CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
June 2015 (2)

# Antitrust v. Anti-Corruption Policy Approaches to Compliance: Why Such A Gap?

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## I. INTRODUCTION

One of the striking differences between competition law and anti-corruption is the manner in which agencies take into account the compliance efforts of companies in the context of their investigations. The European Commission and the U.S. Department of Justice Antitrust Division ("DOJ") refuse to consider compliance programs as mitigating factors in antitrust infringements. The French and U.K. competition authorities may grant a maximum of 10 percent reduction in fines for having effective compliance measures.

In contrast, in the area of anti-corruption, companies in some of the same jurisdictions can escape liability completely for having implemented "adequate procedures." This paper explores possible reasons for such a gap in policy approaches.

## II. REGIONAL VARIATIONS RE CONSIDERING COMPLIANCE PROGRAMS

In a speech in 2011, Joaquin Almunia, Vice President of the Commission responsible for Competition Policy at that time, reaffirmed that compliance programs implemented in companies that infringe EU competition law have "failed" and therefore cannot constitute a mitigating factor in the assessment of the level of fine to be imposed.[2] Consistent with that policy, compliance programs have never been taken into account in the context of investigations of collusive practices in the European Union.[3]

In the United States, the Sentencing Guidelines foresees a possible reduction in a fine if a convicted corporation had in place, at the time of the infringement, an "effective compliance and ethics program." There is, however, a rebuttable presumption that a compliance program is not effective when the offense involves "high-level" or "substantial authority" personnel.[4] Antitrust

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[2] "A successful compliance programme brings its own reward. The main reward for a successful compliance programme is not getting involved in unlawful behaviour. Instead, a company involved in a cartel should not expect a reward from us for setting up a compliance programme, because that would be a failed programme by definition." SPEECH/11/268, 14 April 2011

[3] Although in the 1980s and 1990s the Commission granted some fine reductions in export ban and abuse of dominance cases, e.g. *National Panasonic* (Case COMP IV/30.070) Commission Decision 82/853/EEC [1982] OJ *L354/28,* ¶68; Napier Brown—British Sugar (Case COMP IV/30.178) Commission decision 88/518/EEC [1988] OJ L284/41, ¶86. However, British Sugar was later involved in a cartel, and its compliance program was considered to be an aggravating factor: British Sugar plc (Case COMP IV/F-3/33.708), Tate & Lyle plc (Case COMP IV/F-3/33.709), Napier Brown & Company Ltd (Case COMP IV/F-3/33.710), James Budgett Sugars Ltd (Case COMP IV/F-3/33.711) Commission Decision 1999/210/EC [1998] OJ L076/01 ¶ 208.

[4] U.S. Sentencing Guidelines Manual (2012) §8C2.5 Culpability Score, (f) Effective Compliance and Ethics Program.

infringement always involves individuals who are able to exercise substantial authority within the scope of their responsibility, such as setting prices, negotiating and approving commercial contracts, etc.[5]

Moreover, the DOJ clearly excludes the consideration of compliance programs in the context of antitrust, having "established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program"[6]—one of the reasons being that "antitrust violations, by definition, go to the heart of the corporation's business."[7]

Therefore, although in principle U.S. federal courts may consider compliance programs as a mitigating factor in the context of corporate crimes, the conditions described above almost always exclude this possibility for antitrust violations. In addition, most criminal cases against companies do not go to court but settle. This further limits the possibility of compliance efforts to be taken into consideration in antitrust cases.[8]

Only a few other authorities give credit to compliance programs: the French and U.K. competition authorities may grant up to a 10 percent reduction in fines for having effective compliance measures, under certain conditions.[9] In 2014, Italy introduced fining guidelines confirming that a compliance program may constitute a mitigating factor, with a possible reduction of up to 15 percent of the amount of the fine.[10]

By contrast, anti-corruption laws in some of the same jurisdictions adopt a very different approach.[11] The U.S. anti-corruption policy foresees the possibility of not prosecuting the company at all if it has an effective compliance program.[12] In the case of prosecution, companies can receive a reduction in their fine for having an effective compliance program, according to the

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[5] U.S. Sentencing Guidelines Manual (2012) §8A1.2 Narrow circumstances under which the involvement of senior executives does not rule out the possibility of being credited for an effective compliance program, §8, (f)(3)(C)(i) and §11.

[6] J. E. Murphy, *Making the Sentencing Guidelines Message Complete* (2013), *available at* <http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_Murphy_Proposed_Priorities.pdf>.

[7] United States Attorney's Manual, 9-28.400, Special Policy Concerns (2008), *available at* <http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm>.

