Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils

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Abstract

In the inaugural issue of the *Journal of Antitrust Enforcement*, Mr. Wils published an article discussing the relationship between compliance programmes and competition law enforcement in the EU. This paper questions some aspects of Mr. Wils' analysis of compliance programmes, as well as some of its policy prescriptions. The core theme of Mr. Wils' article is that there are sound policy reasons why the European Commission and the US Department of Justice Antitrust Division do not, and should not, grant a reduction in the amount of fines imposed on companies that have a pre-existing compliance programme. The present paper disagrees with this view and explains why compliance programmes should be rewarded by competition authorities.

JEL: K 21, K 48, L 40

I. Introduction

Wouter Wils is one of the leading European scholars on antitrust enforcement.[1] He has written a series of important books and articles on enforcement-related issues, such as leniency programmes, optimal antitrust fines, the criminalization of antitrust enforcement, the use of settlements in antitrust enforcement, the relationship between public and private antitrust enforcement, due process in antitrust enforcement, the principle of *ne bis idem*, self-incrimination, etc.[2] The defining feature of Mr. Wils' scholarship resides in the application of economic principles to the analysis of the law.

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1 Mr. Wils is also a high-level European Commission official. He is one of the few competition law scholars within the Commission, hence making his academic output particularly remarkable and valuable.

2 See his books, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (Kluwer, 2002); *Principles Of European Antitrust Enforcement* (Hart Publishing 2005); and *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing, 2008), as well as numerous law review articles which can be found on Mr. Wils' ssrn webpage.

In the inaugural issue of the *Journal of Antitrust Enforcement*, Mr. Wils published a paper (hereinafter, "the Paper") that discusses another enforcement-related issue, which is the relationship between compliance programmes and competition law enforcement in the EU.[3] This Paper is well-written, well-researched and insightful. This short reply (hereinafter, "the Reply"), however, questions some aspects of the Paper's analysis of compliance programmes, as well as some of its policy prescriptions. The core theme of the Paper is that there are sound policy reasons why the European Commission (the "Commission") and the US Department of Justice Antitrust Division (the "DoJ") do not,[4] and should not, grant a reduction in the amount of fines imposed on companies that have a pre-existing compliance programme. I disagree with this view and will explain why in this Reply, which I hope will stimulate further discussion on the way compliance programmes should be treated by competition authorities.

The first footnote of the Paper defines an antitrust compliance programme as:

> "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."

While this definition of compliance programme is as good as another, it fails to recognize that there are many types of compliance programmes ranging from mere checklists of loosely defined principles to extremely sophisticated programmes, including monitoring of employee behaviour, reporting systems, and severe internal penalties for breach of antitrust rules. This failure to recognize the considerable differences existing between compliance programmes is problematic as much of the Paper's analysis of compliance programmes seems to relate to the former category of programmes rather than the latter. This somehow creates a straw man since very few observers, including defence counsel and in-house compliance officers, would

[3] W. Wils, "Antitrust Compliance Programmes and Optimal Antitrust Enforcement", 1 (2012) *Journal of Antitrust Enforcement*, 1.

[4] While Mr. Wils is correct to note that the policy of the Antitrust Division is not to give fine reductions for compliance programmes. But the Antitrust Division seems to be the only part of the DoJ that does not take compliance programmes into account in its sanctioning policy. The US Attorneys Manual spells out the policy to consider such programmes, and purports to give the Division as an "example" of an exception – but to the author's knowledge, it is, in fact, the only exception. See United States Attorneys' Manual, 9-28.800 Corporate Compliance Programs, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm Moreover, to the extent the FTC deals with penalty matters, it also considers compliance programmes. See Murphy, "The FTC and antitrust compliance programs," Compliance and Ethics Professional 49 (July/August 2012), available at http://www.joemurphyccep.com/wp-content/uploads/2012/08/Finalpublishedarticle_Murphy_ARTICLEcopy.pdf The US SEC also is a strong proponent of compliance programs and recognizes them in enforcement decisions. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Securities Exchange Act of 1934 Release No. 44969 / October 23, 2001, Accounting And Auditing Enforcement Release No. 1470 / October 23, 2001, http://www.sec.gov/litigation/investreport/34-44969.htm For a specific civil case where the SEC did this, see Securities and Exchange Commission v. Christopher A. Black, Case No. 09-CV-0128 (S.D. Ind., September 24, 2009), enforcing Reg FD (fair disclosure).

claim that weak compliance programmes of the sort described above should benefit from any recognition from competition authorities. By contrast, we will see that it is not unreasonable to suggest that well-designed and executed compliance programmes should lead to fine reductions in competition cases.

This, of course, raises the question of what a "robust" compliance programme should look like. In a recent paper, Murphy and Kolasky list twenty features that an effective compliance programme should have including: periodic assessments of the risks of antitrust infringement; development of clear and articulate standards and policies designed to prevent and detect cartels; implementation of controls designed to make violations difficult; allocation of proper resources and infrastructures to the programme; board oversight; senior management support; training and communication; auditing and monitoring incentive systems; protection against retaliation for those who raise concerns or collaborate with investigation; etc.[5] That list is certainly a good starting point for companies wishing to adopt an effective compliance programme. The content of the programme should of course take into account the specific characteristics of the company in question (in terms of size, whether it has subsidiaries, etc.), the sector(s) in which it is involved, the resources available, etc.

