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The International Law of Antitrust Compliance

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THE INTERNATIONAL LAW OF ANTITRUST COMPLIANCE

TED BANKS* AND JOE MURPHY**

INTRODUCTION

It was not so long ago that the concept of international criminal law was an idea with which lawyers struggled. In 1987, Ved Nanda and M. Cherif Bassiouni put together what may have been the first one-volume compendium of information on antitrust, securities, extradition, tax, and other subjects that made up the developing area of international criminal law. Today, it is well-accepted that there are certain standards of behavior that are the norm in practically all nations, and through national laws and multinational treaties, these principles are entering the realm of customary international law.

Developments in the area of competition law, or antitrust as it is known in some countries, have been particularly dramatic. Countries understand that the encouragement of competition is a key to economic development, and national laws have been enacted where they did not exist before, along with enforcement cooperation agreements among increasing numbers of countries.¹ Enforcement of criminal antitrust laws takes place against both individuals and businesses,² and while it is clear that there are situations where business entities must be held responsible for actions of their employees, there are other situations where the intent of the corporation may be contrary to the actions of the employee. Throughout the world, in competition law, as well as in other areas of law, there is a consensus that it is appropriate for companies to adopt compliance and ethics programs to utilize management techniques to foster compliance with law. So, as standards of corporate

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1. See *Antitrust Division Update, Spring 2011, International Program*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atr/public/division-update/2011/international-program.html> (last visited Nov. 11, 2011).

2. In some jurisdictions, however, particularly those under civil law, corporations are not subject to criminal law. See, e.g., Nora Gotzmann, *Legal Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute*, 1 QUEENSL. L. STUDENT REV. 37, 38 (2008), available at <http://www.law.uq.edu.au/articles/qlsr/Gotzmann-QLSR.pdf>.

conduct become more universal, they reflect adherence to what is essentially an international law – the international law of competition. At the same time, more national authorities recognize that companies are expected to have compliance programs, and that a *bona fide* compliance program reflects a corporate intent not to violate the law, and therefore should be a positive factor in how authorities treat such companies, including as a mitigating factor for any penalty that might be imposed based on the *ultra vires* act by an employee.

It is well accepted that compliance and ethics programs are an expected part of corporate activity, and while no program can always guarantee human behavior, these programs do work to mitigate violations of law. Indeed, it can be said that it is now a standard for companies to have compliance programs or at least some elements of such programs such as codes of conduct. We submit that this growing recognition of the purpose of compliance and ethics programs has reached broad-based acceptance and should now be recognized in the competition law field by the United States and other governments as a standard of international law.

THE CONCEPT OF ORGANIZATIONAL LIABILITY

Under many legal regimes, a corporation cannot be criminally punished for the actions of its employees, and until relatively recently (at least if you consider a century relatively recent), under the common law, a corporation was viewed as a legal fiction,³ which could not be held liable for the criminal conduct of its employees. In the United States, it was not until 1909, in *New York Central & Hudson River Railroad v. United States*,⁴ that the Supreme Court ruled that because the great majority of business transactions were conducted by corporations, it was time to abandon the “old and exploded doctrine” that a corporation was not indictable.⁵ The Court reasoned that, as a matter of public policy, because a corporation could be held civilly liable, criminal liability should also follow.⁶

This concept of corporate liability has been extended to the point where the business is often held liable for acts of employees even if the

3. “Did you ever expect a corporation to have a conscience when it has no soul to be damned and no body to be kicked?” SEC v. John Adams Trust Corp., 697 F. Supp. 573, 579 n.6 (D. Mass. 1988) (quoting Edward, First Baron Thurlow (1731-1806) in MERVYN A. KING, PUBLIC POLICY AND THE CORPORATION (1977)).

4. *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909).

5. *Id.* at 496.

6. *Id.* at 493-94.

company was not aware of the violation,⁷ prohibited the conduct that led to the violation,⁸ or there was no actual benefit to the corporation through the acts of the employee.⁹ So even if none of the three justifications for corporate liability are present, i.e., knowledge, benefit, or authority, corporate liability for the acts of an employee – in addition to the liability of the employee — may still be found. A number of reasons have been given for this approach, but a consistent argument is that this type of liability will have an *in terrorem* effect on the corporation and force the entity to make certain that employees obey the law.¹⁰ As a practical matter, it also reflects the reality that employees working through a corporation, whether or not their actions are authorized, can cause harm far beyond the abilities of one person. Therefore, according to this line of reasoning, it is appropriate that the entity be punished criminally (and pay civil damages).

