

COMPETITION LAW COMPLIANCE: TEN KEY POINTS FOR AGENCIES AND COMPLIANCE PROFESSIONALS TO CONSIDER



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By Paul Lugard & Anne Riley

In this contribution, the authors, Anne Riley, former Head of Royal Dutch Shell's global antitrust group, and Paul Lugard, (Baker Botts (Belgium) LLP, provide a tour d'horizon of antitrust compliance-related topics. Drawing on their decades-long experience as, respectively, inhouse antitrust counsel and private practitioner, the authors discuss ten key points for both competition enforcement agencies and compliance professionals to consider. In addition, they provide valuable insights into antitrust compliance-related work of the OECD, the International Competition Network and the International Chamber of Commerce. But above all, this contribution seeks to provide practical insights and suggestions on how to optimize the use of antitrust compliance programmes.

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I. INTRODUCTION

In many respects, competition law compliance remains an important and topical issue, both for companies and competition enforcement agencies. Importantly, the area of competition law compliance is also highly dynamic. Indeed, while the foundations for successful and credible compliance programs in many areas of law outside antitrust have become almost universally accepted in the last two decades, antitrust compliance programs are not being so widely accepted yet. But the world has moved on, and antitrust needs to catch up.

For one thing, over the past decade, successful implementation of compliance programs has become more sophisticated and costly. Programs have had to evolve to cater for significant developments of competition law in established jurisdictions, the adoption of competition law regimes in areas and jurisdictions with little or no competition law enforcement, the proliferation of compliance requirements in other areas, such as anti-bribery and corruption, trade controls and sanctions requirements, tax evasion, data protection and privacy. In parallel, many – but not all – antitrust authorities have introduced guidance for compliance programs as well as policies that recognize robust corporate compliance programs in calculating the fine or even at the charging stage.²

But as life becomes more sophisticated and the predominance of the digital world increases, there are (increasingly) other challenges that competition law compliance programs must also consider. Modern technologies and ways of communication present new risks for a company and new challenges for compliance - it may be increasingly more likely that their personnel could collude with competitors using virtual means, such as social media, or even algorithms. At the same time, while conventional ways of doing business have changed, especially during the Covid-19 pandemic, with most business being conducted “virtually” with staff in their home locations, it has presented a huge challenge to business in ensuring that all staff are appropriately trained.

In summary, in the past 20 years, competition law compliance has developed from a (sometimes ancillary) activity into a genuine specialty that requires up-to-date insights into new compliance initiatives, intimate knowledge of the company’s business models and potential risk areas, management skills to successfully deploy tailored compliance programs and communication skills to communicate effectively with management, personnel and, above all, external stakeholders. And increasingly, it requires a holistic approach that takes account of compliance efforts in other areas than antitrust.

This contribution does not purport to provide an exhaustive overview of companies’ compliance programs or an account of enforcement agencies’ advocacy efforts.³ It merely provides a number of propositions that we believe might be worth considering by competition enforcement agencies and companies in their respective efforts to step up competition law compliance. In that respect, it is telling that, as former EU Commissioner Joaquín Almunia correctly once observed⁴, the purpose of antitrust enforcement is not, in and of itself, to impose high fines and other penalties. Rather, the ultimate policy goal of antitrust enforcement is to have no need to impose penalties at all. Thus, the focus of – and the proper public policy goal of antitrust enforcement – and so the goal of the antitrust agencies themselves agencies should be to focus on the key questions: “How can antitrust violations be prevented most effectively? How can companies be encouraged and incentivized to comply?” This, we submit, underscores the notion that in many respects, the interests of competition enforcement agencies and companies run in parallel.

The – admittedly simple, but nonetheless persuasive – proposition has a number of important implications. For example, we believe that there is significant scope for competition enforcement agencies to intensify collaboration with individual companies, trade federations or other business organizations jointly to enhance compliance programs and related advocacy efforts. Similarly, because some antitrust agency policies towards compliance programs may still diverge (and in some cases, significantly), international organizations such as the OECD and the International Competition Network (“ICN”) are ideally placed to help disseminate knowledge and develop meaningful best practices in the field of antitrust compliance advocacy and enforcement.

