# RECRUITING COMPANIES IN THE FIGHT AGAINST ANTITRUST VIOLATIONS: GOVERNMENT COULD DO BETTER!

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# I. UNDERMINING COMPANY PROGRAMS

It would be reasonable to assume that governments and legal systems would promote company compliance efforts and avoid steps that undermine these socially beneficial efforts. The reality is that this is not always so; sometimes the legal system has substantially undercut and even punished compliance efforts.

In the U.S., there is a tendency to elevate the importance of litigation above other values. So while corporate self-policing serves an important social value, litigants are nevertheless allowed to use these efforts against companies in ways that discourage compliance work. For example, in a notorious case involving alleged discrimination by Lucky Stores,[2] the plaintiffs were allowed to use against the company notes taken in compliance training. The court even cited those notes as a basis for imposing punitive damages. Predictably, the message to compliance people was not to risk using the types of innovative techniques that had been used in that training (having attendees articulate biased statements they had heard in the workplace) and not to have students take notes (terrible advice, from a training perspective.) When it comes to dealing with litigation, keeping compliance training safe became more important than making it effective.

These flawed approaches can also be seen in the European Union. The European Commission in its competition law activities has shown views bordering on contempt for compliance efforts. The Commission helped establish a legal principle that allowed it to increase punishment for any corporate parent that attempts to promote compliance programs in subsidiaries and then has a violation, using this compliance effort as a basis for holding the parent responsible for a subsidiary's violation. It has steadfastly refused to consider compliance programs as an ameliorating factor. It has severely undercut the role of a principal source of support for compliance programs, corporate inside counsel. The Commission has adamantly opposed any protection for inside counsel's advice and work product, preferring instead to use counsel as a tool for gaining litigation advantage, and thereby discouraging employees from seeking advice from their company lawyers.[3]

There is also a record of privacy bureaucracies misusing privacy laws to undercut company compliance efforts, focusing particularly on company speak-up systems. For example, the French authority, CNIL, attacked companies for implementing helpline systems, mistakenly assuming this was a new concept tied only to the U.S. Sarbanes-Oxley Act. While the agency quickly backtracked on some of its more severe reactions, it nevertheless generated substantial waste in compliance programs in meeting new regulatory requirements. It also triggered other EU privacy agencies to mimic the approach; in some cases these agencies even pur-

2 *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 330 (N.D. Cal. 1992); Compliance Trainers Beware, 1 Corp. Conduct Q. 11 (Fall. 1991).

3 *Akzo Nobel Chemicals and Akros Chemicals v. EC.* (European Court of Justice, Sept. 14, 2010) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0550:EN:HTML.

ported to have the power to prohibit employees from being able to report their bosses' misconduct without revealing their identities and exposing themselves to retaliation.

The stakes have been raised substantially by the new European mandate, the General Data Protection Regulation ("GDPR"). The GDPR grants European privacy enforcers enormous powers to impose fines, enables mass civil actions, and creates significant ambiguity about the requirements of the law. Compliance functions may be attacked by privacy enforcers, because the law failed to take into account the important role of voluntary compliance efforts. As a result, vital compliance steps like conducting due diligence on potential business partners, may be severely curtailed.[4]

These ill-informed approaches inhibit organizations in their efforts to promote compliance and ethics.[5] In addition, they push companies to rely on lawyers and legalize the program, instead of using effective, management-oriented techniques.

## II. IGNORING PROGRAMS

Some enforcers simply ignore company compliance programs, viewing companies as singular actors – inscrutable black boxes acting as units. No credit is given for internal efforts to prevent wrongdoing. Those who willfully flout the law, and those who diligently try to prevent violations are treated identically. Agency personnel ignore government's real role, to ensure the law is followed, and focus instead on harvesting fines.

In this context, enforcers consider a program a failure because even one violation has occurred, notwithstanding that the company may have tens of thousands of employees and may have made prodigious efforts to ensure compliance.

Perhaps government lawyers, untrained in compliance and ethics, are unwilling to try something new. Partnering with in-house compliance professionals may be untried terrain for them, and not something commended by their law professors when they were in school.

## III. MANDATING PROGRAM DETAILS

Some in government believe in the potential of compliance programs, but seek a short cut. Instead of doing the difficult work of actually learning about the field, and working on the most effective means to incent organizations to conduct internal policing, they look for the quick fix of mandating the specifics of compliance programs.

One of the most prominent examples was California's approach to harassment. The state did not explore with compliance and ethics professionals the broader field of compliance and ethics; it simply jumped on traditional training as the cure, and required exactly two hours of training every two years. California overlooked human nature; as soon as the state dictates a minimum, it tends instead to create a maximum. The message is that companies no longer need to struggle with this; all they need do is meet California's minimum. Thus, if behavioral experts teach us that two hours of training is less effective than regular, brief messages, California does not accept that. If there are new, more effective means to motivate employees, mandates like California's push companies to ignore reality and simply "follow the law." Mandates can limit innovation. Why try anything new if what you are doing meets the legal standard (even if it does not actually work)?