The argument made in this reply is that that robust compliance programmes of the type described by Murphy and Kolasky should be rewarded (and thus encouraged) by competition authorities. This leads me to two preliminary observations. First, unlike some other authors, I do not believe that the adoption of a compliance programme, even a robust one, should lead to a full immunity from antitrust fines, but only a reduction of such fines.[6] Second, I do not believe either that all forms of fine reductions implemented by competition authorities are necessarily desirable. As will be seen below, some of the fine reduction schemes put in place by competition authorities may not be optimal. The goal should not be to reduce fines at all costs, but to reduce fines in a way that will stimulate the adoption of compliance programmes that will ensure greater compliance with antitrust law.

Against that background, this reply follows the same structure as the Paper by looking at the nature of antitrust infringements (Section II), discussing the rationale of company liability for antitrust infringement (Section III), analysing the value of antitrust compliance programmes (Section IV), discussing some important questions regarding the way competition authorities should treat compliance programmes (Section V), and briefly concluding (Section VI).

As this reply is intended to be short and merely seeks to steer further debate on some of the statements the Paper contains, it will by no means address all the issues raised by Mr. Wils in his contribution. It should also be noted that while I disagree with the positions taken by Mr.

[5] J. Murphy and W. Kolasky, "The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior", (26) (Spring 2012) *Antitrust*, 61.

[6] Although, at least in jurisdictions where enforcement personnel have discretion in how to proceed it makes complete sense to allocate scarce enforcement resources in a way that distinguishes among companies based on their compliance due diligence. Thus an authority might elect not to proceed against a company based on the diligence of its compliance programs and its remedial efforts (including restitution).

Wils in his paper, I agree with others. For instance, like him, I strongly believe that adding personal sanctions to corporate fines would significantly contribute to ensuring compliance with EU competition rules. But that is the subject for another paper.

II. <u>The Nature of Antitrust Infringements</u>

This section of the Paper defines the main characteristics of antitrust infringements: (i) antitrust infringements involve employees that have been given substantial authority by their company; (ii) antitrust infringements are financially beneficial to the company; (iii) 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; and (iv) the importance of performance targets and incentives.

The objective of this section of the Paper seems to be to demonstrate that there is something really unique about antitrust infringements, which justifies Mr. Wils' position that, whatever the circumstances, competition authorities should *never* take into account the compliance efforts made by corporations when setting fines. Some aspects of the uniqueness of antitrust infringements are, however, questionable. For instance, the Paper argues that, unlike "some other types of employee wrongdoing, such as embezzlement, which victimize the company",[7] in the antitrust field there is "no alignment of interests between companies and antitrust authorities, in that companies would naturally want to reduce the number of illegal acts engaged in by the staff."[8] While this lack of "natural alignment" may be generally true in the antitrust field (but for the fact that many companies genuinely want to prevent their employees from engaging in collusive conduct), it is by no means unique to that field. For instance, in cases of corruption, such a lack of alignment would, according to the Paper's standards, also be present. This is important because in the corruption field, a variety of authorities take compliance efforts into account in their enforcement / sentencing policy. For instance, the recently issued guidance on the US Foreign Corrupt Practices Act ("FCPA") provides that:

> "A well-constructed, thoughtfully implemented, and consistently enforced compliance and ethics program helps prevent, detect, remediate, and report misconduct, including FCPA violations. …
>
> These considerations reflect the recognition that a company's failure to prevent every single violation does not necessarily mean that a particular company's compliance program was not generally effective. DOJ and SEC understand that "no compliance program can ever prevent all criminal activity by a corporation's employees," and they do not hold companies to a standard of perfection. An assessment of a company's compliance program, including its design and good faith implementation and enforcement, is an important part of the government's assessment of whether a violation occurred, and if so, what action should be taken. In appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based

[7] Wils, supra note 2, at 6.
[8] Id.

> on the company's effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation."[9]

Moreover, it seems difficult to justify the Paper's absolute position that competition authorities should *never* consider the compliance efforts made by corporations on the basis of generalizations, such as the fact that "most" antitrust infringement involve senior management or that employees are "primarily" motivated by what they perceive to be their company's interest. There are indeed cases where the infringement may have been caused by more junior employees or by employees acting on the basis of their sole interest (because they find it easier to reach their sales target by colluding than by doing their job). Hence, it seems inadequate to adopt a general, and absolute, rule on the basis of facts that may not necessarily apply in every case.

III. <u>The Rationale of Company Liability for Antitrust Infringement</u>

In this section, the Paper describes the reasons that justify company liability for antitrust infringements: (i) companies are generally best placed to prevent antitrust infringements and to do so in the most cost-effective way; (ii) the importance of avoiding "perverse incentives" and (iii) "unfairness". The Paper also argues that 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.

