and geographic spread of the organisation.

4.3 Compliance know-how and organisation

This topic is vast, encompassing how companies organise their programmes, and how they identify and address compliance risks through training.[19] The first step in assessing what sort of compliance organisation (if any) the company needs and what sort of training needs to be done is to assess what risks the business is facing.

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18 Price Waterhouse Coopers/Economist Intelligence Unit joint report (Financial Services briefings) Compliance: a gap at the heart of risk management 2003: http://www.pwc.com/en_GX/gx/financial-services/pdf/compliancegapheart.

19 See, eg, the US Federal Sentencing Guidelines, Chapter 8, Part B, 'Remedying harm from criminal conduct and effective compliance and ethics program', available http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP8.pdf.

4.3.1 Risk assessments

Since businesses have limited resources they need to focus those resources where the antitrust risk is greatest. Companies need to determine which risks are most likely to occur and which ones have the greatest impact (eg cartel risk, unilateral conduct issues, vertical issues). This will also assist in determining what sort of training might be required for the company and who in the company needs to be trained (about what, and to what level of sophistication). It will also be necessary to consider whether the company has a history of non-compliance. The measures required for a recidivist to prevent a future occurrence (or, at least, to reduce its likelihood) are likely to be greater than for companies with a clean antitrust record.

4.3.2 Compliance organisation

While senior management should be accountable for ensuring compliance, the implementation of an effective and credible programme may be delegated to a designated person (compliance officer or other appropriate officer). Implementation includes training, monitoring and overseeing a complaints and misconduct reporting system. Whether a dedicated compliance organisation is required will depend on the size, scale and the nature of the business concerned. Clearly, a small company dealing in a single country and facing limited compliance risks would not need to go to the expense of establishing a dedicated compliance office, whereas a multinational company with significant potential compliance exposures in many disciplines may feel that this is a prudent thing to do.

There is no set model for what a compliance office might look like. For example, some companies deal with compliance risk in their legal team – where there is an in-house legal function – and some companies prefer to have a dedicated compliance function with dedicated business compliance officers. Some multinationals now also have an in-house business integrity function which is staffed by individuals having forensic investigations experience, who can undertake internal compliance investigations. However the company decides to organise itself, it is most efficient to ensure that its antitrust compliance efforts are harmonised with its compliance efforts generally in other areas, for example, with anti-bribery and corruption efforts, and in all cases the compliance organisation should be designed to address the specific needs and compliance risks of the company concerned.

4.3.3 Compliance training and know-how

Having identified the antitrust risks facing the organisation and the geographic spread of those issues, the next step is to determine what antitrust training should be given, and what supporting documentation is required.[20] The purpose of training staff and providing antitrust compliance guidance notes is to keep the awareness of staff at a high level. Raising awareness helps minimise the risk of violations occurring. However, no matter how good the programme, it can never completely eliminate the possibility that some individuals may simply ignore company policy.

- Practical tips

  Having assessed the specific antitrust risks in the business, design the materials and training to be as relevant as possible to the company's specific risk profile:

[20] See RM Abrantes-Metz, P Bajari, J Murphy, 'Antitrust screening: making compliance programs robust' (26 July 2010). Available at SSRN: http://ssrn.com/abstract=1648948. Abrantes-Metz et al comment: 'In the past much of antitrust compliance work has focused on training, perhaps accompanied by an antitrust compliance manual. But regardless of the amount of employee training they conduct and the existence of written materials, it is likely that most practitioners feel they do not have a handle on this area of risk … Given the lengths participants go to hide their conduct, and the longevity of such cartels, it is evident that the participants were not acting in innocent ignorance. But although this is true, it does not necessarily follow, even in such cases, that training plays no role'.