[8] It seems, however, that the FTC takes a more flexible approach towards compliance programs, having listed specific corporate compliance elements in a settlement procedure. Federal Trade Commission: National Association of Music Merchants, Inc, Docket No. C-4255 FTC File No. 001 0203; 2009.

[9] The OFT, *OFT's guidance as to the appropriate amount of a penalty*, ¶2.15 (2012); Autorité de la Concurrence, *Document-cadre du 10 février 2012 sur les programmes de conformité aux règles de concurrence* ¶31 (2012).

[10] *Italy: Competition Compliance programs a mitigating factor for fines imposed by the Italian Antitrust Authority* (4 November 2014), *available at* http://globalcompliancenews.com/italy-competition-compliance-20141104/.

[11] Anti-corruption legislation is defined at the EU level by a framework decision of the Council: Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, [2003] OJ L192/54, art 5-6. Member States are free to implement measures in order to achieve the required goals set out in the decision.

[12] The Criminal Division of the DOJ and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act* 53 (2012).

Sentencing Guidelines provisions. The Morgan Stanley case, in which the company avoided charges despite corrupt acts committed by a managing director, exemplifies this contrasting approach.[13]

In the United Kingdom, Section 7 of the Bribery Act 2010 provides that companies can defend themselves from being liable for an employee's illegal conduct if "adequate procedures' are put in place by companies."[14] In Italy, the company can avoid liability by adopting an effective organizational, management, and control model.[15]

## III. THE NATURE OF THE INFRINGEMENT

Is there anything specific to cartel practices that explains why companies' compliance efforts ought to be treated differently by agencies? Do cartel practices benefit the company more than corruption practices? Are cartels typically decided at a much higher level than anti-corruption, hence the reluctance of authorities to exempt companies involved in cartels? Are cartels inherently parts of business processes more than corruption?

Cartel practices typically involve senior executives of companies.[16] This is one of the reasons why the DOJ refuses to give credit for a compliance program in antitrust.[17] However, sales people—not necessarily at a high level within the hierarchy—are also typically those who initiate collusive practices. Also, the complex corporate structure of some companies implies that a subsidiary's senior executives may take part in a cartel, without the senior executives of the whole undertaking being involved.

In addition, senior management involvement is not an exclusive characteristic of antitrust infringements. In the Siemens corruption scandal, senior managers, up to the board level, were

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[13] DOJ, *Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA*, press release *available at* <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>:

> Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. […]After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct.

[14] Evidence brought by the company in its defense will be analyzed on a case-by-case basis, in light of matters such as the level of control over the activities of the responsible employee and the level of corruption that requires prevention. Ministry of Justice, *Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing* ¶43 (2010).

[15] Decreto Legge no. 231/2001.

[16] A. Stephan, *See no Evil: Cartels and the Limits of Antitrust Compliance Programs,* 31 COMPANY LAWYER 231, 236 (2010). In some cases the top level of management was personally involved, and in other cases the top managers were permitting the collusion while not being directly involved.

[17] J. E. Murphy, *Making The Sentencing Guidelines Message Complete*, Letter to the Department of Justice: Proposed Revision to the Sentencing Guide, *available at* <http://www.compliance-network.com/wp-content/uploads/2012/08/4-5-13-filing-.pdf>; M. Volkov, *Antitrust Compliance and Credit for an Effective Compliance Program*, *available at* <http://corruptioncrimecompliance.com/2013/09/antitrust-compliance-and-credit-for-an-effective-compliance-program/>.

directly involved in the policy of making corrupt payments.[18] While Siemens was heavily fined both in Germany and in the United States, a defense based on compliance efforts still remained a possibility: the involvement of an employee in a position of authority, in cases other than antitrust, does not preclude the consideration of a company's compliance efforts.[19]

And, as mentioned above, despite corruption acts being committed by one of Morgan Stanley's managing directors, the company avoided liability for violating anti-corruption regulations due to compliance procedures being in place. Therefore, although in general cartel practices seem to involve a higher level of employees than corruption, this is not necessarily always the case.

Another possibly unique aspect of antitrust infringement is that it goes to the "heart of businesses."[20] Cartels that constitute the operational mode used in the whole industry certainly define the business mode.[21] However, price-fixing practices can also originate from isolated actions of sales employees who are departing from accepted business standards.