One should first observe that the same problem of using generalizations to set an absolute principle is also found in this section of the Paper, which, for instance, argues that companies are "generally" best placed to prevent infringements. While it may often be true that companies are well placed to prevent infringements, they also face limitations in their ability to detect and punish the infringements made by their employees, such as, for instance, the guarantees offered to employees by data privacy rules, employment law, etc.[10] The "draconian consequences" referred to in the quote cited in the Paper may thus be more limited than one may think. In the absence of personal sanctions imposed by the law, termination of employment is probably the worst sanction faced by employees and it may not be enough to discourage those who are bent on infringement of antitrust laws.

As to the avoidance of "perverse incentives", the Paper may be right to claim that if companies were not liable for the antitrust infringements committed by their employees, they

[9] US Department of Justice and US Securities and Exchange Commission, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act (Nov. 14, 2012), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf

[10] For instance, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, (OJ L 281/31, 23 January 1995 places serious limitations on the ability of companies to conduct internal investigations.

would have incentives to encourage such infringements (although I would not generalize that statement). It should be recalled, however, that this Reply does not argue that companies should not be held liable when they have developed robust compliance programmes, but that such programmes should be taken into considerations by competition authorities determining how to treat a company such as in for the setting of the fine in case of antitrust infringements. Regarding the need to avoid "unfairness", while it is true that it would generally be unfair to allow companies not to be held liable for the antitrust infringements that have been committed by their employees, it would also be unfair to treat in the same manner companies that have invested in robust compliance programmes and those that have not done so.

Finally, the Paper justifies "parent company liability" on two main grounds. The first argument is that parent companies would be well placed to "influence the likelihood of their subsidiaries committing antitrust infringements, in particular through the setting of financial targets."[11] This statement is questionable for several reasons. First, the notion that parent companies are well placed to influence their subsidiaries not to commit infringement is not as obvious as it may sound, especially when large companies holding with many subsidiaries are at stake. Moreover, there is a tension between saying, on the one hand, that parent companies should be liable because they can influence their subsidiaries and saying, on the other hand, that parent companies are in fact liable when they exercise decisive influence on their subsidiaries. In other words, there is a risk that, because they are intrusive, the type of robust compliance programmes described above could be used to demonstrate, together with other forms of evidence, that a parent company exercises decisive influence on its subsidiary. Second, the argument whereby parent companies would be able to influence the likelihood that their subsidiaries breach antitrust rules through the setting of financial targets is problematic. While imposing strict targets on employees may well incentivize them to breach the law (although other factors are at stake), the parallel argument that by imposing demanding financial targets on their subsidiaries parent companies would incentivize the employees of the latter to breach antitrust rules is less than clear and, to the best of my knowledge, such a correlation has not been proved empirically. Moreover, the Paper's constant emphasis on the fact that companies would cause antitrust breaches when they set demanding targets is puzzling considering we operate in a market economy where investors want to obtain a return on their investment investment and this is seen as maximizing the efficient use of resources in society. Most companies have no choice but to set demanding financial targets on their managers and yet proportionally few companies have their managers engage in collusive conduct. In any event, what can be done to reduce the risks that targets put pressure on employees to breach antitrust rules is to encourage companies to adopt compliance programmes, whereby compliance officers will, among other things, review the way incentives given to employees are set so as to reduce the risk of infringement.[12]

[11] Wils, supra note 2, at 9.
[12] See, e.g., J. Murphy, "Using Incentives in Your Compliance and Ethics Program" (SCCE; 2012), available at http://www.corporatecompliance.org/Resources/View/smid/940/ArticleID/724.aspx

The second argument whereby not holding parent companies liable for infringement of their subsidiaries would create perverse incentives "[g]iven that parent companies, as shareholders, benefit from their subsidiaries' infringements"[13] is frankly odd considering that for the same reason they benefit from their subsidiaries' illicit gains parent companies would also suffer from the penalties imposed on them.

IV. <u>The value of antitrust compliance programmes</u>

In this section, the Paper carries out a cost-benefit analysis comparing the possible positive and negative effects of compliance programmes for "the enforcement of the antitrust prohibitions".[14] If that is the test selected by Mr Wils to assess the value of compliance programmes, it is not in my view the right one. Compliance programmes are not implemented to facilitate "enforcement" of antitrust rules, but to ensure greater "compliance" with such rules.

A. <u>Positive vs. negative effects of compliance programmes</u>

The Paper observes that compliance programmes have *positive effects* in three situations: (i) when they prevent antitrust infringements that would have occurred, but for the existence of the programme; (ii) when they lead to an on-going infringement being terminated earlier than would have happened, but for the existence of the compliance programme; and (iii) when they lead to an infringement being reported to the competition authorities in cases where such infringements would not have been reported or reported later, but for the existence of the programme.[15] In addition, I would add that compliance programmes represent a form of "competition advocacy", which is probably more effective in terms of reaching business actors that advocacy programmes run by competition authorities. This is especially true since, as observed by Danny Sokol, besides some high profile matters (e.g., investigations involving tech giants), the press gives surprisingly little coverage to antitrust cases.[16]

The Paper then posits that compliance programmes may generate two types of negative enforcement effects. First, negative effects ensue when employees bent on committing antitrust infringements "learn from compliance training how to engage more effectively in antitrust infringements or how to avoid detection and punishment."[17] That is a truly odd consideration as this risk is present in every prevention programme. If one followed the logic of the Paper, parents should be concerned about drug prevention programmes in schools as teenagers interested in drugs may as a result of such programmes learn how such drugs can be used. In addition, the Paper seems to be based on the view that compliance programmes essentially aim at describing what antitrust rules are and how infringements can be detected.