4.3.4 Training

- Identify staff to be trained according to their risk profile. For example, higher risk staff may be people in a sales function or who attend trade or industry meetings and networks.[21] Ensure that induction of new employees (or movement of employees from a lower risk job into a higher risk job) includes antitrust training as required by their risk profile.
- Ensure the content of the training is specific to the company's antitrust needs and risk profiles. Consider whether the company needs on-line training, face-to-face (FTF) training, or both. While on-line training is good for global reach and can be sourced in multiple languages, it is probably not adequate on its own for higher risk staff who will need to be able to ask questions and get on the spot answers. There are many on-line training products available off-the-shelf; however, some are too high level and generic. Others are too legalistic and tend to cover all antitrust issues (some of which may not be relevant to the business). Hence, some multinational companies have developed their own specific on-line training despite the cost involved in doing so.
- The next step is to identify appropriate trainers for FTF antitrust training. Ideally the trainers will be knowledgeable in antitrust law. But (depending on the resources available) this may not always be the case; so the company may need to consider developing a 'train the trainer' course. Many external counsel commentators on this subject recommend that external counsel deliver FTF training. This is certainly possible if there is no other alternative. But it is costly and external counsel may not fully understand the company's business model. Consider training trainers from within the company's legal, compliance or other functions.
- The size of the group to be trained in FTF training is of critical importance. There may be a (short-term) cost saving in 'training' a large group of people in a lecture-style format. But this sort of training is not effective in the long run, since the audience is unlikely to learn (or retain) much if the session is not interactive and lively. It is only possible to ensure a lively interaction with a small group of people. The optimal number for FTF training is around 20 people in one session. This makes training extremely time consuming for the trainer (and possibly more costly for the organisation, even if in-house resources are used for training), but it is more effective in the long run.
- The format and content of the training (whether FTF or on-line) should be best suited and adapted to the compliance needs of the business. Various forms of training have been tried and tested, including teaching by examples (scenarios) and case studies, using quizzes, Q&A sessions and other interactive modes of training involving role playing such as mock trials. The purpose of these different training methods is not to trivialise the topic but to ensure that the training fully engages the trainees. Using different methods of training also helps overcome or minimise compliance fatigue or resistance to training. If the resource is available in-house, it is useful to have colleagues in the company's HR or training functions help with the design of the courses to ensure maximum impact.
- Where possible, senior management or team leaders should play an active role in the training to reinforce the messages given on the expected corporate culture of ethics and compliance.
- Ensure suitable records are made of attendance at all training.[22]
- In summary, make it relevant; make it memorable; and above all, maintain the effort.

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21 Some useful guidance on risk profiling for training is contained in the OFT documents referred to at op cit n 13, above.

22 Training attendance can be recorded, eg, by asking attendees to sign an attendance sheet or by electronic tracking of on-line training. The purpose of tracking who attends training is to ensure that those who were scheduled to attend but have not can be identified and required to take necessary training. Obviously all records kept of training should be in compliance with other legal requirements such as data privacy laws.

4.3.5 Guidelines and notes to staff

- Develop clear and simple rules – these can be 'Do's and Don'ts' or any other form that is suitable for the company. The key rule however is to use plain business language – not legalistic jargon.
- The notes should not be too lengthy. Make it easy for people to understand and follow the rules.
- Tailor guidelines to the specific needs of different business units and in different situations.
- Consider preparing short (1–2 pages maximum) notes on specific topics of particular relevance to the business (eg benchmarking, attending trade associations).
- Think about what languages materials should be translated into[23] and the method of delivery to get maximum reach (eg having all materials easily accessible on a company intranet site).

4.4 Controls

Training needs to be supported by other control mechanisms. Some of the more common ones are discussed below.

4.4.1 Individual compliance assurances

Ensuring executives and senior managers continue to focus on antitrust issues can prove a continuing challenge. Some have suggested[24] that companies should require at risk staff to sign an annual statement of compliance with the company's antitrust policy. These could take the form of:

- a statement that the individual has read and understood the company's programme, including its policies and procedures;
- a statement that the individual has complied with antitrust laws and with the company's business principles or code of conduct;[25]
- a statement that an employee has understood the compliance programme and *will* comply with the law.