The usual rule in the United States and other common law countries is that a corporation is liable for acts of agents and employees acting within the scope of their employment and, in most cases, with the intent to benefit the company.¹¹ This approach derives from the common law doctrine of *respondeat superior*, which held that a master is generally liable for the actions of servants, but may escape liability if the servant acts outside the scope of employment (i.e., takes action for

7. A company may be held liable for acts of employees when the company was under prior ownership. See, e.g., *United States v. Alamo Bank of Texas*, 880 F.2d 828, 830 (5th Cir. 1989).

8. See, e.g., *United States v. Portac, Inc.*, 869 F.2d 1288, 1293 (9th Cir. 1989). Under the US Attorneys' Manual the prosecution may, in its discretion, choose not to bring an action against a corporation based on evidence of due diligence to prevent wrongdoing (the case of the "rogue employee"). One older case that appears to have allowed a corporation to escape liability as a matter of law based on due diligence to prevent legal violations is *Holland Furnace Co. v. United States*, 158 F.2d 2, 5-6, 8 (6th Cir. 1946).

9. For example, a corporation may be held liable for sexual harassment under the "hostile work environment" theory when it fails to take action to stop the inappropriate behavior of employees. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998). However, if the corporation was diligent in its efforts to prevent and stop such behavior, even if imperfect, then it can avoid liability. The same reasoning, we posit, should apply to compliance efforts in general.

10. For example, in *Bazley v. Curry*, [1999] 2 S.C.R. 534 (Can.), the Supreme Court of Canada found a nonprofit organization that took care of abused children liable for sexual molestation committed by an employee, even though the agency had no knowledge of the employee's record as a pedophile when he was hired, and the employee was immediately discharged when his improper conduct became known. The court found that vicarious liability was appropriate in order to provide compensation to injured parties and to provide an incentive to employers to make sure that intentional misconduct would not occur (deterrence of future harm). *Bazley v. Curry*, [1999] 2 S.C.R. 534 (Can.).

11. *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981).

which there is no actual or apparent authority).¹² The concept of apparent authority, the authority that outsiders would normally assume the agent to possess judging from his or her position in the company and the circumstances surrounding previous instances of conduct, is often the foundation for a finding of corporate liability.¹³ Employees are assumed to be acting within the scope of their employment¹⁴ if they are doing acts on the corporation's behalf in the performance of their general line of work.¹⁵ An agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated — at least in part — by an intent to benefit the corporation."¹⁶ It is not necessary that the acts actually benefited the corporation, only that they were intended to do so.

The court decisions and statutes that led to these multiple bases for finding enterprise liability grew up in an era where there was recognition of the power of the "faceless" corporation and the need to control its activities. Courts would impute knowledge or intent to the corporation, even where there was no benefit to the enterprise by the wrongful acts of the employee and the activities did not benefit the corporation, although some courts are willing to consider whether the violation was foreseeable.¹⁷ In other situations, liability might be imputed to a corporate officer or director for failure to exert their authority to ensure that the corporation (i.e., acting through employees) did not do wrong.¹⁸

But it is also an inescapable fact of our human existence that people are fallible, and that in some cases people will ignore instructions and do things that they were expressly forbidden to do. By holding a corporation liable for virtually anything that any employee does, a situation of strict liability is created that may, in fact, be outside the scope of many laws that require an intent to violate the law.

12. See, e.g., *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 63 (4th Cir. 1993).

13. *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737 (5th Cir. 1984).

14. Activities are deemed to be within the scope of employment when they are "so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." *Domar Ocean Transp., Ltd. v. Indep. Ref. Co.*, 783 F.2d 1185, 1190 (5th Cir. 1986) (quoting KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 502 (W. Page Keeton ed., 5th ed. 1984)).

15. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

16. *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir.), cert. denied, 459 U.S. 991 (1982).

17. *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992); *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 129 (5th Cir. 1962); *United States v. Sun-Diamond Growers of California*, 964 F. Supp. 486, 490-91 (D.D.C. 1997).

18. See, e.g., *Hoye v. Meek*, 795 F.2d 893, 897 (10th Cir. 1986).

Notwithstanding the desire to control the power of the corporation, there are limits to what it can do. The efforts of the corporation to control the actions of employees are a valid consideration in determining whether the corporation should be held liable for the actions of an employee, as was noted in the instructions to the jury after the trial of Arthur Andersen in connection with the Enron debacle:

If an agent was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions, or against the partnership's policies does not relieve the partnership of responsibility for the agent's acts. A partnership may be held responsible for the acts its agents performed within the scope of their employment even though the agent's conduct may be contrary to the partnership's actual instructions or contrary to the partnership's stated policies. *You may, however, consider the existence of Andersen's policies and instructions, and the diligence of its efforts to enforce any such policies and instructions, in determining whether the firm's agents were acting within the scope of their employment.*¹⁹