[13] Id. at 9.
[14] Id.
[15] Id., at 9-10.
[16] Daniel Sokol, "Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement", 78 (2012) *Antitrust Law Journal*, 201.
[17] Wils,, at 10.

We have, however, seen above that robust compliance programmes, i.e. those that deserve to be taken into consideration by competition authorities, go far beyond that and represent a real threat for non-compliant employees. What a good compliance programme does is to tell employees that breaches of competition rules place the company at risk, will not be tolerated, and that internal mechanisms will be put in place to detect those who may be tempted to collude.

Second, the Paper notes that "[n]egative 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."[18] Again, while such a situation cannot be theoretically excluded, it will only occur when the company in question is very badly advised. First, in jurisdictions such as the EU where antitrust infringement is not a crime, destroying evidence, suborning perjury, etc. may very well be one, hence creating personal liability for those who engage in such behaviour. Second, when evidence of an antitrust infringement is uncovered, a well-advised company will typically seek leniency, hence absolving itself from corporate fines. The risk that companies fail to report infringements that would have been unearthed by a compliance programme, or worse conceal or destroy evidence, is thus quite limited.

B. Empirical evidence

The Paper rightly observes that there is little empirical evidence as to the positive and the negative effects of compliance programmes, which is not surprising since the counterfactual (what would have occurred, but for the existence/absence of a compliance programme) is very hard to determine.[19]

The Paper, however, cites a quote from Bill Kolasky – the very same author who, as noted above, identified in a paper with Joe Murphy a list of twenty features that an effective compliance programme should have – showing an example where the General Counsel of a company had been fooled by a top executive of his firm despite the existence of an antitrust compliance programme. Of course, anecdotal evidence is not empirical evidence and the Paper recognizes that there are cases where compliance programmes led to the detection and subsequent reporting of antitrust infringements. Moreover, the quote cited in the Paper questions the argument made in the same paper that companies are best placed to prevent infringement of their employees.

C. A tale of four companies

[18] Id.
[19] For some useful references to empirical studies see, however, D. Sokol and R. Abrantes-Metz, "Corporate Governance and Compliance" in *Oxford Handbook of International Antitrust Economics*, Roger D. Blair and D. Daniel Sokol eds., forthcoming Oxford University Press 2014.

The Paper argues that the lack of empirical evidence should not "prevent us from making judgments on the basis of reasonable arguments informed by the limited empirical knowledge we have and by what we can learn from research into corporate law-breaking and compliance more generally."[20]

Against that background, the Paper tells the tale of four companies "describing types of situations, which can arise realistically"[21]:

- Company A is run by an inspiring and strongly principled CEO who "could not even imagine ever engaging into any illegal activity".[22] Company A never committed an antitrust infringement and does not have an antitrust compliance programme.

- Company B has been fined several times for antitrust infringement. The CEO, who has been shocked by the discovery of illegal conduct engaged in by some of its managers, decides to devote a large budget for a state-of-the-art compliance programme and to hire a chief compliance officer. The staff of company B perceives that the CEO genuinely wants to put an end to any illegal activity, even if this may affect the company's figures. The "new ethical culture spreads through the company",[23] which is not involved in any antitrust infringement anymore.

- Company C, like Company B, has been fined for antitrust infringements. The CEO of this company was not aware of such infringements as he saw his role as setting financial targets and monitoring the achievement of such targets. Recognizing that these infringements are a serious problem, he hires a chief compliance officer who develops a state-of-the-art compliance programme. However, unlike the CEO of Company B, the CEO of Company C continues to set high financial targets and makes it clear that they need to be fulfilled. Managers continue to engage in antitrust infringements, but hide them.

- Company D is an antitrust enforcer's nightmare. Its CEO has been involved in cartels in the different functions he exercised over the years in the company and even as CEO he continues to manage personally a number of cartels in which Company A is involved. In order to respond to corporate trends, he hires compliance counsel, devotes a significant budget to the development of a state-of-the-art compliance programme, but deceives the company's compliance counsel in secretly pursuing its cartel activities.

The Paper uses the above tale of the four companies to answer the question of whether compliance programmes are a necessary and sufficient condition for real compliance with

[20] Wils, at 13.
[21] Id.
[22] Id.
[23] Id. at 13.

antitrust rules. It answers these questions in the negative. According to the Paper, Company A illustrates that a formal compliance programme is *not necessary* to ensure compliance "at least in smaller or relatively centralised companies",[24] while the difference in the effectiveness of the (identical) compliance programme set up by Companies B and C shows that a formal compliance programme is *not sufficient* for ensuring real compliance.