Governments should not rely on mandates instead of doing the difficult job of encouraging innovation. Mandating programs in effect encourages companies to do minimum, check-box compliance. Process becomes more important than effectiveness.

4 See, e.g. Conflicts between GDPR and corporate anti-bribery compliance: OECD Working Group invites comments, available at http://www.fcpablog.com/blog/2019/5/2/conflicts-between-gdpr-and-corporate-anti-bribery-compliance.html.

5 This hostility to compliance efforts is explored in more detail in Murphy, "Policies in conflict: Undermining corporate self-policing," 69 Rutgers U.L. Rev. 421 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827324.



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## IV. FOCUSING ON PAPER AND PREACHING

Those working in the compliance field know that effective programs call for a broad range of management tools. While in the past some might have imagined that a mere code of conduct could magically transform human conduct, realists today know better. Nor do lectures by lawyers ensure compliance. Government agents who focus only on policies and lawyer presentations will not be encouraging effective programs.

There was a recent example in the Czech Republic of this dynamic. Czech law had been revised to allow diligent efforts to prevent violations as a defense to criminal cases against organizations. A lower court gave a company a complete pass because it had a code of conduct. The appellate court wisely reversed this ruling, noting that a code of conduct alone does not meet this standard.[6]

Issuing policies or providing training is not a compliance program. The U.S. Sentencing Guidelines'[7] excellent *minimum* list of steps, spells out what needs to be included. Anyone assessing programs needs to use a list with this degree of comprehensiveness. The Department of Justice ("DOJ") Antitrust Division's list of questions for evaluating programs[8] provides a good example of the types of questions enforcers should ask of compliance programs.

## V. NOT PROVIDING EXAMPLES OR DISCUSSING CASES

There are leaders in government who understand their mission to take effective steps to prevent violations. They endorse compliance and ethics programs and give them credit in assessing organizational wrongdoing.

But they sometimes miss an important opportunity to strengthen the field by not providing examples and lessons learned from their cases. Discussing the cases where they have considered compliance programs and sharing with the community what elements were impressive and what steps were done wrong provides an important chance to learn. For compliance and ethics professionals one of the best ways to get the attention of company lawyers and managers is to have actual cases from the government that illustrate important points.

Why is there this reluctance by enforcers? In some cases it may be that they did not know of the need. While it is helpful to have positive statements from government encouraging programs, these lack the power, persuasiveness and utility of actual examples.

Enforcers may fear setting a binding precedent – a concern that spelling out examples may allow a company to assert that any time a company has done x, y, and z it should get a free pass because the government gave credit for those things in a prior case. But this fear has only a superficial basis.

Government can state publicly that each case is individual, and determined by the facts in that case; case determinations are not binding precedent. So in a relatively minor offense involving no executives, less may be expected for a compliance program. But in a severe case with executive involvement, the government may place a higher burden on a company. Given that the government is exercising discretion and is not legally bound by prior determinations, the fear of setting a binding precedent seems unfounded.

## VI. NOT HAVING COMPLIANCE AND ETHICS EXPERTISE

Compliance and ethics is a relatively new field. So it is understandable that some are slow to recognize what is involved in doing this work. Those in related fields may mistakenly assume that expertise in their field, such as law, is the same as expertise in compliance and ethics.

Enforcement people may attempt to deal with this field as if it were nothing more than the practice of law. They may focus greatly on documents and box-ticking. But the field is multidisciplinary, requiring knowledge and skill in a number of areas. It draws from many fields, but is not a subset of any of them.

6 See "Czech Republic: Which compliance programme can exculpate your company from criminal liability?," available at https://www.schoenherr.eu/publications/publication-detail/czech-republic-which-compliance-programme-can-exculpate-your-company-from-criminal-liability/.

7 U.S.S.G. §8B2.1 Effective Compliance and Ethics Program, available at http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf.

8 See https://www.justice.gov/atr/page/file/1182001/download.



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In assessing compliance and ethics programs those who have not been trained in this field may be impressed by things that look good on the surface, but do not really work. But when enforcement people know what questions to ask, what records to review, and whom to interview, assessing programs is no more difficult than any other area that requires expertise.

In the author's past experience, DOJ people have done little to develop such expertise. My consistent experience as a faculty member at various training programs, including those for SCCE and the Practising Law Institute, is that Department personnel only show up if they are speaking, stay long enough to deliver their addresses, and leave immediately thereafter.