The key here is "diligence." Was a compliance program something that existed only on paper,²⁰ or were there indicia of sincerity on the part of the corporation that showed that it legitimately tried to enforce its policy of compliance? The diligence of the corporation in enforcing its policy should be a key factor in determining if it is the kind of program that should entitle the corporation to some measure of mitigation from legal penalties imposed as a result of the actions of an employee that disobeyed the policy.²¹

19. CORP. LEGAL COMPLIANCE HANDBOOK 1-6 n.13.1 (Theodore L. Banks & Frederick Z. Banks eds., 2008) (quoting *United States v. Arthur Andersen*, Crim. No. H-02-121 (S.D. Tex. June 5, 2002)) (emphasis added).

20. CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS* 13 (1973) (In *United States v. Westinghouse Electric Corp.*, No. 20399 (E.D. Pa. 1960), Judge Ganey stated, "[The antitrust policy] was observed in its breach rather than in its enforcement. . . . I am not naïve enough to believe that General Electric didn't know about [the conspiracy] and it didn't meet with their hearty approbation."

21. Barry J. Lipson, *A Survey On the Ins and Outs of Antitrust Compliance*, 51 *ANTITRUST L.J.* 517, 525-26 n.15 (jury instruction in *United States v. Koppers Co.*, No. 79-85 (D. Conn.) (June 12, 1980) ("One of the factors, among others, that you may consider in determining the intent imputed to Koppers Company through its [managerial] agents or employees is whether or not that corporation had an antitrust compliance policy. In this regard, you are instructed that the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary imputed intent. If, however, you find that Koppers Company acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact

Competition law imposes certain standards of behavior that are accepted because of an understanding that society benefits from competition. Therefore, in most cases, cartels are prohibited, as is abuse of market power or dominance. There is a recognition in many areas of law that transparency is beneficial, and thus bribes or secret rebates are prohibited for their disruptive impact on competition, as well as their inherent corruptness.

But how do these standards become accepted? It is not sufficient only to implement national laws and multinational agreements. Enforcement authorities recognize that there must also be private action to enforce policies within corporations and to demonstrate that noncompliance with law will not be tolerated. As will be discussed below, there are benchmarks of what is an “effective” compliance and ethics program that have received broad-based acceptance. Standards of international competition law *cannot have their desired impact* without international standards and efforts for compliance. Companies need to be able to know that what they do to implement compliance standards does matter so that they will make a diligent effort to prevent cartel behavior from happening. If a company has taken serious action to enforce its standards, such as by discharge of employees who violate the law,²² this level of corporate compliance, which is expected by enforcement authorities, should be recognized when deciding how to treat corporations, including charging and penalty decisions.

So, there is a combination of factors at work here. Competition law standards are virtually universal in their acceptance.²³ To get those standards to actually be implemented by corporations, there need to be corporate compliance and ethics programs in place. Standards of culpability recognize that factors such as intent, knowledge, and benefit are relevant to findings of corporate liability. A number of countries do specifically encourage compliance and ethics programs, including in the antitrust area.²⁴ Therefore, this growing, worldwide acceptance,

into account in determining whether or not to impute an agent or employee’s intent to the Koppers Company.”).

22. See *United States v. Beusch*, 596 F.2d 871, 877-78 (9th Cir. 1979) (holding that the jury instruction, “A corporation may be responsible for the acts of its agents done or made within the scope of its authority, even though the agent’s conduct may be contrary to the corporation’s actual instruction or contrary to the corporation’s stated policies” does not impose strict liability on the corporation, but instead means that a corporation “may be liable for acts of its employees done contrary to express instructions and policies, but that the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.”).

23. See *e.g.*, SCOTT H. JACOBS, OECD, *REGULATORY REFORM IN MEXICO* 59 (1999).

24. See *infra*. Some of the enforcement agencies provide videos to show the folly of antitrust violations, and to aid in compliance training. See, *e.g.*, NMaMovie, *Leniency in Cartel Cases*, YOUTUBE (June 9, 2008), <http://www.youtube.com/watch?v=5diFAaJdweI>

combined with universal necessity, has established an international law not just for antitrust, but for antitrust compliance. The countries that do not formally recognize the value of *bona fide* compliance programs as relevant to corporate liability, perhaps seduced by the possibility of collecting huge fines from a corporate piggy-bank, are out-of-step with the reality of what is necessary to truly promote the principles of competition law.