The latter approach may do more to embed a compliance culture in the organisation and to ensure personal individual responsibility among the employees for compliance behaviour; consequently, it is the approach which is often taken. Given the administrative difficulties of obtaining and monitoring such statements on an annual basis, some companies now incorporate this statement in their on-line training to capture the certification electronically.

4.4.2 Reporting concerns (helpline)

It is considered to be good practice[26] to establish a confidential system which individual employees can use anonymously to report compliance concerns. Generally, this is a helpline operated by a third party:

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23 In some countries, works council rules can require company training materials to be translated into local languages.

24 This is suggested in the Canadian Competition Bureau 2010 Enforcement Bulletin, see op cit n 13, above.

25 But there is a risk that a backward looking statement of past compliance by individuals may be counter-productive within the organisation. It made be viewed by employees as a cynical and self serving attempt by the company to 'cover' itself in the event of a violation and to provide the grounds for disciplinary action. There may also be works council/employment law issues with this approach in some countries.

usually a compliance services organisation or external counsel. It is common for the helpline to be available for reporting all forms of code of conduct and compliance concerns, not just antitrust concerns. It is also important for the organisation to have in place some clearly understood principles for investigating all concerns raised through the helpline and for the company to provide appropriate assurances that internal whistle-blowers will not be retaliated against.

4.4.3 Keeping a record of disassociation

Given the importance of being able to 'prove the negative' and show that the individual and the company had disassociated themselves from potentially unlawful activity involving others, many companies now have a system of requiring employees to report competition concerns and the actions taken to disassociate the company.[27]

4.4.4 Consequence management and incentives

- Disciplinary measures

  It is essential that the antitrust compliance programme is supported by clear rules, policies and procedures on what will happen to individuals in the event of non-compliance. It is important that a deliberate violation of company policy and of antitrust law is appropriately sanctioned by the company, with disciplinary measures up to and including dismissal. As a practical matter, the disciplinary policy needs to be flexible enough to deal with situations where the company may need to apply for leniency and therefore may not want to dismiss the individual immediately, but to keep him/her on the pay-roll (possibly on suspension or 'gardening leave') until the antitrust investigation has finally concluded. However, it is also important that disciplinary measures for minor or genuinely accidental violations are carefully judged. It is better to ensure that any accidental errors are disclosed voluntarily by employees, allowing in-house counsel to assess whether or not the matter needs to be dealt with further, than to risk employees deliberately covering up their unwitting errors and creating evidentiary gaps which can prove more problematic later.

- Positive incentives

  It is worth considering whether the company could assist in fostering a culture of compliance by providing appropriate incentives for performing in accordance with the compliance programme. For instance, compliance could be considered for the purposes of employee evaluations, promotion and bonuses. While attending required training could and arguably should be linked to the employee performance appraisal process, there may be some reluctance to reward employees merely for complying with the company's code of conduct, since this would be a minimum expectation in any event.[28]

- No compliance disincentives

  While some companies may express some slight discomfort in granting bonuses for (mere) compliance with their code of conduct, most would agree that a company should not undermine the code of conduct by rewarding commercial success when antitrust (or other compliance) risks

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26 Only where permitted as a matter of national law, of course.

27 See the OFT report and consultation, op cit n 13, above.

28 This view may be the corporate equivalent of an antitrust agency's reluctance to grant a reduction in fine.

are being ignored. In other words, the company should not provide incentives that directly undermine compliance objectives. Unrealistic commercial objectives, combined with group pressure, may cause individual employees to violate the law and company policies. Senior management must make it clear that business performance is only good when it is in compliance with the law.

4.4.5 Controls relating to trade association attendance and industry events

Trade associations can provide a useful and perfectly lawful forum for companies to meet and discuss matters of common concern to the industry, such as the introduction of new legislation. However, such events involve competitors meeting together so there is a risk that discussions may stray into inappropriate topics. For that reason, a number of multinationals are now introducing systems to track who attends such events.[29] Tracking enables the company to ensure the proper internal authorities have been obtained for attendance, to ensure that the individuals are appropriately trained and to ensure that the activities of the trade association or business network (including formal and informal meetings) are conducted in compliance with antitrust law.