In reality, the fact that formal compliance programmes are neither necessary nor sufficient to ensure real compliance is fairly obvious as it is true of any prevention effort, but this is entirely beside the point. For instance, drug prevention schemes in high schools are neither necessary nor sufficient to prevent drug abuse by students. While many teenagers will never be tempted to resort to drugs for a variety of reasons (they belong to loving families, have a good dialogue with their parents, engage in physical activity, etc.), even the most elaborate prevention programmes will have no impact on other teenagers who will always end up taking drugs (because they physically vulnerable to addiction, have a poor relationship with their parents, have the wrong sort of friends, etc.). What matters is of course whether drug prevention programmes have a positive impact on the students who do not belong to these polar categories. *Mutatis mutandis*, the same is true for compliance programmes.

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

This is of course a false question. No one can specify a programme that can "ensure" compliance no matter the level of resources put into it. There will always be a risk that some managers for reasons that may be impossible to anticipate or control (sense of "solidarity" with fellow managers at competing companies, pleasure taken in engaging in risky activities, etc.). The relevant question is whether an intelligent person studying the field can come up with steps that will significantly reduce the risk of infringement. The answer is yes.

The Paper posits that "[t]he 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"[25] and that "[t]his 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."[26]

These assertions trigger a couple of observations. First, it seems that part of Mr Wils' distrust of compliance programmes is that he sees them as mere checklists. However, as indicated

[24] Id. at 14.
[25] Id. at 15.
[26] Id.

above, a robust compliance programme ought to be more than a checklist. It must include a variety of steps that will make the life of managers tempted to get involved in cartels considerably more difficult and risky. Hence, it is most likely that the compliance programmes put in place in companies B, C and D will end up being very different. If the objective of Company D is to "project a misleading image of compliance",[27] it is likely that this programme will be a mere checklist easy to evade. A more sophisticated programme would indeed present major risks for the rogue CEO. By contrast, if the objective of Company B is to eliminate or at least considerably reduce the risk of cartels, it will put into place a programme that is likely to comprise most of the twenty features identified by Murphy and Kolasky. In other words, "the multiple and complexly interacting factors of structure, culture and agency that determine real compliance"[28] will likely determine the shape of the compliance programme put into place.

Second, when an infringement has unfortunately been committed (which, as noted above, may always occur even in companies that deploy best efforts to prevent infringements), it should be possible for a competition authority to determine the extent to which the compliance programme set up by the investigated company was really aimed at preventing infringements or a pure sham. First, the Paper seems to ignore that the burden of proof would be on the investigated company, which would have to provide the competition authority with all available evidence that the compliance programme put into place was a genuine and serious effort to reduce the risks of infringements. Moreover, competition authorities typically have access to a large number of documents (including emails and other forms of correspondence, minutes of meetings, board presentations, etc.) that will allow them to see whether the management of the company made its best efforts to limit to the greatest extent possible the risk of infringement. Competition authorities can clearly go beyond formal appearances. For instance, while two parent companies (X and Y) may have the same formal relationships with their respective subsidiaries, a competition authority may, on the basis of the evidence available, determine that while Company X exercises decisive influence on its subsidiaries, Company Y does not.

V. <u>Discussions of the different questions</u>

In this section, the Paper seeks to answer some important questions regarding the way competition authorities should treat compliance programmes.

A. <u>Should companies that have antitrust compliance programmes be granted immunity from fines?</u>

Unsurprisingly, the Paper answers in the negative since it considers that "it is not possible to identify a list of characteristics of formal compliance programmes that ensure real

[27] Id.
[28] Id.

compliance and that can be applied at reasonable cost."[29] Although we disagree with this reasoning, the more fundamental problem is that the Paper creates a straw man. Very few authors (he cites one only) argue that companies with formal compliance programmes should be granted immunity. What the vast majority of observers argue is that companies that are able to show that they did their very best to prevent antitrust infringements from happening should be rewarded for these efforts through, for instance, a reduction (not an elimination) of the fine. In other words, companies that have breached competition rules despite their best prevention efforts will still have to pay a fine and/or suffer other negative consequences, making it very clear that the adoption and implementation of a compliance programme does not "become a cheap insurance policy against antitrust liability."[30]

As to the Paper's argument that "[g]ranting 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",[31] it is hard to follow as the fines imposed by competition authorities are designed to deter, not to make victims whole or to disgorge illegally obtained profits. Note that an antitrust authority could perfectly condition the taking into account of a compliance programme in determining the fine to the obligation for such programme to commit to restitution in case of infringement.

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

The Paper answers again in the negative. Mr Wils justifies this position by a variety of reasons: (i) granting fine reductions would replace the incentive for companies to avoid infringement by all possible means by an incentive to set up a compliance programme for obtaining a fine reduction; (ii) granting such reductions would also send the message that antitrust infringements are part of normal of normal business; (iii) reductions would be unfair as the higher the reduction, the more the companies can keep the benefits of the antitrust infringements; etc.[32] In other words, the Paper justifies banning fine reductions on the basis of the same reasons as those used for banning immunity from fines, with the caveat that the negative incentives or effects of granting fine reductions depend on the size of the reduction.