2 See for example Department of Justice, “Evaluation of Corporate Compliance Programs,” at <https://www.justice.gov/criminal-fraud/page/file/937501/download>; Competition Bureau Canada, Corporate Compliance Programs, at <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04297.html>; <https://www.indecopi.gob.pe/documentos/1902049/2501877/Guidelines+on+Antitrust+Compliance+Programs.pdf/0aae5618-9069-14e3-624b-2719d45259ef> and more generally: <https://www.oecd.org/competition/latinamerica/2021forum/>.

3 For a useful overview of antitrust compliance practices, see the June 2021 OECD Roundtable on Competition Compliance Programmes, <https://www.oecd.org/daf/competition/competition-compliance-programmes.htm>

4 Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Compliance and Competition policy Business Europe & U.S. Chamber of Commerce. Competition conference Brussels, October 25, 2010 (“*The ultimate aim of our cartels and antitrust policies is not to levy fines – the objective is to have no need for fines at all*”) available at http://europa.eu/rapid/press-release_SPEECH-10-586_en.htm?locale=en.

II. PROPOSITION 1: CLEAR RULES AND PREDICTABLE ANTITRUST ENFORCEMENT THAT IS PERCEIVED AS LEGITIMATE AND IN LINE WITH INTERNATIONALLY ACCEPTED NORMS SUPPORTS COMPLIANCE

Let us start with the proposition that there is a correlation between predictable, transparent, and fair competition law enforcement on the one hand and competition law awareness and compliance with the law on the other hand.

The basis for this proposition is the notion that people and, by extension, companies, are more inclined to comply with the law if they understand the applicable rules and perceive those rules as fair and legitimate. The law will not be followed if it is not understood. Empirical research supports this proposition.⁵ We therefore respectfully submit that agencies have a moral obligation to make the law clear – not just by imposing fines and other traditional enforcement actions, but by making the principles very clearly understood. Many agencies, including the Hong Kong Competition Commission, the Competition and Consumer Commission of Singapore and the Brazilian agency, CADE, have embraced this concept in their advocacy.

While there are some studies suggesting that agency advocacy efforts have a positive effect on the level of competition law awareness, there are unfortunately also a number of studies showing rather disappointing results.⁶ Importantly however, research also shows that companies' own compliance efforts are capable to significantly increase awareness (and prevent competition law violations).

One obstacle for competition enforcement agencies is the reality that competition law rules in many areas of the economy are unclear, have become extraordinarily complex and are often viewed by business as “counterintuitive” (such as hub and spoke “cartels”) and thus difficult to understand. Another example is the law in relation to platform-based industries. This is already complex and risks becoming even more complicated with governments' initiatives to adopt regulation to manage competition in those areas. It is possible that the perception of antitrust enforcement in those areas as complex and perhaps even irrational may also have a negative impact on competition law compliance generally. Similarly, irrational, or unpredictable antitrust enforcement, which is not seen as not legitimate by the business (and even consumer) community, may have a negative impact on the legitimacy of global competition law enforcement and compliance.⁷

On balance we believe that investing in tailored advocacy efforts, coupled with meaningful collaboration with business actors that may be instrumental to legitimize agencies' enforcement actions, is a good policy choice. There are already numerous examples of such collaboration being fruitful, for example the collaboration between the ICC Competition Commission and a large number of competition agencies, including the Canadian Bureau.⁸ Moreover, a recent OECD overview lists a number of interesting and successful collaborative initiatives between agencies and the private sector.⁹

III. PROPOSITION 2: ENCOURAGING COMPLIANCE IS IN EVERYONE'S INTEREST

No-one need ask “why comply?” – the benefits of competition to the economy are well understood in terms of fostering innovation, promoting consumer welfare and choice, ensuring allocative efficiency, and stimulating economic growth. Genuine antitrust compliance efforts help to protect and promote a level playing field, where companies compete “on the merits” and consumers benefit from that competition.

Accordingly, encouraging compliant behavior in the antitrust field is very clearly in everyone's interest. It assists agencies in their policy goal of increasing consumer welfare, it assists companies in their goal to compete fairly on the merits and to avoid the reputational damage and

5 See for example J.L. Short, ‘Competing Normative Frameworks and the Limits of Deterrence Theory: Comments on Baker and Griffith’s Ensuring Corporate Misconduct,’ *Law & Social Inquiry* 2013, vol. 38, issue 2, p. 493-511, and W. Huisman & A.M. Beukelman, *Invloeden op regelgeving door bedrijven. Inzichten uit wetenschappelijk onderzoek*, Den Haag: Boom Juridische uitgevers 2007.