And once more, the example of the Siemens corruption scandal shows that a violation of a business operation standard is not exclusively an antitrust infringement. [22] Cash desks were located within the company so that employees could withdraw large sums of cash up to one million euros at a time. In addition, Post-it notes were used to sign payment authorizations so that the identity of the subscriber could be concealed in case of payment control.[23] While most corruption cases do not seem to be as organized as the Siemens case, the widespread use of corruption in some countries may suggest that companies take into account such reality in their standard business practices.[24]

Finally, competition authorities may be reluctant to consider compliance programs because the company seems largely to benefit from the colluded prices. The profitability of an undetected and sustained cartel is not questioned here; however, a breach of anti-corruption law can also bring considerable economic advantages. Bribing an official with money can serve the purpose of getting favored treatment in contracts, concessions, or licensing processes, or of obtaining some relevant information or influencing the terms of contracts.

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[18] Statement of Siemens Aktiengesellschaft, *Investigation and Summary of Findings with respect to the Proceedings in Munich and the US*, 11-12, *available at* <http://www.siemens.com/press/pool/de/events/2008-12-PK/summary-e.pdf>.

[19] U.S. Sentencing Guidelines Manual, §8, (f)(3)(C)(i) and §11 (2012).

[20] United States Attorney's Manual 9-28.400, Special Policy Concerns (2008).

[21] J. Sonnenfeld & P.R. Lawrence, *supra*, re examples of industries where price-fixing was widespread in the industry.

[22] Press Release, Department of Justice, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines*: "bribery was nothing less than standard operating procedure for Siemens."

[23] K. Sidhu, *Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal,* 10 GERMAN L.J. 1343, 1346 (2009).

[24] *Id.* However, this does not seem to be the case in the jurisdictions of interest in this paper.

These economic benefits stem from the substantial competitive advantage over other companies, acquired outside the scope of the fair competitive process.[25] Therefore, a breach of either antitrust or anti-corruption law by an employee can bring considerable economic advantage to their company.

To sum up, cartels and corruption corporate crimes are not systematically different in nature. Another justification needs to be found to understand the contrasting regulatory approaches to companies' efforts to comply.

## IV. DIFFERENT APPROACH TO DETERRENCE

Another possible explanation of the contrast in approach between antitrust and anti-corruption is the emphasis antitrust agencies give to leniency schemes. Authorities want to make leniency as attractive as possible, as this is seen as being the most powerful device for deterring and detecting cartels. And, granted, some reduction in fines due to compliance programs may be seen as undermining the attractiveness of leniency policies.

In addition, the U.K. approach to compliance has also centered on the issue of deterrence, with the expressed concern of not providing an incentive for businesses to find a "scapegoat" within the company and presenting him as a "rogue" in order to get credit for a compliance program, instead of complying in the first place.[26] However, although leniency policy is quite specific to antitrust, this latter concern should also exist in anti-corruption.

## V. DIFFERENT LIABILITY REGIMES

Another explanation, more satisfying to my mind, is the existence of different liability regimes in both areas of the law. In particular in the European Union, cartel sanctions and provisions are of an administrative nature and addressed against companies, not against individuals.[27] In addition, notwithstanding the fact that a fair proportion of EU Member States have sanctions against individuals (of a criminal, civil, or administrative nature), there is currently a very low enforcement level of such provisions.[28]

In anti-corruption legislations, sanctions are typically of a criminal nature, targeting responsible individuals in the first place. All of the 26 countries covered by the *CMS Guide to Anti-Bribery and Corruption Laws* impose criminal sanctions on individuals for corruption

[25] R. Calderón Cuadrado & J.L. Alvarez Arce, *The Complexity of Corruption: Nature and Ethical Suggestions*, Working Paper, Facultad de Ciencias Económicas y Empresariales Universidad de Navarra 26-27 (May, 2006).

[26] Drivers of Compliance and Non-Compliance with Competition Law (OFT1227).

[27] The undertaking is the subject of antitrust law provisions in the EU: Article 101(1) TFEU: Prohibition of anti-competitive agreements "between undertakings, decisions by associations of undertakings." Article 102 TFEU: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. […]"

[28] K. Jones & F. Harrison, *Criminal Sanctions: An overview of EU and national case law*, E-COMPETITIONS N° 64713 (2014).

activities.[29] In addition, criminal liability of individuals doesn't necessarily extend to corporations in some jurisdictions.