At the core of the above arguments are the notions of "incentives" and "fairness". The notion of *incentives* is central to Mr Wils' scholarship as he, very rightly, applies in his work the learning of economics to the law. The problem in this Paper is that it almost exclusively focuses on the negative incentives that may result from granting fine reductions to companies that have put into place compliance programmes. Fine reductions may also have positive signalling effects to the management. For instance, considering that most legal and compliance departments are under constant pressure to reduce their expenses, they have to

[29] Id., at 16.
[30] Id., at 17.
[31] Id., at 18.
[32] Id., at 19.

prioritise their efforts. Granting fine reductions to companies that have put into place robust (not a mere checklist) compliance programmes may make it easier for the General Counsel and the Chief Compliance Officer to convince their top management to invest in such programmes, first and foremost because it will reduce the risk of future infringements and fines, but also because if an infringement nevertheless occurs (as zero risk cannot be achieved), the investment made into a robust (hence, costly) compliance programme will nevertheless be taken into consideration in setting the fines. This does not mean that the compliance programme will be seen as a "cheap insurance policy" against antitrust liability as it will not be cheap (robust compliance programmes are expensive) and liability will be maintained, but it will make the investment in such a programme more attractive.

As to the notion of "fairness", two observations should be made. First, while the Paper uses this notion as an argument against the granting of fine reductions, fairness could also be used in support of granting such reductions when the company has put into place a robust compliance programme. Indeed, it does not appear entirely fair to treat in a similar fashion companies that have made extensive and genuine efforts to prevent antitrust infringements from occurring and those which have not made such efforts. Second, while the Commission's current fining policy may have some remits (in terms of deterrence), it is by no means fair. Because the stock of listed companies change hands on a daily basis, the shareholders of a company that is fined by the Commission may not have held any stock at the time of infringement. The same is true for the employees of the fined company, which – when the fine is large – may have to suffer the consequences of the fines (lay-offs, no end of the year bonuses, etc.) while they are by not responsible for the infringement. In addition, while the leniency programme that is at the core of the Commission's fight against cartels may be an effective means to uncover cartels, it is clearly unfair as it will reward one or several companies that have breached antitrust rules. To refer to one of Mr Wils' concerns, it may also signal companies that cartels are business as usual provided you are the first to run to the Commission when the cartel has become unstable.

C. Responses to some concerns

In this section, the Paper responds to some of the concerns that "may have led others to argue in favour of [fine] reductions or immunity."[33]

1. Current enforcement policy is not working

The Paper observes that "[s]ome 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."[34]

[33] Id., at 20.
[34] Id.

I will not devote much space to commenting on this statement as, while I tend to believe that the current enforcement policy is not optimal, I do not believe that this is the reason why compliance programmes should be rewarded by competition authorities. Compliance programmes should be rewarded because when they are well designed and implemented (i.e., when they are "robust" to refer to the terminology earlier used), they can contribute to significantly reduce antitrust infringements. While some companies have adopted robust compliance programmes in the absence of any reward, fine reductions may give a positive signal to the top management of companies when they arbitrate between different types of requests for resources. Fine reductions can also be justified for fairness reasons as it seems legitimate to sanction less harshly companies that have done their very best to prevent infringement. In this respect, I agree with Mr Wils when he says "completely eliminating antitrust infringements is an unattainable objective."[35] Hence, for these reasons, it is fair to treat differently companies that have done their best to reduce to the greatest extent possible the risk of infringement, hence lowering the risk of infringement but not eliminating it entirely.

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

The Paper raises a number of arguments to rebut that claim.

First, the Paper alleges that it may be very difficult for competition authorities to determine on the basis of the existence of a compliance programme whether a company has "done everything it could"[36] to prevent antitrust infringements to occur. This argument fails to convince. First, whether a company has "done everything it could" is not the right standard. Companies could always do more to prevent infringement, but they will stop at a given point either because of costs (you cannot place a compliance officer behind each desk) or legal constraints (such as those imposed by labour and data privacy laws). The relevant question is whether they have put into place a robust compliance programme. Second, as noted above, it is hard to accept that competition authorities cannot distinguish (at a reasonable cost) between real and sham compliance programmes considering the investigative resources at their disposal and the fact that the burden of proof would be on the investigated company. In the context of abuse of dominance cases, for instance, the Commission generally spends considerable time reviewing emails, minutes of meetings, presentations made to the management, etc. to determine whether the dominant firm had a strategy to exclude. The Commission thus typically has a fairly clear view on the culture of the company it investigates, as well as the incentives given to its employees. The Commission also looks very closely at the internal workings of investigated companies when it seeks to establish the presence of parental liability. Hence, the Commission and other competition authorities are

[35] Id. at 21.
[36] Id. at 22.

typically ramped to the sort of exercise that is needed to assess the seriousness of the compliance efforts made by a company.