6 See for instance ICM Unlimited (2018), *Competition law research 2018 – report on behalf of the CMA*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750149/icm_unlimited_cma_competition_law_research_2018.pdf.

7 One corollary of this hypothesis is that it is in the interest of the international competition law system to monitor the implementation of best competition law practices, to assist younger agencies and to prevent ill-informed and incorrect enforcement decisions of those agencies.

8 For example, since 2014, the ICC has conducted over one hundred seminars and “round tables” promoting antitrust compliance all around the world, from China, Malaysia, and Singapore in East Asia to Canada and Brazil in the Americas – and in almost all European countries. For more information see <https://icwbo.org>.

9 See OECD (2021), *Competition Compliance Programmes*, OECD Competition Committee Discussion Paper, available at <https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf>.

shareholder criticism that is necessarily (and rightly) attaches to violations and fines. But not least, it assists consumers by avoiding the very real harm that flows from antitrust infringements. In every sense, therefore, encouraging genuine antitrust compliance efforts can (and should) be seen as increasing consumer welfare and social good.

Having said this, agencies should recognize that a single failure to comply does not mean that a compliance program has “failed” or is not “effective” – violations are ultimately committed by people, and human beings make mistakes – so compliance efforts (and indeed enforcement actions) should perhaps recognize that there is no such thing as zero risk – and possibly no such thing as 100 percent perfect compliance. Focusing only on penalties and not on behavioral expectations does little to change societal norms.

As Hodges and Steinholtz observed when considering the effectiveness of deterrence in encouraging compliance, most people want to do the right thing and only a few do not.¹⁰ It is logical therefore to use an approach that is geared towards most “good” people, but also to ensure that compliance efforts are targeted at those who might “go off the rails.” We have mentioned above that antitrust laws (in particular) can seem complex - and even counter-intuitive to business, so that the enforcement agencies have a real responsibility in terms of educative advocacy in this regard.

IV. PROPOSITION 3: BUSINESS ORGANIZATIONS ARE AGENCIES’ ALLIES IN ENHANCING COMPLIANCE

Every respectable business organization (and every respectable business) accepts that cartels are bad for business. This fact is now understood by many antitrust agencies, which have engaged actively and fruitfully with the business community, not just to spread the compliance message, but to educate businesses (particularly the SME business community) and to recognize genuine compliance efforts. This has become such an important part of the agency-business dialogue that the issue of antitrust compliance programs is now regularly discussed at the International Competition Network – both in their annual meeting and in various working group webinars, and this is very much to be welcomed and encouraged.¹¹

A number of business organizations have worked hard to spread the message among the business community. For example, already in 2013 and the again in 2015, the ICC has issued Antitrust Compliance Toolkits¹² for both larger and smaller businesses and supported these with more than one hundred interactive workshops around the world. The work of the ICC has further been supported by the American Bar Association¹³, and indeed many antitrust agencies themselves¹⁴

V. PROPOSITION 4: COMPLIANCE EFFORTS NEED TO BE DYNAMIC AND FORWARD THINKING

Almost all larger companies now recognize the need for dedicated competition law compliance efforts – indeed this is also recognized by many (and one may say most) smaller companies who wish to “do the right thing” but may not understand the rules or know exactly what to do.

As mentioned above, this puts a social responsibility on enforcement agencies not just to take enforcement action and impose fines, important as those are, but also to educate the community, to explain the rules and to give clear and helpful guidance. There has not been enough of this, but what there has been, is very welcome.

Agencies are encouraged to do more, and business associations also should redouble their efforts – not only responding to emerging risks (such as AI and digital challenges), but also to respond to new risks a company may face as it enters new markets – whether those new markets come about because a company extends its geographic footprint or through acquisition or merger. The need for a dynamic and a forward-thinking compliance approach applies not only to companies, but also to antitrust agencies when giving compliance guidance or considering genuine compliance efforts.

¹⁰ See Hodges & Steinholtz, *Ethical Business Practice and Regulation: A Behavioural Values-Based Approach to Compliance and Enforcement*; Hart Publishing 2017.

