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Normative Compliance— The Endgame

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Normative Compliance: The Endgame

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Global anti-cartel enforcement has developed over the last decade into a formidable enterprise. Competition authorities have considerable powers and resources and are networked with each other in a way that gives them unprecedented access to expertise and information. Most authorities marshal immunity and leniency policies—tools for detecting and prosecuting illegal activity—in a way that would be the envy of law enforcers in any other field.

In the United States and European Union, as well as in an increasing number of other jurisdictions, when offenders are detected they are subject to debilitating corporate fines and, if not fined themselves, individuals may be banned from management or, in some places, jailed. The process of investigation and enforcement is extremely costly and time consuming. The reputational damage to the corporations and often the individuals involved is inestimable.

This enforcement “industry”² is justified by reference to the economic harm associated with anticompetitive conduct, and cartels in particular. The overriding goal is said to be deterrence—specific and general. Deterrence is narrowly characterized for this purpose as the rational calculative response by potential offenders to the prospect of formal legal consequences for breaching the law. The degree of deterrence is seen to be conditioned primarily, if not exclusively, by the potential offender’s fear of, or at least desire to avoid, such consequences.

One consequence of the overriding focus on deterrence is that it may detract from a focus on compliance. Compliance may be seen as a secondary, or at least a separate concern, of enforcement authorities. Moreover, the relationship between deterrence-oriented enforcement action and compliance, particularly normative compliance, appears rarely to be considered—at least by enforcers.

However, there is substantial research to support the view that motivations and behavior in relation to legal compliance are far more complex than this emphasis on deterrence allows for.³ This research supports the adoption of a broader approach that encompasses a range of strategies, formal and informal, that are employed in contextually sensitive ways. Based on the well-known theory of responsive regulation,⁴ such an approach emphasizes compliance as the ultimate goal and deterrence as one of various strategies that may be invoked to motivate or, if necessary, secure compliance. Depicted as a pyramid, the responsive regulation model identifies

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² See, further, Christopher Harding, *The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation*, CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, Ch. 16 (C. Beaton-Wells & A. Ezrachi eds., 2011).

³ See, specifically in this context, Christine Parker & Vibeke Lehmann Nielsen, *Deterrence and the impact of calculative thinking on business compliance with competition and consumer regulation*, (56)2 ANTITRUST BULL., 377 (2001). There is considerable research bearing on this from a wide range of fields, including psychology, organizational theory, business strategy, and behavioral economics.

⁴ The seminal exposition of which remains IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

the capacity to persuade businesses to voluntarily comply in a social interaction as the baseline for enforcement strategies that are then escalated to deterrence and punishment where necessary. Deterrence and punishment are considered most effective when held in reserve, “threatening in the background but never in the foreground,”⁵ and only used in the most serious cases at the tip of the pyramid.

The responsive regulation approach has been extended by a further body of research that explores the motivations for compliance. According to this research, compliance should be understood as influenced by a constellation of plural motivations—economic, social, and normative.⁶

Economic motivation to comply is clearly based on the commitment by a firm or individual to maximize economic utility and hence is most directly influenced by the deterrence-oriented strategy of increasing the costs of non-compliance through the threat of formal legal sanctions. However, informal economic sanctions, such as the damage to brand value and reputation through adverse publicity should also be counted as material to economic motivation. Additionally, the economic costs and gains associated with compliance (as distinct from non-compliance) are relevant. Economic motivation is not only influenced by the costs and gains associated with the activity that may ultimately be found to be in breach of the law (i.e., with non-compliance). Firms also weigh the costs of investing in compliance programs and training, for example, against the benefits of improving customer and employee retention and satisfaction through a demonstrated commitment to compliance.⁷

Social motivation captures the extent to which firms or individuals are influenced in their decisions to comply, or not comply, with the law by the value they attach to the approval or respect of significant others. Social motivation may be linked to economic motivation in the sense that social disapproval might lead to economic losses. However, the independent distinctive motivation to be well regarded, including to the extent of acting against one’s economic self-interest, and even if not normatively committed to compliance, should not be discounted. Consistent with this, there is empirical evidence to support the proposition that businesses are concerned to preserve the respect and esteem of “third parties” including customers, shareholders, employees, and business partners and that, in respect of some of these stakeholders (customers and employees especially), such concerns have a positive impact on compliance behavior.⁸ It should be expected that family and friends also exert a powerful social influence.

Ultimately the most effective, efficient, and sustainable form of compliance is compliance that is normatively motivated; that is, compliance based on a voluntary normative commitment to adhere to the law. This is the scenario in which compliance is internalized by a sense of duty and does not require activation by some external force or pressure. Normative motivation to

⁵ JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION, 35 (2002).

⁶ See Vibeke Nielsen & Christine Parker, *Mixed Motives: Economic, Social and Normative Motivations in Business Compliance* (forthcoming), drawing in turn on Soren Winter & Peter May, *Motivation for compliance with environmental regulations*, 20 J. POL’Y ANALYSIS & MGMT. 675 (2001). More generally, see the various contributions in EXPLAINING COMPLIANCE (Christine Parker & Vibeke Nielsen eds., 2011).

⁷ See Christine Parker & Vibeke Nielsen, *How Much Does it Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Non-Compliance with the Trade Practices Act*, 32 MELB. U. L. REV. 554 (2008).