Perhaps one fundamental difficulty here is that no form of organizational punishment seems to hit exactly the "right" target when dealing with large corporations. Punishment of individual employees alone does not seem fair, because the corporate entity goes unscathed. Yet punishing the corporation for individual acts that it could not control also seems unfair. Moreover, for large multinational corporations, small fines appear meaningless, yet fines large enough to have an impact cause unavoidable collateral damage to innocent parties uninvolved in the wrongful acts. For publicly-traded corporations, managers writing enormous checks for major violations seem merely to be spending other people's money – the distant shareholders who may largely constitute innocent, passive investors such as pensioners in any event. It is a frustrating exercise, meting out punishment to amorphous entities.

We believe the most effective place to focus attention is how best to prevent violations within the organization. Preventing the massive harm that a large corporation can cause is considerably more useful than figuring out who to punish after the harm is done. The vehicle for prevention in large organization is the compliance and ethics program.

A VERY BRIEF HISTORY OF CORPORATE COMPLIANCE AND ETHICS PROGRAMS

Compliance and ethics programs are management systems to prevent and detect misconduct, i.e., illegal and unethical conduct. The genesis of these programs is probably in the antitrust field, beginning with the electrical equipment conspiracies in the 1950s and 60s.²⁵ The field grew as other risk areas developed similar needs for internal corporate efforts, including such areas as environmental compliance, workplace safety, employment discrimination, and foreign corrupt payments. However, until 1991 the focus was almost always on compliance confined to specific risk areas.

(Netherlands); Konkurrensverket, *Be the First to Tell – A Film About Leniency (trailer)*, YOUTUBE (Mar. 3, 2010), <http://www.youtube.com/watch?v=OE8WmibbaSs&feature=related> (Sweden); European Commission Audiovisual Services, *Benefits of Competition Policy for Consumers* (Oct. 20, 2009), <http://ec.europa.eu/avservices/video/videoplayer.cfm?ref=I063248&sitelang=en> (EU).

25. See e.g., BANE, *supra* note 20.

In 1991, the United States Sentencing Commission issued sentencing guidelines for federal judges to use in criminal cases involving organizations.²⁶ While the guidelines imposed tough terms that resulted in substantial increases in penalties imposed, they also recognized effective compliance and ethics programs as a significant mitigation factor. As part of this formula, the Guidelines set out a standard for such programs based on seven elements.²⁷ These standards used an approach aptly described as “structured flexibility,”²⁸ setting minimum standards but giving organizations flexibility in the details of their programs. If a company had such a program and met certain other conditions, it was to be given a substantial reduction in its fine.

In 2009, the Organization for Economic Development and Cooperation, through its Working Group on Bribery, issued the first international standard for compliance and ethics programs.²⁹ In a document called the Good Practice Guidance, the Working Group enumerated twelve elements for an anti-bribery program.³⁰ These elements, substantially similar to the seven elements in the Sentencing Guidelines, set out a framework that, for the most part, could be easily adapted to any type of compliance and ethics program. That the Sentencing Guidelines and the Good Practice Guidance would be very similar was a predictable result for a fundamental reason. Compliance and ethics programs are not some bureaucratic formulation or a mysterious concoction; rather, they are the application of basic management principles to accomplish a defined task: prevention and detection of misconduct. The fact that compliance programs operate within the organization and form part of the organization’s fabric explain why their ability to prevent harm is so much greater than the government’s. Working within the organization provides the access necessary to be effective and to interdict misconduct before it comes to complete fruition.³¹

26. U.S. SENTENCING GUIDELINES MANUAL § 8 (1991).

27. *Id.* § 8A1.2(k).

28. Winthrop M. Swenson & Nolan E. Clark, *The New Federal Sentencing Guidelines: Three Keys to Understanding the Credit for Compliance Programs*, 1 CORP. CONDUCT Q. 3 (1991).

29. Organization for Economic Cooperation and Development [OECD], *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (Nov. 26, 2009), <http://www.oecd.org/dataoecd/11/40/44176910.pdf>.

30. OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (adopted Feb. 18, 2010), <http://www.oecd.org/dataoecd/5/51/44884389.pdf>.

31. See generally CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975) (limitations of external forces in reaching within the corporate entity).