¹¹ See <https://www.internationalcompetitionnetwork.org/>.

¹² See International Chamber of Commerce (2013), ICC Antitrust Compliance Toolkit, <https://iccwbo.org/publication/icc-antitrust-compliance-toolkit/> (accessed on 2 February 2021) and International Chamber of Commerce (2015), ICC SME Toolkit, <https://iccwbo.org/publication/iccsme-toolkit-complying-competition-law-good-business/>.

¹³ See *The Antitrust Compliance Handbook: A Practitioner’s Guide*, available at <https://www.americanbar.org/products/inv/book/392696071/>.

¹⁴ See footnote 3 above.

VI. PROPOSITION 5: COMPLIANCE EFFORTS SHOULD TAKE A “HOLISTIC APPROACH”

Many compliance professionals view antitrust practitioners – and indeed antitrust agencies – as living in an “Ivory Tower,” where the specialist practitioners seem to think that the only compliance consideration should be for antitrust law and antitrust compliance. As antitrust lawyers, we naturally have some sympathy for this view. However, this is not how the world works.

Companies are increasingly facing a myriad of compliance issues – from anti-bribery and corruption compliance, to trade controls and sanctions compliance, data privacy compliance, anti-slavery, and human rights compliance – and so forth. Antitrust compliance – while rightly important in its own right – is simply one of a large number of compliance issues that a company must deal with in modern times.

To deal properly with the large variety of compliance challenges, companies are finding it increasingly essential to take a “holistic” approach to all compliance topics, ensuring that compliance efforts in antitrust are integrated into their compliance efforts in other areas outside antitrust. For example, it may make sense to offer sales departments of companies that often respond to public procurement tenders a comprehensive compliance program including both antitrust and bribery-related topics. Such a holistic approach is not only essential to ensure that resources are appropriately deployed, and real risks adequately and appropriately addressed, but it also helps minimize the very real risk of “compliance fatigue” that “overtraining” might create.

VII. PROPOSITION 6: CREATING BETTER INCENTIVES FOR COMPLIANCE EFFORTS PAYS OFF

Building, implementing, maintaining, and continuously improving a robust competition law compliance program across any organization, regardless of its size, is a costly and complex task. In-house antitrust lawyers often face great difficulties in persuading leadership to allocate adequate resources and headcount for antitrust compliance. This is not the case because companies are unwilling to comply – far from it. The challenge for internal resources occurs because not only are there very many compliance-related demands outside antitrust which need resources, but enforcement agencies really need to understand that compliance is not the only resource demand a company has. There are very many demands that a company must deal with – continuing R&D, product development, innovation and market growth being some of the many legitimate demands a company needs to cater for to serve its customers well.

A key development in recent years has been the consideration of genuine and robust antitrust compliance program as a mitigating factor in the sanctioning and/or the charging stage after a violation has occurred. A growing number of jurisdictions now take the existence of a robust compliance program into consideration when assessing violations.

In the U.S., the existence of a robust compliance program (i.e. a program that detects, addresses and mitigates antitrust issues), as well as early cooperation with a cartel investigation, have long been associated with recommended reductions in penalties.¹⁵ In 2019, the Department of Justice (“DOJ”) Antitrust Division announced a broader policy that takes antitrust compliance program into account already at the charging stage, i.e. in considering whether to file criminal antitrust charges against a company.¹⁶ These guidelines are complementary to a similar set of DOJ guidelines relating more broadly to corporate compliance program.¹⁷ The 2019 U.S. antitrust compliance guidelines are a welcome development and bring the Antitrust Division’s practice more in line with the rest of the DOJ prosecutors and indeed closer to other antitrust agencies.¹⁸

¹⁵ See OECD, Promoting Compliance with Competition Law—Note by U.S., DAF/COMP(2011)20, 193-200, 199 (Aug. 30, 2012), available at <https://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>.

¹⁶ See Press Release, U.S. Dep’t of Justice, Antitrust Div., Antitrust Division Announces New Policy to Incentivize Corporate Compliance (July 11, 2019), available at <https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance>; and U.S. Dep’t of Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), available at <https://www.justice.gov/atr/page/file/1182001/download>.