Incidentally, the Paper notes that however good a compliance programme is, its impact may be neutralized when top management imposes demanding targets on their managers. That issue can be handled as part of a compliance programme. As noted above, a robust compliance programme is not meant to be a mere checklist but should address the various risk factors that may lead to infringements. The setting of unreasonable or badly structured targets may be one of the issues that need to be addressed as part of a compliance programme. Robust compliance programmes should also include reporting systems incentivizing employees to report to the chief compliance officer when they are placed under undue pressure to, for instance, win a particular contract whatever it takes.

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

The Paper observes that "[s]ome authors have, in support of their arguments in favour of fine reductions or even immunity from fines for companies with compliance programmes, 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."[37] According to these authors, the strict vicarious liability of companies for the wrongdoing of their employees "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."[38]

Mr Wils agrees with this concern, but does not agree that it should lead to a reduction or immunity from fines for companies with compliance programmes for two reasons. First, the Paper notes that Arlen and Kraakman's argument is about liability of companies for "the wrongdoing of their employees",[39] i.e. employees "that commit crimes to benefit themselves".[40] As noted above, I am not convinced that what distinguishes antitrust from other forms of corporate "crimes" is that employees commit antitrust infringements for the benefit of their firms. Employees may commit antitrust infringements for a variety of reasons and this is exactly why compliance programmes cannot be one hundred per cent effective. Moreover, robust antitrust compliance programmes (including detection and reporting systems) will considerably reduce the risk of institutionalized antitrust infringements in that such programmes will make it considerably harder for companies to maintain or engage in a culture of non-compliance.

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[37] Id. at 23. The Paper cites the following articles: 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.

[38] Id. at 24.

[39] Id.

[40] Id.

Second, the paper observes that the enforcement policies of both the European Commission and the US DoJ 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."[41] The Paper further observes that 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."[42]

This argument triggers several observations. First, it is not necessarily the first company that "detects" an antitrust infringement that will benefit from leniency. It is the first to report it no matter when that company learned that it engaged in an infringement. While it cannot be denied that leniency plays a central role in bringing cartels to an end, it essentially rewards companies that are good at assessing when a cartel is starting to decay and thus when it becomes urgent to denounce it to the relevant antitrust authority. Second, it is not because antitrust authorities reward companies that are granted leniency that it should not reward companies that have implemented a robust antitrust programme. Let us, for instance, imagine a scenario where companies X and Y are involved in a cartel together with several other companies. Both companies have already been condemned for earlier cartels. Company X put into a place a robust compliance programme and no further infringements are committed during a period of ten years. Company Y does not put into place a robust compliance programme as it would be useless since the cartels are managed from the top of the company. Hence, the management of the company has a much better view of the cartels in which the company is involved and thus can react promptly when there are signs that one of these cartels has become unstable. Hence, it is the first to run to the authority and obtain leniency. In that case, pursuant to Mr. Wils' approach, Company Y would be granted full immunity whereas Company X would not obtain even the slightest reduction in fines. Finally, compliance programmes may contribute to the effectiveness of leniency programmes if they allow early detections of infringements.

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

The Paper notes that "[i]t 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."[43]

[41] Id.
[42] Id.
[43] Id. at 25.

The Paper is, however, not convincing by this argument for two reasons. First, it is asserted that the characteristics of antitrust infringements tend to differentiate them from other corporate "crimes" in 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."[44] Moreover cartels are "conspiracies between several wrongdoers (several companies or employees in several companies)."[45] This, according to the Paper, explains the use by competition authorities of leniency programmes. We have already seen that the differences that would exist between antitrust infringement and other forms of corporate delinquency are not as clear cut as alleged. For instance, bribery typically benefits the firms whose employees engage in corruption. The same is true of government contract fraud. Moreover, other forms of corporate delinquency involved several actors. Obviously, this is the case of bribery as one cannot bribed oneself.

Second, the Paper argues that "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."[46] This statement is a bit presumptuous as there is no reason to believe that the policies designed to enforce penalties against corporate delinquency are less well conceived that those elaborated by competition authorities. These other policies may have been more sensitive to the reasonable arguments made by many scholars that robust compliance programmes should be rewarded as they contribute to ensure greater compliance with the law. The only way to determine whether these policies are misconceived would be to compare the rationale that led them to reward compliance programmes with the arguments included in the Paper, but that has not been done.

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

Mr Wils is not convinced by this approach, which would *de facto* make compliance obligatory, and he is right. Besides the fact it may be hard to find a justification for imposing such an obligation, making compliance programmes mandatory may have some downsides. First, because it is mandated, companies may deliberately seek to do only the minimum their lawyers tell them they have to do to "tick the compliance box". Second, this would further add to fines, which in the EU competition law regimes, are already extremely heavy.

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[44] Id. at 26.
[45] Id.
[46] Id.