RECOGNITION OF THE IMPORTANCE AND VALUE OF COMPLIANCE AND ETHICS PROGRAMS

The Sentencing Guidelines model, setting a standard for an effective program and then providing incentives to companies to adopt such programs, has developed as a global model. Since 1991, government agencies in the United States and around the world have recognized the essential role of compliance and ethics programs, and government's role in promoting these programs. In the United States, for example, the U.S. Attorney's Manual advises federal prosecutors to take into account the existence of an effective program in deciding how and whether to proceed in prosecuting a company (with the exception only of antitrust violations).³² The Department of Justice's Criminal Division, in settling cases such as Foreign Corrupt Practices Act prosecutions, has followed the U.S. Sentencing Guidelines (and more recently the OECD Good Practice Guidance) standards in requiring companies to implement strong programs as part of these settlements.³³ Regulatory agencies, such as the Federal Energy Regulatory Commission, have held public hearings on the issue of the agency's role vis-à-vis such programs and issued guidance to industry.³⁴ The U.S. Supreme Court, in dealing with employment discrimination and harassment, has recognized the role of compliance programs in preventing such socially undesirable conduct; in the case of certain forms of harassment the existence of a compliance program can form part of the defense,³⁵ and for any form of employment discrimination compliance efforts can be a defense to punitive damages.³⁶

Globally, governments concerned with protecting privacy have followed the compliance program model, calling on companies to have a designated privacy officer or "data controller" to ensure compliance with privacy laws.³⁷ Some legal systems have provided that compliance efforts can serve as a defense, either to corporate liability³⁸ or to

32. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CH. 9-28.800 CORPORATE COMPLIANCE PROGRAMS (2008), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.800.

33. See e.g., Department's Sentencing Memorandum at 12, *United States v. Siemens Aktiengesellschaft*, No. 08-CR-367-RJL (D.D.C. 2008).

34. FED. ENERGY REG. COMM'N, 125 FERC ¶ 61,058, POLICY STATEMENT ON COMPLIANCE (Oct. 16, 2008), available at http://www.balch.com/files/upload/FERC_Policy_Stmt_on_Comp_Oct_16_08.pdf.

35. *Faragher v. City of Boca Raton*, *supra* note 9; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-765 (1998) (adopting the same holding as *Faragher v. City of Boca Raton*).

36. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 546-47 (1999).

37. OECD, PRIVACY ONLINE: OECD GUIDANCE ON POLICY AND PRACTICE, 231-32 (2003).

38. See *Bribery Act* (Act. No. 23/2010) (U.K.); *Ministry of Justice, Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery*

liability for directors under a due diligence defense. Compliance programs may be specifically acknowledged as factors in reducing penalties for violations, as the Singapore Competition Commission has done.³⁹

Why has this trend developed? The recognition of the importance of compliance programs addresses a fundamental reality about organizations; no matter how fond lawyers may be of the legal fiction that a corporation is a “person,” like all fiction it should not be confused with reality. Corporations are not simply large individuals; they are complicated collections of individuals, departments, cultures, motivations, and all the other elements that constitute a society. No company, and no society in the history of mankind, has been able to control the conduct of all its members in all their actions. Simply punishing an organization because one or more of its members does something wrong makes sense only if it serves to prevent misconduct. But how does an organization act to prevent misconduct? There is only one method, and that is the use of management tools to prevent and detect misconduct, i.e., a compliance and ethics program. If a company has not made the effort to prevent violations, then punishment serves a very important and useful social function – driving management to take the necessary steps. But if a company uses true diligence to prevent misconduct, then punishment serves no deterrent function, and becomes only an amoral revenue raising exercise.

THE “ANTITRUST DIVISION”

Logic, experience, and public policy strongly favor development of effective organizational compliance and ethics programs. However, there has emerged in the enforcement community a sharp division in approach. In the U.S. Department of Justice, the Criminal Division, with responsibility for a broad range of offenses such as fraud and FCPA violations, is vocal about the importance of such programs, and specifically cites them as a factor in its enforcement decisions.⁴⁰ It also exacts from violators a requirement that they reform their conduct by adopting rigorous programs. Even companies that voluntarily disclose

Act 2010), CP 11/10 (Nov. 8, 2010) (U.K.) <http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf>. Credit for compliance is also given in Italy. See e.g., Francesca Chirara Bevilacqua, *Corporate Compliance Programs Under Italian Law*, ETHIKOS AND CORP. CONDUCT Q. (Nov./Dec. 2006), <http://www.ethikospublication.com/html/italy.html>.

39. COMPETITION COMM'N OF SINGAPORE, CCS GUIDELINES ON THE APPROPRIATE AMOUNT OF PENALTY ¶ 2.13 (June 2007), available at http://app.ccs.gov.sg/cms/user_documents/main/pdf/CCSGuideline_Penalty_20071033.pdf.

40. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CH. 9-28.800 CORPORATE COMPLIANCE PROGRAMS (2008), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.800.

violations must take this step. Similarly, the Department's Environmental and Natural Resources Division has addressed compliance and ethics programs as a key factor in prosecutorial decisions since 1991.⁴¹ But the Department's Antitrust Division, in its enforcement actions against cartel conduct, has created a split in approaches, taking the position that it will not consider programs. Moreover, unlike the Criminal Division, even admitted criminal violators who are accepted into the Antitrust Division's leniency program, need do absolutely nothing regarding institution of a program.⁴²

In fact, in contrast to the approach of the Sentencing Commission, the Supreme Court in the context of employment discrimination, and the Criminal and Environmental Divisions in the same Justice Department, the Antitrust Division dismisses as "failed programs" any program, no matter how diligent, if it fails to prevent or be the first in an industry to detect a violation.⁴³ As one Division spokesperson has said, "We will not reward a company for a failed compliance program that neither prevented nor detected the wrongdoing."⁴⁴ This split has been cursorily "explained" as existing because antitrust "goes to the heart of the business."⁴⁵ Nothing further is offered to justify this, or explain why a price-fixing conspiracy in a small subsidiary in Biloxi goes more to the core of a business while a securities fraud from headquarters or a bribe paid to a another country's prime minister is somehow peripheral.

Remarkably, in the global context, this division in approaches has been exacerbated by the EU Commission, adopting in almost the same words the position of this one Justice Department Division.⁴⁶ On the

41. ENV'T & NATURAL RES. DIV., U.S. DEP'T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (July 1, 1991) <http://www.justice.gov/enrd/3058.htm>.

42. U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY PROGRAM 1-2 (Aug. 10, 1993), *available at* <http://www.justice.gov/atr/public/guidelines/0091.pdf>.

43. Gary R. Spratling, Deputy Assistant Att'y Gen., Speech at the U.S. Sentencing Comm'n Nat'l Symposium: Corporate Crime in America (Sept. 18, 1995), *available at* <http://www.justice.gov/atr/public/speeches/0456.htm>.

44. Scott D. Hammond, Deputy Assistant Att'y Gen. for Crim. Enforcement, Antitrust Div., U.S. Dep't of Justice, Agency Update with the Antitrust Division DAAGs, Speech at American Bar Association Section of Antitrust Law Spring Mtg. (Mar. 30, 2011).

45. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, Ch. 9-28.400, 9-28.800 CORPORATE COMPLIANCE PROGRAMS (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm ("In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program."). No illustrative examples are provided.

46. Press Release, Speech by Joaquin Almunia, Vice President, Eur. Comm'n for Competition Policy, Compliance and Competition Policy (Oct. 25, 2010), *available at*

other hand both the Antitrust Division and the EU, as well as more than 50 jurisdictions worldwide, have so-called leniency programs.⁴⁷ Under these arrangements, the first company involved in a cartel to report the violation gets a complete pass from any form of punishment.⁴⁸ Those entering such a leniency program need not have a program at the time of the violation, nor need they even consider one going forward. In other words, violators who have not even made a small effort to prevent violations are richly rewarded; companies that do try even with extraordinary diligence, however, are punished no matter how hard they tried. In short, while others in the global enforcement and regulatory world go to substantial efforts to promote and recognize compliance and ethics programs, those on the other side of this “antitrust division” offer companies with even the most diligent programs no credit when investigating, no credit in the decision to prosecute, and no credit regarding penalties. Those who win the race to the prosecutor to report cartel violations face no penalties and are not required to have the inconvenience of taking at least some compliance program steps despite admitting to the most destructive types of competition law violations.

This “antitrust division” exists not only between the Antitrust Division and EU on the one hand, and enforcement authorities in other areas of the law, but it also exists within the antitrust enforcement community itself. While the Antitrust Division and EU scoff at so-called “failed programs,” and do nothing to recognize programs at any stage of enforcement, other competition law enforcement agencies have recognized the importance of such programs in a variety of ways. The importance of compliance programs, in some instances as part of case settlements, has been recognized in Canada,⁴⁹ Norway,⁵⁰ the UK,⁵¹

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/586&format=PDF&aged=1&language=EN&guiLanguage=en>.

47. Scott D. Hammond, Deputy Assistant Att’y Gen. for Crim. Enforcement, Antitrust Div., U.S. Dep’t of Justice, Speech at the 24th Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.pdf>.

48. *Id.*

49. COMPETITION BUREAU CANADA, CORPORATE COMPLIANCE PROGRAMS 15 (Sept. 2010), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf).

50. KONKURRANSETILSYNET (NORWEGIAN COMPETITION AUTHORITY), REGULATION ON THE CALCULATION OF AND LENIENCY FROM ADMINISTRATIVE FINES ¶ 3 (Aug. 2005), available at <http://www.konkurransetilsynet.no/en/legislation/Regulation-on-the-calculation-of-and-leniency-from-administrative-fines-/>.