¹⁷ See U.S. Dep’t of Justice, Crim. Div., Evaluation of Corporate Compliance Programs (June 2020), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

¹⁸ See, e.g. Competition Bureau Canada, Bulletin: Corporate Compliance Programs (June 2015), available at <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html> [hereinafter Canadian Compliance Guide]; Italian Competition Auth., Guidelines on Antitrust Compliance, available at https://en.agcm.it/dotcmsdoc/guidelines-compliance/guidelines_compliance.pdf; Comisión Nacional de los Mercados y la Competencia, CNMC Proposal For a Guide to Compliance Programs Concerning the Defense of Competition, available at https://www.cnmc.es/sites/default/files/editor_contenidos/Competencia/20200221_Compliance_Guidelines_Draft_Public_Consultation_EN.pdf; Australian Competition & Consumer Comm’n, Guidelines for the Use of Enforceable Undertakings (Apr. 2014), available at <https://www.accc.gov.au/system/files/Guide%20to%20Section%2087B.pdf>; Fiscalía Nacional Económica, Programas de Cumplimiento de la Normativa de Libre Competencia (June 2012), available at <https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf>; Competition & Mkts. Auth., CMA’s Guidance as to the Appropriate Amount of a Penalty (Apr. 18, 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf.

A recent (2021) OECD study finds that the number of jurisdictions which will grant credit for compliance programs has increased significantly since 2011 and lists Canada, Germany, China, Hungary, the Netherlands, and Brazil as jurisdictions that have introduced credit systems for existing and/or new programs.¹⁹

Giving appropriate recognition to good (sincere) compliance efforts will encourage greater investment, more dedicated resources, and further efforts to enhance real compliance efforts in practice. Many in-house lawyers, the backbone of compliance efforts, argue from experience that taking into account a compliance program for the purpose of a fine would allow them to show why their businesses should invest in the program and resist budget limitations and help them in making their case for adequate compliance resources in the “internal” competition for resources.

An obvious conclusion to this proposition is that – as considerable variance continues to exist among jurisdictions – competition enforcement agencies should continue their dialogue to converge more closely on the treatment of compliance programs (and should look to fellow enforcers outside the antitrust field for useful lessons in recognizing and promoting credible and sincere compliance efforts).

VIII. PROPOSITION 7: BENCHMARKING COMPLIANCE EFFORTS MAKES SENSE

Nowadays, the critical components of a robust antitrust compliance program are well understood. For example, the ICC Antitrust Compliance Toolkit emphasizes that compliance should be embedded in the company’s culture and be explicitly supported by senior management, that compliance initiatives should be tailored to the specific risks that the company faces and that compliance programs require adequate monitoring and continuous improvement.²⁰

Tailoring compliance initiatives in the form of online training, in-person meetings, audits and the like can be a complex task, in particular if the company is active on many different markets, each with different competitive conditions and perhaps different legal regimes. For example, a company may wish to deploy apply a differentiated compliance approach for online and offline activities. One question that in-house compliance personnel will then often face, is whether the company’s compliance initiatives are effective and sufficient.

Benchmarking compliance programs with companies active in the same or comparable markets may help to optimize compliance programs and ensure that the company’s program can withstand scrutiny and may qualify for compliance credits in jurisdictions where compliance credits are available. Such benchmarking initiatives could for instance be useful – and are already explored – in the Oil & Gas sector, where companies are confronted with a limited, but very specific set of antitrust risks.

As there is no established infrastructure for antitrust compliance benchmarking initiatives, it is up to the interested parties and their advisors to reach out to potentially interested peer firms and, importantly, to put a robust governance structure in place to prevent the sharing of any competitively sensitive information and other antitrust concerns.

In any event, a critical conclusion for companies is that not only should they consider benchmarking their compliance efforts with their peers but that the companies should take the opportunity to gain experience from other companies in terms of tailoring, updating, and improving their compliance efforts continuously.

IX. PROPOSITION 8: ANTITRUST COMPLIANCE IS PARTICULARLY IMPORTANT IN THE AFTER-MATH OF M&A TRANSACTIONS

It is a well-known that acquirer companies may be liable to pay damages for the anticompetitive conduct of acquired companies.²¹ Attributing liability for antitrust damages to an undertaking instead of a legal entity may expand the legal exposure of companies in a company group that are considered to be part of the same undertaking in sometimes in unexpected way. Accordingly, there are good reasons to be particularly vigilant that an acquiring company does not “import” any antitrust liability as a part of an M&A transaction.²²

¹⁹ See OECD (2021), footnote 4 above.