First, the legislation in some jurisdictions, such as Bulgaria or Ukraine, simply does not hold companies liable for corruption committed by their employees. Some other countries have only recently introduced corporate liability, as is the case in Italy.[30] In Germany liability for companies do exist, but it is not of criminal nature.[31]

Second, in some jurisdictions, company liability rests on specific circumstances. In Hungary, company liability is established if the act benefited the company (or aimed to do so) and was committed intentionally by certain individuals within the company, or by any employee of which an officer or a manager had knowledge.[32] Similarly in Italy, corporate liability is extended if the crime is committed in the interest or for the advantage of the company.[33] In the Netherlands, liability for criminal acts is established if the director (or a member of senior management) had the authority and responsibility to take measures to prevent the offense, but failed to do so.[34]

Therefore, a logical conclusion is that the existence of effective compliance measures is crucial in establishing liability in the first place. While the default rule is that undertakings are liable for competition law infringements, liability is primarily of criminal and individual nature in anti-corruption. The extension of liability to companies has not always been, and is still not automatic, in many jurisdictions. This explains that the company's role in fostering, detecting or preventing the occurrence of such action currently receives more attention for the purpose of the attribution of liability in anti-corruption.

In the fight against anti-corruption, the OECD provides recommendations to countries to introduce corporate liability, in addition to individual liability, within a company.[35] In the area of competition law, discussions concern the adoption of sanctions targeted at individuals, to complement corporate liability.[36] It is important to point out that competition law and corruption laws, in spite of both targeting corporate crimes, have evolved in different directions due to a different approach to liability in the first place.

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[29] *CMS Guide to Anti-Bribery and Corruption Laws* (September 2014), *available at* http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/b459b95d-5ba4-4e20-9f95-2df3f32d8849/Presentation/PublicationAttachment/a5ee0c6d-a377-4ac7-b575-a4ca09eb05e8/CMS-Guide-to-Anti-Bribery-and-Corruption-Laws.pdf. The countries covered are mostly European countries but also include China, India, and Brazil.

[30] Corporate liability introduced in 2012.

[31] Although administrative liability seems to be of criminal nature in effect, *supra* note 29 at 28.

[32] Section 2 of the Corporate Sanctions Act.

[33] Legislative Decree No.231 / 2001.

[34] Dutch Criminal Code, Art. 177 and Art. 328 ¶2.

[35] OECD, *Working Group on Bribery in International Business Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2009).

[36] OECD, *Cartel Sanctions Against Individuals* (2003).

## VI. DIFFERENT PERCEPTION OF CORRUPTION AND ANTITRUST VIOLATIONS

Some jurisdictions have a similar liability regime in both areas, as is the case in the United States.[37] However, in these jurisdictions, different approaches to compliance can also exist, and may echo a very different public perception of the gravity of corruption and cartel corporate crimes.[38]

Nowadays, the seriousness and immorality of corruption is widely perceived by the public. In contrast, the harm of cartels is still mostly based on economic concepts that have a much more reduced emotional impact among citizens. In the anti-corruption area there are very vocal and vibrant NGOs that have pushed the fight forward. As an example, Transparency International has strong influence worldwide, contributing with its Corruption Perception Index.[39] No such NGO is active in the fight against cartels.[40]

Interestingly, though, in the 1960s and 1970s there seemed to be a more general understanding that price-fixing was immoral and deserved serious punishment.[41] In contrast, during this period, corruption was seen as business as usual in a large part of the world, as a result of which there was logically a very low perception of immorality. However the situation seems to have reversed, as cartel cases no longer make the same amount of headlines as other white-collar crimes make.[42]

## VII. CONCLUSION

Different liability regimes may explain why, in some jurisdictions, competition law and anti-corruption agencies have very contrasted approaches to compliance programs. However, this explanation may not hold in some other regimes, but may relate to a different perception of cartels as a crime, and a different emphasis on deterrence instruments.

Important questions to ask are: In competition law, do companies have strong incentives to implement effective compliance programs? Is the incentive stronger in the area of anti-corruption? How may incentives provided by agencies contribute to greater internal prevention and detection of corporate wrongdoing?

In my view, competition authorities should learn, from the anti-corruption agencies, the manner in which they encourage and reward a strong culture of compliance supported by effective internal measures.

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[37] E.g., both cartels and corruption are criminalized in the United States, and cartel criminalization is enforced (unlike many EU Member States).

[38] This is based on a discussion with Joe Murphy, Director of Public Policy for the Society of Corporate Compliance and Ethics.

[39] http://www.transparency.org/research/cpi/overview.

[40] In the United States the American Antitrust Institute primarily focuses on legal advocacy.

[41] E.g., the electrical equipment case, in which seven executives of top U.S. companies served jail sentences was mediatized in 1961. The docudrama, *The Price,* dealing with compliance with price-fixing prohibitions, has been widely used in legal practice, http://www.commonwealthfilms.com/s/1_2_40.asp.

[42] D. Daniel Sokol, *Cartels, corporate compliance, and what practitioners really think about enforcement*, 78 ANTITRUST L.J. (2012).