51. OFFICE OF FAIR TRADING (U.K.), HOW YOUR BUSINESS CAN ACHIEVE COMPLIANCE: A GUIDE TO ACHIEVING COMPLIANCE WITH COMPETITION LAW: GUIDANCE 6, ¶ 1.6 (June 2011), available at http://www.offt.gov.uk/shared_offt/ca-and-cartels/competition-awareness-compliance/oft1341.pdf.

Singapore,⁵² Australia,⁵³ South Africa,⁵⁴ France,⁵⁵ Israel,⁵⁶ India,⁵⁷ and by the FTC.⁵⁸

COMPLIANCE AND ETHICS PROGRAMS PROMOTE GLOBAL POLICY OBJECTIVES

Compliance and ethics programs have been found to be key tools in promoting important public policy objectives. There is no more effective way to control the conduct of large organizations. They have been promoted as instruments to achieve important policy objectives regarding prevention of corruption, fraud, pollution, invasion of privacy, healthcare fraud, and many other forms of organizational misconduct. There is no valid policy reason why prevention of cartels should be treated as a less important policy objective. If policy makers believe that cartels are serious offenses against the public then they should be using and recognizing this essential tool to prevent and control them.

Effective compliance and ethics programs historically have not simply emerged from industry unguided by government. It has consistently been active government support and promotion that has made the difference. But those in industry are astute on this point – government actions and commitment matter and empty rhetoric is routinely ignored by those in the private sector. If competition law enforcers do nothing but give speeches and write articles, but offer no value for such programs, then those in industry are smart enough to

52. COMPETITION COMM'N OF SINGAPORE, *supra* note 39, ¶ 2.13.

53. AUSTRALIAN COMPETITION AND CONSUMER COMM'N, CORPORATE TRADE PRACTICES COMPLIANCE PROGRAMS III (Nov. 2005), available at <http://www.accc.gov.au/content/item.php?itemId=717078&nodeId=0de4ca0a69fe9dde037bf81391b2cdab&fn=Corporate%20trade%20practices%20compliance%20programs.pdf>.

54. See, e.g., *Competition Comm'n v. Pioneer Foods Ltd.* 2007 15/CR/Feb07, ¶ 33 (S. Afr.), available at <http://www.comptrib.co.za/assets/Uploads/Case-Documents/15CRFeb07%20Pioneer.pdf>.

55. COMPETITION AUTHORITY OF FRANCE, 2008 ANNUAL REPORT 36, available at http://www.autoritedelaconurrence.fr/doc/synthese2008_uk.pdf. “The Autorité already encourages compliance programs thanks to commitments that can be made, in the course of a settlement package. It wishes to speed up the process by taking a more proactive approach, outside the litigation context. Beneficial to a competitive economy, this preventive compliance may be an element structuring the company’s strategy. The cost of a program should be viewed against the investment in terms of legal security, image, and ultimately, trust on the part of clients and consumers.”

56. ISRAEL ANTITRUST AUTHORITY, MODEL INTERNAL COMPLIANCE PROGRAM 7 (Nov. 1998), available at <http://www.antitrust.gov.il/Files/HPLinks/Internal%20Compliance.pdf>.

57. COMPETITION COMM'N OF INDIA, COMPETITION COMPLIANCE PROGRAMME FOR ENTERPRISES 26 (June 2008), available at http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00.

58. Joseph E. Murphy, *An FTC View of Compliance Programs: Good Faith Efforts Can Mean No Penalties*, 4 CORP. CONDUCT Q. 53 (1996).

focus on actions, not mere words. Corporate resources will not be directed to activities that bear no fruit.

Moreover, only the government can ensure that corporate programs are themselves marked by actions and not mere rhetoric. Effective programs call for tough levels of commitment within companies. When government makes it clear that effective programs matter and will result in favorable treatment, then and only then does the government have the leverage necessary to get industry's attention and cause companies to upgrade their efforts to be truly effective. On the other side of the antitrust division, however, both the EU and the DOJ Antitrust Division have needlessly forfeited their leverage by only paying lip service to programs.

What is it that makes a company's competition law compliance and ethics program effective? What is it that governments need to promote in companies? Full coverage of this topic is beyond the scope of this article. In fact, both authors of this paper have written entire treatises on this topic. But here in a nutshell are the types of steps needed to make a program actually work, and also the types of steps that may be missing in antitrust programs, at least in jurisdictions on the wrong side of the antitrust division:

Audits and monitoring. Programs need to be more than talk. There need to be efforts to actually find out what employees are doing, and whether they are violating the rules.