²⁰ See International Chamber of Commerce (2013), ICC Antitrust Compliance Toolkit, footnote 12 above.

²¹ For the EU, see in particular Case C-724/17, *Skanska*.

²² This may also occur in the context of full-function or even non-full-function joint ventures.

In our experience, it is often difficult – if not impossible – to conduct a comprehensive antitrust due diligence as part of the M&A process with a view to identifying any antitrust exposure. Second, wide-scope representations and warranties are frequently not acceptable, or altogether not effective, for example if the acquisition concerns a stand-alone target company.

Establishing and implementing an effective antitrust compliance program covering newly acquired companies may in addition involve specific obstacles. In particular, antitrust audits and compliance programs may not be a top priority when the target company is being integrated in the acquirer's company's business. Second, as an effective program requires a robust compliance organization and reporting lines, it may take a while before inhouse counsel may actually be able to accurately identify the most relevant antitrust risks, decide on appropriate compliance approaches and implement adequate measures. And this may be particularly complex if the corporate cultures of the two companies are not yet well aligned.

Nonetheless, it is important for antitrust inhouse counsel to quickly come to grips with the potential antitrust exposure in the aftermath of M&A transactions and to take preparatory steps at an early stage.

X. PROPOSITION 9: EFFECTIVE ANTITRUST COMPLIANCE PROGRAMS REQUIRE UP-TO-DATE KNOWLEDGE OF THE LAW

In our experience, most antitrust compliance programs are centered around a number of well-known hardcore or per se antitrust violations, in particular price cartels, the exchange of competitively sensitive information, bid-rigging, collective boycotts and, particularly outside the U.S., resale price maintenance. This is often a good starting point.

However, in many instances, antitrust risks may also arise in connection with specific business practices and may sometimes even occur because of changes in antitrust enforcement or enforcement priorities. It is important for the company to be well aware of these changes and to timely integrate those in compliance initiatives. For example, the antitrust treatment of wide and narrow parity clauses in relation to platform-based businesses has undergone remarkable changes in the past few years. Similarly, a number of antitrust agencies, including the European Commission, are increasingly concentrating on potential antitrust violations on the interface between IP and antitrust law.

The implication of this proposition is that antitrust compliance professionals should preferably have a solid understanding of the law, as well as changes to the law, next to being well-integrated in the company's organization. And this in turn may influence the staffing of antitrust compliance functions and the relationship with the (corporate) legal department of the company and external advisors.

XI. PROPOSITION 10: DON'T BE OBLIVIOUS TO TECHNOLOGICAL CHANGES

Finally, when embarking on compliance initiatives, it may be useful to appreciate the significance of the new digital business environment and innovative technologies. This is because antitrust violations may occur online, or be facilitated by digital technologies, such as technologies to monitor competitors' market conduct.²³ And competition enforcement agencies are known to utilize new technologies themselves to uncover illegal conduct.²⁴

At the same time, new technologies using big data and artificial intelligence tools are also increasingly used by companies for compliance purposes. For example, AB InBEV has developed its own data analysis tool and machine-learning technology to identify bribery and antitrust risks.²⁵ And, significantly, some competition enforcement agencies expect companies to utilize sophisticated data analytics as part of their compliance programs.²⁶

23 See for the June 2017 OECD Competition Committee Roundtable on algorithms and collusion, available at <https://www.oecd.org/competition/algorithms-and-collusion.htm>.

24 For example, the Dutch competition enforcement agency, the ACM, recently imposed a fine of € 39,875,500 on Samsung for coordinating the retail prices of Samsung television sets together with various retailers. The ACM evaluated the use by Samsung of web crawlers to monitor its retailers. See <https://www.acm.nl/en/publications/acm-fines-samsung-for-influencing-the-online-prices-of-television-sets>.

25 See note four, above, p. 40.

26 See for example <https://clsbluesky.law.columbia.edu/2021/10/19/skadden-discusses-government-expectations-for-companies-data-driven-compliance-programs/>.

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