



## One Size Fits All: A Flawed Approach to Company Compliance Programs

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Let's begin with a statement of the obvious. When it comes to corporate compliance programs, in antitrust or any other area, one size does not fit all. What suits a large multinational will be out of place in a small company offering only one product or service. What works to fight cartels is different from what works to protect privacy. What is effective in Britain will need modifications to work in Nigeria. So while all effective programs share the core fundamentals<sup>1</sup> (e.g., effective training, an independent and empowered compliance officer, audits, etc.), no one who knows this field would suggest a mindless, cookie-cutter approach to programs.

So given how obvious this is, we would naturally expect that when enforcers deal with company compliance programs they would do the same thing. Start with the basics, but then look at what each company had done to prevent wrongdoing. Those who were diligent and did more would be treated better. Those who did less would benefit less. Those who did not care and did nothing would get no benefit. Each case would be based on its own merits. This certainly makes sense. And, in the US for example, this is the approach taken by the Department of Justice and other enforcement and regulatory bodies. Programs are assessed on their diligence and taken into account in enforcement decisions. That is, with one single exception.

What is that exception? Cartels. In the Department of Justice, only the Antitrust Division takes an inflexible approach to compliance programs. And this rigid approach is followed equally inflexibly in the EU by the Directorate General of Competition ("DG Comp").<sup>2</sup>

How do these enforcers deal with specific cases? How would they treat a company that had a single sales person engage in bid rigging? What if a company had trained its executives and employees, audited its operations, empowered an independent compliance officer, and even used screening to detect cartels? What if a company detected signs of a potential violation early, but while its wrongdoing employee stymied the investigation its opportunistic competitor seized the chance to beat it to the leniency gate of these enforcers? Here is the news: DG Comp and the US Antitrust Division have a one-size-fits-all policy. No matter what the facts of the specific case, no matter how junior the wrongdoing employee may be, no

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<sup>1</sup> One of the best guides on the core elements is offered by the OECD Working Group on Bribery in its Good Practice Guidance, OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II, <http://www.oecd.org/dataoecd/11/40/44176910.pdf>

<sup>2</sup> There are competition law enforcement policies who have not followed this rigid policy and have encouraged and recognized compliance programs, but the Antitrust Division and DG Comp are the most visible enforcers in this area.

matter how diligent the compliance program, it has one, and only one policy that fits all companies in all cases: compliance programs are ignored. Period. The same agency that will greet a deliberate cartel with open arms if it merely beats its competitors in the door for leniency<sup>3</sup> will give not the slightest consideration to a company that has shown even outstanding diligence in its programs.

Here is the policy, in its rawest form. It is quite ok to steal from your customers, cheat in the marketplace, and rob the public till, as long as you beat a path to DG Comp or the Antitrust Division before your thieving peers get there. Then you are welcomed with not the slightest penalty. Spend not a Euro or a dollar on training, or auditing or even a little pamphlet. Care not a bit about the law. Vow never to do a single thing to prevent more cartel conduct. It does not matter at all. All that matters is that you are first in the door. Turn in your erstwhile co-conspirators, and you need do nothing more. No compliance program, not even any training.

It does not matter how evil your cartel was, how much you stole, who you harmed, or how long you broke the law. You face no penalty at all from DG Comp or the Antitrust Division. And you need do absolutely nothing to reform.

So if you have a violation and a competitor beats you in the leniency race, what happens if you can present the facts to the authorities demonstrating that you:

1. engaged in careful antitrust risk assessment;
2. empowered an independent chief ethics and compliance officer to participate in and monitor executive management;
3. required the compliance officer to report in executive session to the board of directors, who controlled his or her retention and discharge;
4. designated compliance liaisons in all of the business units and field locations;
5. trained on a periodic basis with small groups, all at-risk employees, especially the senior executives in a way that was memorable and impactful;
6. communicated an ongoing message about the importance of fair competition;
7. disciplined executives who failed to take reasonable steps to prevent violations;
8. publicized disciplinary cases so employees learned from them;

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<sup>3</sup> See Department of Justice, Corporate Leniency Program, <http://www.justice.gov/atr/public/guidelines/0091.pdf>

9. actively monitored the treatment of those who raised questions to detect and prevent retaliation;
10. had the compliance officer participate in all executive sessions where incentive and bonus approaches were planned to stop anything that might drive anticompetitive behavior;
11. only promoted those who were on an approved list from the compliance and ethics office and had demonstrated leadership in supporting the compliance and ethics program;
12. used computer-based screening to detect red flags of potential cartel activity;
13. conducted periodic, unannounced audits to detect any cartel activity;
14. polled and surveyed employees for any signs of misconduct or indications of unethical conduct by management;
15. conducted employee exit interviews to detect misconduct;
16. professionally investigated any allegations of misconduct;
17. operated a “speak up” system so any employee could get prompt advice or report any anticompetitive conduct;
18. periodically brought in outside professionals to assess the effectiveness of the anti-cartel program;
19. required any trade association your company joined to have its own anti-cartel compliance program; and
20. consistently monitored state of the art in compliance and kept upgrading your program.