An empowered, senior officer-level chief ethics and compliance officer with sufficient autonomy, empowerment, and resources. If there is not a strong compliance and ethics officer at the top, the program may be nothing more than a corporate decoration.

Effective communications. All those acting for the company need to know the antitrust laws and be convinced to follow them. Boring lectures by lawyers do not work; effective adult learning techniques do. Effective communications requires targeting a message to the right employees, and putting it into a form that will be relevant to the employees. The shotgun approach is usually not very effective.

Incentives and discipline. Those who break the rules and ignore the compliance and ethics program need to be held accountable. Those who manage and supervise them need to be held equally accountable. The incentive system needs to promote ethical and compliance conduct.

Other management tools. There are many other management tools needed in a program. The Sentencing Guidelines and the Canadian Competition Bureau's Guidance bulletin⁵⁹ show the way. Similarly, the OECD Working Group on Bribery's twelve step Good Practice Guidance

59. COMPETITION BUREAU CANADA, *supra* note 49.

provides effective guidance, allowing for only a few differences related to corruption versus treatment of cartels.

BRIDGING THE "ANTITRUST DIVISION"

How can we move beyond the artificial and dysfunctional division originated by this one enclave of enforcers in the Department of Justice's Antitrust Division? How can antitrust enforcement authorities around the world harness the force of compliance and ethics programs to more effectively prevent cartels? The change would not be difficult, and there are more than enough good models around the world.

Enforcement authorities that recognize the importance of compliance and ethics programs do this through several vehicles. In the U.S. Department of Justice, outside of the Antitrust Division, prosecutors take programs into account in making decisions about how to proceed against companies. Violations deemed less serious, or mitigated by an existing compliance program, may be pursued with a civil, rather than a criminal, remedy. In jurisdictions where enforcers have discretion in how to proceed, they can readily take into account the diligence of a company's compliance and ethics program.

Another useful tool is the consideration of programs in penalty decisions. Here the Competition Commission of Singapore provides a useful model. The Commission spells out key factors it considers in programs:

2.13 In considering how much mitigating value to be accorded to the existence of any compliance programme, the CCS will consider:

- whether there are appropriate compliance policies and procedures in place;
- whether the programme has been actively implemented;
- whether it has the support of, and is observed by, senior management;
- whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and
- whether the programme is evaluated and reviewed at regular intervals.⁶⁰

While there is no specific number provided regarding the weight given to programs, the important point is that this provision sends the message that real programs count. In the UK, the OFT has said it will give up to 10 percent reductions on penalties for effective programs.⁶¹

60. COMPETITION COMM'N OF SINGAPORE, *supra* note 39.

61. OFFICE OF FAIR TRADING (U.K.), *supra* note 51, at 32, ¶ 7.4.

This self-imposed, artificial limit, which only serves as a counterproductive restraint on the government's own freedom, is perhaps understandable given the existence of the environment set by the EU and the U.S. Antitrust Division.

Enforcement authorities can also require that those who admit misconduct and enter into agreed-upon arrangements with authorities must institute effective programs. Unfortunately, in those cases where the Antitrust Division does this – never for leniency applicants – the programs have been formalistic measures readily dismissed by corporate employees as legalistic exercises. None of the experience developed in the past 20 years appears to have seeped into the Division's decrees. Most remarkable is that those offenders admitted into the leniency programs need do nothing at all.

The more justifiable approach, from a policy perspective, is to require all those entering into consent decrees and especially those coming into the leniency program, to adopt high-potency programs. Governments should recognize that the mere act of being first to disclose a violation does not merit praise and a complete pass from any responsible action. Companies that commit violations should be expected to take serious steps to prevent recurrence. In this respect, someone must be right and someone must be wrong in their approach. Either the Criminal Division or the Antitrust Division is using an effective approach. The policy factors behind effective compliance and ethics programs strongly support the Criminal Division's perspective, and raise unanswerable questions about the Antitrust Division's unlimited rewarding of those in the leniency program.

Finally, it is time to end the dysfunctional antitrust division and bring cartel prevention efforts into line with enforcement of other important policy objectives. The hostile tone of the Antitrust Division and the EU, which likely has served to sharply undercut preventive corporate efforts in competition law compliance, needs to be reconsidered. Government needs to speak with one voice to promote effective corporate compliance and ethics efforts. Government, industry, and the public can only benefit from enhanced corporate efforts to prevent and detect misconduct, including the scourge of cartels. If the governments of the world expect to treat competition law as a basic tenet of international law, governing, as it does, the conduct of local and multinational corporations, then they must also recognize the need to accord competition law compliance programs their proper role in determining enforcement priorities and penalties.