⁸ See Vibeke Nielsen & Christine Parker, *To What Extent do Third Parties Influence Business Compliance?* 35(3) J. LAW & SOCIETY 309 (2008). There is potential also for the enforcement agency itself to exercise social relational influence.

comply can be based on a belief that a law is just or right in the sense that obeying the law leads to an outcome that fits with moral or ideological values—the regulated business complies with rules because its managers and employees see those rules as *substantively just* or *right*. They agree with the ethos of competition and agree there should be a law to protect it.

Further, an impressive body of empirical research has established that people are also likely to obey a law where they see that law, and its enforcement, as “legitimate,” and that they judge legitimacy by whether the relevant legal authorities are *procedurally just* or *fair*. People comply because they recognize the legitimate authority of the law and of the regulatory agencies that administer and enforce the law, rather than, or in addition to, evaluating the substance of the law.⁹

Businesses are influenced by all three types of motivation. And there are likely to be some contexts in which different types of motivation support each other and other contexts in which they may chafe against or conflict with each other. Enforcement agencies should be concerned to activate every possible motivation for compliance, but should also be sensitive to potential conflicts between strategies that are directed at different types of motivation—in particular, strategies that may have a bearing on both economic (deterrence-related) and normative motivations.

There are several aspects of the current deterrence-oriented approach to the public enforcement of competition laws that could be seen as damaging to normative compliance, either because they may be seen as antithetical to the substantive rationale for competition law or because they may be viewed as procedurally unjust or unfair. Three such aspects are highlighted below.

First, immunity policies are justified entirely by the need to detect and deter conduct that is said otherwise to be largely undetectable and hence undeterrable. However, the impact of such policies on normative compliance appears rarely, if ever, to be considered by public enforcers and other immunity advocates. These policies reduce law enforcement to a “game”¹⁰—the company that is first to “the confessional” wins, and winner takes all. The outcome is determined by timing only, and sometimes as a matter of days or hours. Neither the circumstances in which the immunity beneficiary came to be first, nor the compliance commitment of the beneficiary relative to other parties to the offending conduct, are relevant.¹¹ Moreover, in most jurisdictions, the immunity prize does not include any requirement to implement, improve, or update a compliance program. Nor does it generally require the beneficiary to take reasonable steps to make restitution to the victims of the cartel.

It is difficult to imagine how this scenario promotes respect for the law or its administration. The challenges of cartel detection are not to be discounted. However, as with any

⁹ See TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); Tom R. Tyler & John Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOFSTRA L. REV. 707 (2000).

¹⁰ See Joe Murphy, *Compliance Policy at the Antitrust Division*, BLOOMBERG LAW REPORTS (November 8, 2011).

¹¹ See the examples in Joe Murphy, *Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play?*, Paper for Roundtable on Promoting Compliance with Competition Law, OECD DAF/COMP(2011), October 7, 2011, [30]-[37] (Paper circulated for Competition Committee meeting on June 29-30, 2011).

enforcement tool, good public policy demands that both the benefits *and* costs of its use be counted.

Second, as discussed elsewhere in this Chronicle, there are jurisdictions (the United States and European Union particularly) in which prosecutorial and penalty decisions are made without regard to the efforts made by the company to ensure compliance. In the United States, the Department of Justice Antitrust Division (“DOJ”) has a special carve-out for antitrust cases from the compliance program provisions of the U.S. Attorney’s Manual and there is a similar carve-out from the U.S. Sentencing Guidelines which would otherwise allow a company to rely on its compliance program and record by way of mitigation. The DOJ is unusual among U.S. enforcement agencies in this regard.

Similarly the European Commission has recently published compliance guidance urging companies to take compliance seriously but, at the same time, rejecting the relevance of compliance programs in calculating penalties. The contradiction in these positions by the U.S. and E.U. authorities is not hard to miss. The legitimacy of an authority advocating compliance on the one hand while choosing to ignore it for certain purposes on the other is highly questionable as a matter of public policy, not to mention practical effectiveness in achieving compliance—the ultimate objective.

Third, while there is growing support for private actions for damages in respect of anticompetitive conduct around the world, public enforcement agencies by and large remain adamant that private claimants should receive minimal assistance from agencies by way of access to information on their files. The rationale for this stance relates primarily to protection of the efficacy of immunity policies. At its essence, the argument made in support of such protection prioritizes deterrence (through the heightened prospects of detection with an immunity policy) over the facilitation of compensation for victims of cartel conduct. The argument may not be problematic where other measures are taken to facilitate compensation, including requiring immunity beneficiaries to take reasonable steps to compensate victims or otherwise incentivizing cooperation with private claimants.¹² However, it conceivably threatens normative compliance where competition authorities pursue an enforcement agenda that makes no provision or does not reasonably provide in some way for compensation.

At this point it is possible only to theorize about the impact of current public enforcement policies on normative compliance among the business community. Empirical research on such matters would assist competition authorities in an ongoing effort to develop and customize strategies aimed at maximizing compliance with competition laws. And that ultimately should be the “endgame.”

¹² As for example, under the *Antitrust Criminal Penalty Enhancement and Reform Act* (2004) 15 USC 1.