The Canadian Competition Bureau provides a model of what to do. The Bureau designated specific Bureau personnel who were available as resources for other enforcement personnel. The Bureau made sure their people knew the area by having them attend the Society of Corporate Compliance & Ethics' ("SCCE") academy and then qualify for certification as Certified Compliance & Ethics Professionals.[9]

Another practical example involved the Securities and Exchange Commission's creation of an FCPA task force. As part of its increased focus on FCPA enforcement, the Commission held a boot camp of SEC, DOJ and FBI personnel and invited people with background in compliance, including the author, to teach. The author gave a presentation called "*Don't get conned*," advising on how to avoid being misled by a company's compliance program presentation.

## VII. TAKING A PASS/FAIL APPROACH

Any agency that gives companies credit for having a compliance and ethics program is certainly worthy of praise. But even those who do give credit need to consider how best to do this.

Some may take a pass/fail approach to programs, with no room for nuance. In this all or nothing context, programs are neatly divided between good and ineffective. For example, this was the original model of the U.S. Sentencing Guidelines. The problem with pass/fail is that the goal is only to pass, which can lead companies to shoot for the minimum. When there is no "A+" grade to reach for, "pass" becomes the definition of success. There is no inspiration for companies to strive to do better. This can lead to box ticking, to meet the minimum.

While this was the original model of the Sentencing Guidelines, the "secret" of the U.S. system is that while the Sentencing Guidelines drew people's attention, it is the discretionary approach of the DOJ that actually counts in real life. The DOJ, in its Justice Manual,[10] applies a range of factors and allows for a range of responses. In that context, anyone working on compliance programs certainly wants to meet the Sentencing Guidelines minimums, but must also be sure whatever they do will impress the government in an actual case. This keeps programs dynamic and focused on real results.

## VIII. TYING THEIR OWN HANDS

One of the abiding mysteries in this area is why any agency would voluntarily impose restrictions on itself. Agencies should be free to make appropriate determinations of how culpable an organization is. One company may show contempt for the law, taking steps to cover up wrongdoing, and having senior management directly involved in the offenses. But another company may have done all the management steps it could to prevent misconduct, but be victimized by an employee actively concealing the violations. One of these companies deserves severe treatment, while the other had no real moral culpability. While they both must repair any damage they caused, no purpose is served by beating with a stick the one that already did what was appropriate and was itself the victim of a transgressing employee.

The DOJ's Justice Manual appropriately empowers enforcement personnel to consider these factors before making any of the enforcement decisions in a given case. But in competition law elsewhere an inexplicable approach has been adopted. Enforcement personnel, using no research and no empirical support, have pulled a number from the ether to limit what consideration they can give to a company's compliance efforts. Instead of having the freedom to examine all the circumstances and determine what makes sense in any given case, they place a numerical chain on their own hands, limiting what percentage fine reduction a company can get. This make-believe percentage ranges arbitrarily from 10 to 15 percent, but it just as easily could have been 3.8 percent or 7.3 percent. There is no basis for the number, or for limiting agency freedom simply to dealing with fines and applying some small number reduction.

9 See "Meet Terence Stechysin, CCEP-I," Compliance and Ethics Professional 37 (July 2018).

10 See http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.



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It is difficult to understand why in antitrust anyone believes that these small percentages are a significant incentive. Ironically, competition law enforcers had learned from experience that half-baked incentives were worthless. In years past there had been an anemic incentive program operated by the DOJ's Antitrust Division for violators to self-disclose violations. Almost no one ever used it because there were no assurances that companies would really benefit, or get anything more than unpredictable fine reductions. But when the Justice Department stepped up and guaranteed the first in to receive full immunity in cartel cases, the program took off and has been copied around the world.

If simply inventing a tiny number were enough, then offering an arbitrary 11.3 percent or 7.2 percent reduction in fines should have been enough to encourage voluntary disclosures; no immunity would be needed. In the real world this circumscribed benefit did not work for self-disclosure, and it is certainly the case that imposing artificial restraints on enforcement people in dealing with company self-policing efforts does little to promote socially useful compliance efforts.

## IX. REWARDING COMPANIES FOR NOT HAVING PROGRAMS

Another approach in competition law that defies explanation is rewarding companies for delaying any compliance effort until *after* a violation occurs. In other words, to gain the most favor with enforcers, companies could rationally defer any effort to prevent violations until they are caught in a violation, and only then implement a compliance program.

This approach was embraced by the French competition authority in dealing with cartels, and had been tried by the U.S. Antitrust Division. The government was not interested in what a company did to prevent a violation. But once a crime had occurred, then efforts to prevent a recurrence were rewarded.