4.5 Constant monitoring and improvement of the programme

It is important that businesses regularly review all aspects of their compliance programme to ensure that there is unambiguous commitment to compliance from the top down, that the risks identified or the assessment of them have not changed and that the risk mitigation activities remain appropriate and effective.

4.5.1 Practical tips

- Ensure the programme expressly provides for regular reviews. Review antitrust risks within each business unit or area on a regular basis. An annual review is recommended.
- Have the programme controls audited periodically to ensure that the governance structure for antitrust compliance is robust.
- Undertake a root and branch review of the entire programme periodically (every 3–5 years). Part of that should involve, at a minimum, benchmarking best practice programmes with other compliance professionals and may include an external assessment of the robustness of the programme.
- Update and renew training materials from time to time to minimise compliance fatigue.
- Amend the programme as required to address new risks or perceived defects or gaps in the programme.

4.5.2 Reports to senior management

Senior management must continue to be engaged in and supportive of the programme. The board should understand the operation of the programme and the compliance risks facing the organisation. Hence, the compliance programme should involve regular reports to senior management and to board committees such as the audit committee or corporate social responsibility committee (if relevant to the company). These reports could either be made as antitrust compliance reports or as part of an overall compliance and ethics report, depending on the particular risks faced by the company.

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[29] See the OFT report and consultation, op cit n 13, above.

4.5.3 Audits of the programme

It is important to distinguish between audits of processes and controls, and audits of substantive compliance. Audits of processes and controls are essential to ensure that there is a robust and effective governance structure. There are pros and cons of undertaking audits of substantive antitrust compliance which ought to be fully understood before they are embarked upon.

- Pros
  - An audit of substantive compliance allows potential violations to be uncovered and, if it uncovers instances of non-compliance, puts the company in a better position in the race for immunity.
  - Identified areas of potential non-compliance can, and should, be used to focus on risk and improve the quality of the compliance programme (including training). They can be used to leverage further management support for the compliance effort.
  - Undertaking periodic audits of substantive compliance underlines management's commitment to the programme.
- Cons
  - In order to ensure and preserve legal privilege, it may be essential to have audits of substantive compliance undertaken by external counsel, which could be extremely costly.
  - However, the cost is not the only drawback. Since by their nature cartels are covert and individuals involved go to great lengths to hide their participation, there is a considerable risk (without the benefit of a 'smoking gun') that the audit will not uncover any violations. There is a risk of producing false negatives and drawing false assurance from the results.
  - In the absence of a 'smoking gun', substantive compliance audits may be resisted by the business as being unnecessarily disruptive. They risk engendering a feeling of resentment and suspicion towards genuine compliance efforts.

Because of the downsides of undertaking an audit of substantive compliance without evidence of a potential violation, some commentators have suggested that it may be worthwhile running an audit of substantive compliance in tandem with an internal amnesty programme (where the company offers to take no action against employees if they come forward voluntarily with evidence of antitrust violations).[30] While that is certainly an interesting idea, there are a number of complex legal and practical issues that would need to be fully addressed before such an approach could be put into action.[31]

30 See the Jasper De Gou (Akzo in-house Antitrust Counsel) presentation with Gibson Dunn webinar. Slides from the presentation are available at http://www.gibsondunn.com/publications/Documents/WebcastSlides-LegalProfessionalPrivilege.pdf.

31 The issues that would need to be addressed would include employment law issues, staff/works council issues, legal privilege, corporate disclosure requirements, potential conflicts of interest between the company and the employee if the activity disclosed is criminal, and the validity of any 'amnesty' offers under public interest and other relevant laws.

4.5.4 Other suggestions for compliance action

Other commentators have made other suggestions for inclusion in a compliance programme. Although these have some negative aspects or practical difficulties, they are mentioned here for the sake of completeness.