In other words, your company has been diligent, thorough and committed in its program.<sup>4</sup> And the company did not stop at essentials but explored the full range of effective tools available.<sup>5</sup>

Where does your treatment fall?

According to DG Comp’s and the US Antitrust Division’s one-size-fits-all policy, your company is always, with no exception, treated exactly the same as a company that has merely cut and pasted another company’s legalistic antitrust manual and had one technical lawyer lecture given only for employees too slow to escape. It is also treated exactly the same as a company that scoffed at doing anything in

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<sup>4</sup> For a guide to diligence in anti-cartel compliance programs, see Murphy & Kolasky, The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior, 26 ANTITRUST 61 (Spring 2012).

<sup>5</sup> See Murphy, 501 Ideas for Your Compliance and Ethics Program: Lessons from 30 Years of Practice (SCCE; 2008)

antitrust compliance, saying it was a complete waste of money and management time.

Your company is, however, treated like dirt when compared to a company that did absolutely nothing except be lucky enough to have one employee blurt out to a company lawyer that he and the CEO had been meeting with competitors. This company, although it did nothing to prevent or detect any form of cartel activity, is not merely given a penalty reduction or treated more gently than other violators; it is given a complete pass. And all its officers who were involved in the cartel are likewise given a complete pass. And going forward, it need do not one single thing to reform or prevent recurrence. It can ignore the whole area of compliance programs.

But the company that exercised substantial diligence? It is treated exactly like a company that did not care and did not make any effort at all on a compliance program.

As for me, I am a compliance and ethics professional. I urge companies to do their best in their compliance and ethics programs, no matter what. I do this as part of the fight against corruption of public officials. But when I work in that area I know I have strong allies. The US Department of Justice and the SEC, the UK enforcers under the UK Bribery Act, the OECD Working Group on Bribery are all there on the side of any compliance and ethics professional who spends his or her time and energy fighting corruption. And when compliance professionals in this area talk to company managers we have a strong, even compelling story to tell. We believe corruption is not just illegal but immoral as well. We know that it takes from the public and harms society. We share the anger of groups like Transparency International in fighting this moral scourge. I can tell a client that fighting corruption is the duty of all of us, and that their diligence is the right thing to do and that it will matter to enforcers.

As a compliance and ethics professional I also urge companies to fight cartels. But I cannot point to the Antitrust Division or DG Comp in this fight. Nor can I point to the OECD Competition Committee, which has chosen to ignore the model of its sister organization the OECD Working Group on Bribery. Indeed, I can hardly describe our treatment as anything more than an irritating nuisance to these enforcers. I must tell my peers that DG Comp and the Antitrust Division only want to talk with us if our clients first break the law and then turn in their competitors. I cannot tell clients and their managers that cartels are criminal and immoral and then satisfactorily explain why they can count on getting completely

off if they simply win a race to the government's door. I cannot tell them that they will have to reform and take strong steps to prevent recurrence, because if they win the leniency race none of that matters. Nor can I report any anger by any citizens' group about cartels. Citizens apparently are not inspired by a system that resembles a game, not a moral battle. And to be honest, I must tell them their diligence is irrelevant and will not matter to enforcers in this one area of the law.

If I tell a client about the due diligence needed in dealing with third parties to avoid foreign bribery, I can point to guidance from the enforcement community. Even better, I can point to cases where government-imposed compliance programs called for this type of diligence. And I can explain to a client that one errant employee does not mean all their good work is ignored. I can point to cases where enforcers realized the diligence of a company and declined to prosecute. I can show that even when companies voluntarily disclosed violations, as they so often do in the US for FCPA violations (even without guaranteed immunity), they must still implement strong compliance programs, so they might as well do that beforehand when it does the most good.

But if I tell a client that they can get good direction on where to focus their antitrust compliance audits through the use of screening in their internal compliance programs,<sup>6</sup> how do I keep their interest? There is no guidance in cases from DG Comp or the Antitrust Division, because there are no cases. There is no company that has received leniency who then had to implement a compliance program. There is no company that received even the slightest acknowledgement from DG Comp or the Antitrust Division, no matter how diligent its program or how junior the offending employee. I believe screens can be as essential in antitrust compliance as due diligence is in fighting corruption. But I have no faith that in this environment I will see this or the many other potent compliance weapons implemented in companies who are being told by the government that compliance programs simply do not matter, and that a policy of ignoring compliance programs is a policy that fits all companies in all circumstances.

So for those of us who do the difficult work of fighting corruption or cartels or all the other forms of business wrongdoing in companies, we know that "one size fits all" makes no sense and is a formula for failure. For those in government, if they really want to fight corporate crime and wrongdoing, one size fits all is also a

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<sup>6</sup> Abrantes-Metz, Bajari & Murphy, "Antitrust Screening: Making Compliance Programs Robust," [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648948](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648948)

guaranteed formula for failure. It is time to tailor enforcement to a policy that works.