As wrong-headed as this policy would be in any enforcement area, it is astonishing in antitrust, where economics is supposed to be a key factor. Consider the impact of incentives in two different compliance areas. A rational company acting on a purely economic basis would see that in a different compliance area – corruption – compliance programs implemented before violations do, in fact, count if a violation occurs. The stronger the preventive program, the better the government will treat the company.

If the same company looks at antitrust following the French model, such a preventive program was useless and merited no attention. But if there is nothing done beforehand, then anything done afterward converts into money saved. Only steps taken *after* the crime occurs received any reward. Where would companies rationally focus resources? Fighting corruption, where preventive steps are rewarded, or antitrust where the benefit only occurs when the actions are taken after the violation has been caught? Notably, according to at least one Justice official, they saw much stronger anticorruption programs than antitrust ones.[11] When it comes to competition law compliance, if the company never spends money on a compliance program and never commits a violation (or is never caught), it has saved money. And if it is caught, there is then time to put some money into the program and reap a reward. How can this make sense? Wisely the Antitrust Division now follows the path set by the anti-corruption enforcers and will credit prior programs. The French, on the other hand, now do nothing.

## X. DOING ASSESSMENTS THE WRONG WAY

Wise agencies will see the value of recognizing and encouraging company compliance programs. They will ensure they have expertise to assess compliance programs. They will not hamstring their own freedom to assess programs, and they will not deliberately send the wrong message. But when it comes to doing the actual work, it is important to do this in a smart way. So a brief review of *wrong* ways can help ensure agencies do this effectively.

One of the easiest mistakes to make is only listening to a company's outside counsel. Unless counsel is from one of the few law firms that has its own rigorous compliance program or includes practitioners who have had on-the-ground in-house experience implementing programs, they likely start from a thin base themselves. They may want to give the government a ton of paper and policies and act like they are presenting a case to a judge. The government enforcers need to talk to the real players. They can start with company in-house counsel, but they need to talk with the actual managers who operate the compliance program on a daily basis to get the full story.

11 Murphy, "Gee, I wonder why antitrust compliance programs aren't better?," COMPLIANCE AND ETHICS PROFESSIONAL 68 (Feb. 2018).



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If a company's compliance program is effective then it is part of the company's culture. It is either part of how the company really works or it is not. Enforcers should start exploring this from the first day of the investigation. As the Antitrust Division has noted:

> Division prosecutors should evaluate compliance programs throughout the course of their investigation, including asking relevant compliance-related questions of witnesses, and should not wait for companies to offer a compliance presentation before beginning their evaluation of a company's antitrust compliance program.[12]

But if instead the government waits for the company to propose to visit and "present their compliance program" the enforcers are not fully doing their job. Lawyers in suits using PowerPoints will not give the necessary depth. A compliance program is not a pile of papers in a folder. It is in the daily lives of the company's people.

No review should be limited to simply reading documents. Companies may offer to "send over their compliance program," but that makes no sense. Documents do not tell the full story about an organization and its culture. Documents are not a compliance program, they are merely the shell.

In the same way that documents do not tell the full story, merely talking with selected witnesses within the company may give only a limited view. It helps to talk with others involved in the matter being investigated. So if there are customers, suppliers, or other business partners involved, include the company's compliance program and its apparent commitment to doing the right thing in discussions with everyone who is part of the investigation. If there is a real program and a deep culture of integrity, those who deal with the company will know.

## XI. HOW CAN THESE MISTAKES BE FIXED?

How do we make changes in this area and help government do a more effective job in achieving organizational compliance? The first step is accepting that this is a problem. Policymakers need to see that simply beating organizations with sticks has limits as a matter of policy. First, it always comes after the harm has been done. And second, organizations are not just big individuals. Relying on punishment of groups has severe limitations in effectiveness. All in, it makes much more sense to prevent violations.

For agencies looking at this issue, it is essential to have someone with responsibility for it – designating an appropriately-positioned leader in the organization with responsibility for developing and implementing an effective approach.

Those in government also need to accept that compliance and ethics is a field that requires study. Government people need to study this field and be part of it.

There also needs to be change in the laws, rules and policies that undermine compliance and ethics programs. There should be provisions that recognize and encourage organizations to adopt strong programs. Organizational self-policing should be recognized, promoted and protected, at a policy level, as a step that makes a positive contribution to society.

Governments should engage with compliance and ethics professionals. For example those devising the GDPR in Europe should have consulted directly with major compliance professional organizations like SCCE, and talked with some of the individual professionals who spend their days working to prevent organizational crime and misconduct.

Compliance and ethics professionals share with government the mission of preventing illegal conduct by organizations. We all want to prevent this harm. If Government continues to undercut our work we all lose. But if we work together we can make a real difference.

12 See https://www.justice.gov/atr/page/file/1182001/download pp 2-3.



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