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

While Mr Wils is not convinced that fine reductions should be granted to companies that set up a compliance programme after detection of an infringement, he argues in the Paper that "[c]ompared 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."[47] The reason is that this latter approach would send "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."[48]

This approach fails to convince for several reasons. First, if we believe that: (i) compliance with antitrust rules is important and that (ii) robust compliance programmes contribute to ensure greater compliance to such rules, then it seems entirely counter-intuitive to reward companies that commit to set up a compliance programme only *after* an infringement has been committed. The earlier the compliance programme is adopted, the better. Second, this approach is not only likely to reward Company D as described by the Paper in its tale of four companies – as it will be too happy to commit to a compliance programme in return for a fine reduction once an infringement has occurred, but it *may* also discourage companies B and C to set up such programmes as they may be concerned this will adversely affect their position if they end up being caught for an antitrust infringement. Some companies will of course decide to adopt a compliance programme before an infringement has been committed as reducing the risk that an infringement is the best way not to be liable to any fine, but this would nevertheless send the wrong signal to the company.

In this respect, the approach taken by the French competition authority in the context of its specific settlement procedure (*procédure de non-contestation des griefs*), whereby it 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 is not optimal.[49] In terms of setting the right incentives, it would be

[47] Id. at 27
[48] Id.
[49] See paragraph 31 of the Framework-Document of 10 February 2012 on Antitrust Compliance Programmes, available at http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf ("If the Autorité accepts a commitment to set up a compliance programme that meets the best practices set forth in the present framework-document or to improve an existing programme to the extent necessary to that effect, the Autorité will reduce the financial penalty of the concerned company or organisation by up to 10%.") However, the Competition Authority can grant an additional 5 % for commitments that go further (e.g., limited participation to trade association meetings, limited participation to bidding consortia, etc.). Moreover, the Authority can add a 10 % reduction for the admission of the objections (a pre-requisite to obtain the compliance programme reduction) and further divides by two the maximum fine cap (5% and not 10 % of the total worldwide turnover). The Authority has also accepted to reward compliance programmes before the infringement occurred, but only outside the cartel arena (see paragraph 28 of the Framework Document where

much better if it gave a reward to companies that set up compliance programmes *before* the infringement occurred, which should also be higher than the 10% reduction granted to the companies that set up a compliance programme or upgrade an existing compliance programme after the infringement has been committed. More generally, it is not clear why an authority would want to limit its ability to give a greater reduction than 10%. For instance, some companies, which have invested particularly heavily in a robust compliance programme and that are victimized by one of their managers, may deserve a greater fine reduction than others that left some gaps in their programmes.

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

The Paper notes that "[s]ome authors have suggested that antitrust authorities could impose the adoption of a compliance programme as part of an infringement decision or a settlement."[50] While not opposed to this suggestion, Mr Wils recalls, however, that one may object that compliance programmes can have two possible types of negative effects noted earlier in his paper: "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."[51] The Paper nevertheless notes that (i) "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"[52]; and (ii) the risk that companies may conceal or destroy evidence of infringements detected through the compliance programme would appear to be neutralised by the leniency programmes put into place by competition authorities.

While I agree on the second point (although, as noted above, I am sceptical as to the concern raised by the Paper), I tend to partly disagree with the first point. It is indeed fair for compliance programmes to include some dawn raid training if only to ensure that employees are aware of their rights and advised on what to do and not to do in case a dawn raid occurs. Dawn raids are rather stressful events and it is important that companies prepare their employees for such events. Simple advice regarding what can be claimed as privileged, what to do in case of disagreement with the inspectors, etc. is certainly helpful not only for the company investigated, but also for the inspectors as this will avoid time to be wasted over issues that can be addressed in advance. By contrast, compliance programmes should certainly not advise employees to conceal or destroy information as it will often be illegal and not in the best interest of the company or the employees to do so.

V. **Conclusion**

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the French Competition Authority keeps the possibility to grant a fine reduction to companies with compliance programmes discovering the existence of an infringement and voluntarily putting an end to it).

[50] Wils, at 29.

[51] Id.

[52] Id.

The paper written by Mr Wils raises very many interesting issues and contains a number of useful insights as to the impact of compliance programmes on the enforcement of antitrust law. While I agree with him on certain aspects, I disagree with his view that the adoption of a robust compliance programme before an antitrust infringement is committed should never be rewarded by competition authorities. First, I am not in favour of such absolute rules as the facts of every case are different and, considering the severity of the fines imposed by the Commission, it is fair to distinguish between those companies that have not invested in compliance and those that have invested in compliance, but whose efforts have not borne fruition (as it is impossible to eliminate all risks of infringements). Second, I believe that Mr Wils exaggerates the potential negative effects of compliance programmes and ignores some of the benefits of such programmes. For instance, because antitrust infringements are hardly covered in the press, compliance programmes have an important educational role. It is important to remind employees that cartels are not business as usual, but inacceptable conduct that puts their company at risk. Third, I am not convinced that antitrust authorities could not distinguish between robust and sham enforcement programmes at reasonable cost. The Commission typically collects a large amount of information over the companies it decides to prosecute, including information about the culture and values of the companies, the compliance efforts made, and the circumstances that led to an infringement. The Commission could also adopt some guidance as to the necessary features that compliance programmes should contain to be taken into consideration when a fine is set, as well as place the burden of proof on the prosecuted company to demonstrate that such features are present. Fourth, it makes infinitely more sense for competition authorities to reward robust compliance programmes that have been adopted prior to an infringement than those that have been adopted after an infringement.