- *Mock dawn raids*. Consideration might also be given to whether the antitrust compliance programme should include dawn raid training. While it is obviously important for the company to understand what happens in an investigation (and in particular to understand the duty of co-operation), dawn raid 'training' through mock raids should not be part of the antitrust compliance programme since it dilutes the main message of the importance of compliance.[32]
- *Contract review*. It has been suggested that companies should regularly review individual business contracts (including diarising review dates) and even that the marketing department should communicate with the legal department when market share thresholds are met.[33] While this concept is not entirely without merit, it is important for companies to focus their resources on the areas of greatest risk. If a company's risk area is more likely to be horizontal arrangements than vertical arrangements, this contract review would likely go beyond what is essential to mitigate the main risks to the business. If a company did decide to undertake such a rolling contract review, the marketing department may not be best placed to assess market share (unless a comprehensive economic analysis of relevant markets had first been conducted).

5. What (more) can agencies do to promote compliance?

Compliance programmes should be welcomed and actively promoted by antitrust agencies as part of their enforcement toolbox.[34] Credible and genuine programmes reduce the likelihood of wrongdoing and expand the government's overall enforcement resources, thereby increasing the likelihood that a given corporate employee will be apprehended either before or after the employee commits the violation.[35] Compliance programmes also deter wrongdoing by generating social norms that champion law-abiding behaviour.

Followers of Harvard Business School's Michael Porter will be aware of his call[36] for government agencies and companies to work together to 'create shared values'. In line with this thinking, perhaps it is now time for the business community and the antitrust agencies to work together to produce a shared understanding of what a credible compliance programme might look like, and to work together jointly to promote compliance expectations and acceptance within the community at large and the business community in particular.

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32 In addition, conducting mock raids gives rise to employment law, human rights and other legal issues.

33 KS Desai, 'Antitrust compliance: the effects of perceived regulatory failure'. *The European Antitrust Review* (Global Competition Review, 2010).

34 The antitrust agencies should also bear in mind that regulatory authorities and a growing number of governments around the world have welcomed company compliance efforts; recently, eg, the member countries of the OECD and the signatories to the anti-bribery convention have endorsed the role of compliance programs in preventing corruption – cited in Abrantes-Metz et al (op cit n 21, above).

35 MH Baer, 'Governing corporate compliance' (2009) 50(1) *Boston College Law Review*; Brooklyn Law School, Legal Studies Paper No 166. Available at SSRN: http://ssrn.com/abstract=1474291.

36 ME Porter, MR Kramer, 'The big idea: creating shared value' (Jan–Feb 2011) *Harvard Business Review*, forthcoming.

This is not a request for reduced antitrust enforcement, but for more engagement from the agencies. This is desirable because the public needs a better understanding of the benefits of antitrust enforcement,[37] and companies need a better understanding of the value of compliance programmes as a useful cultural tool to improve compliance.[38]

Possible measures antitrust agencies could take to promote further investment in credible compliance programmes include:

- Consideration of credible antitrust compliance programmes as a mitigating factor when assessing the level of any penalty.
- Consideration of the absence of genuine antitrust compliance efforts as an aggravating factor in assessing the level of any penalty.
- Imposing a requirement on companies to adopt a credible antitrust compliance programme as part of an infringement decision, settlement or commitment decision.[39]
- Providing clear guidance on the necessary elements of a credible compliance programme.[40]
- Expressing views on the adequacy (or otherwise) of compliance programmes in infringement decisions to provide guidance on the required elements of a credible antitrust compliance programme.
- Discussing antitrust compliance programmes in the European Competition Network and the International Competition Network to reach a consensus on the requisite elements of a credible compliance programme. Particularly valuable would be any experience of agencies from their investigations as to which aspects of programmes work well in practice and which need strengthening.

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37 Sokol, op cit n 18, above, suggests that successful enforcement has not created sufficient awareness of cartel behaviour among the public. Relative to other types of financial crimes, such as accounting fraud, the public seems unaware or uninterested in cartel activity. Sokol comments that the lack of public awareness of cartels and lack of corresponding moral outrage to cartel crimes reduces the (societal) cost of participation in a cartel. The conclusion therefore is that more needs to be done to raise normative expectations: in society at large as well as within the business community.

38 I Ayers, J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992). See also the European Parliament Resolution of 20 January 2011, at n 6 above: the Resolution calls for 'mechanisms to ensure the effective operation of ...corporate compliance programmes' (para 60).

39 The Australian ACCC has used its enforcement activity to make businesses implement compliance systems. The ACCC's strategy is aimed at deeper business commitment to and achievement of competition goals. In combination with this strategy, the ACCC has 'very self-consciously' nurtured trade practices compliance skills and standards in order to promote high quality compliance management within Australian business more widely than would have been possible through enforcement action alone. See CE Parker, VL Nielsen, 'Do businesses take compliance seriously?' (2006). University of Melbourne Legal Studies Research Paper No 197. Available at SSRN: http://ssrn.com/abstract=946850, and the ACCC's Corporate Trade Practices Compliance document, op cit n 13, above.

40 Antitrust authorities have an important role to play in providing guidance, advice and support on how companies can introduce a credible antitrust compliance programme. The report produced for the French Conseil de la Concurrence recommended that the French agency provide clear guidelines on an optimal framework for a compliance programme (see n 9, above). This approach has also been recommended more generally in Europe (see the ICC Policy Paper, op cit n 6, above.) A number of agencies do provide helpful guidelines, see in particular the guidelines issued by the Canadian Competition Bureau, the ACC and the OFT (op cit n 13, above).

- Expressing views in press releases and other publications on the requisite elements of a credible antitrust compliance programme.
- Greatly improving and increasing antitrust advocacy, in particular within the business community. Some agencies assume that if guidance or compliance statements are made on the agency website that business people will read the statements and amend their behaviour accordingly. Sadly, this is most unlikely to be the case. Agency websites are not part of the day-to-day reading matter for most business people. Agencies therefore need to be far more active in reaching out to the business community. Advocacy action could include:
  - Increasing, and vastly improving the quality of, dialogue with business and in the general media to raise awareness about the importance of antitrust compliance, including targeted information campaigns. One example was a campaign in Brazil to alert younger people to the societal dangers of price-fixing and other cartels, to improve normative standards.[41]
  - Holding national 'antitrust days' or national 'anti-cartel enforcement days' involving not only agencies, academics and practitioners but members of the business and wider community.[42]
  - Targeting specific organisations or associations (e.g. trade associations) as part of an active educational campaign.[43]

6. Conclusion

The purpose of a good compliance programme is to ensure that a company operates according to ethical standards. This article offers some practical guidance on how companies can strengthen their investment in antitrust compliance. In addition, the antitrust agencies should do more to encourage companies to invest the considerable resources needed to have a credible compliance programme. The incentives of agencies and companies need to be aligned to deliver compliance with the law.

41 In 2009 Brazil's CADE and SDE commissioned a comic booklet for children, featuring the characters from the country's most popular comic book series, telling the story of a cartel among lemonade stands. The idea was to introduce concepts of business ethics by exploring the example of a 'lemonade cartel' and target those who are the future of the country, the children, who would then go home and discuss the issues with their parents and guardians.

42 To be of any real value it would be essential that the event should be designed in a way which reaches the widest possible public audience. Similar 'antitrust days' in Brazil involved advocacy actions in eight Brazilian airports, in which brochures and materials were distributed to raise awareness of competition culture and the importance of fighting cartels. It was accompanied by a nationwide campaign via advertisements in the four major weekly magazines in Brazil, and postcards were sent to key executives of 1,000 companies. The main objective of this initiative was 'to prevent companies from engaging into cartel activity as well as to raise awareness of the evilness of cartel behaviour and the ways it affects the lives of consumers'. See OECD Document: DAF/COMP(2010)14 *Annual report on competition policy developments in Brazil 2009*.

43 The ACCC targeted a range of individuals and organisations (such as industry associations, compliance professionals and potential whistle-blowers) with the capacity to understand the possible reputational damage caused by publicity and encouraged the business compliance community to put in place compliance controls – See Parker and Nielsen, op cit n 40, above.