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How DG Competition and the U.S DOJ Antitrust Division Hurt Compliance Efforts

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I. INTRODUCTION: WHAT ARE COMPLIANCE PROGRAMS AND WHY DO THEY MATTER?

Compliance programs today are generally recognized as key weapons in the fight against corporate crime and wrongdoing. When the U.S. Sentencing Guidelines (“USSG”) in 1991 instituted a carrot and stick approach to promote programs, and set out a rigorous definition, this triggered a strong focus on making such programs effective. The understanding of such programs shifted dramatically, from mere codes and lawyer lectures, to requiring the use of a full range of management techniques to prevent and detect misconduct. Governments, following the USSG’s model, have used standards with structured flexibility to give strong guidance, but allow businesses the freedom to tailor their approaches.

This trend follows the recognition of a fundamental point: Effective programs utilize the same management tools and techniques that all organizations utilize when there is any task they value and want to achieve. This is how organizations get things done. Without this level of commitment, the message just does not effectively reach people in companies.

II. WHAT THE ANTITRUST ENFORCERS DO

The Sentencing Guidelines touched off a revolution in government’s approach to companies. The Department of Justice officially advised prosecutors to consider compliance programs, though the U.S. Attorneys Manual (“Manual”). But the Manual has one carve-out—a special exception for antitrust cases, on the dubious proposition that antitrust crimes (unlike all other federal crimes and with no exceptions) go to the “heart of the business.” There is an equally peculiar system of carve-outs in the U.S. Sentencing Guidelines, designed to ensure that no company can get credit and a sentence reduction for its program. In fact, in the 20-year history of the Guidelines, no company ever has received such credit for an antitrust compliance program.

In circumstances where companies voluntarily disclose violations, other divisions of the Justice Department require such companies to institute or enhance compliance programs. But in the DOJ Antitrust Division’s (“Antitrust Division”) leniency program there is no such requirement. Even in settled criminal cases, the Antitrust Division ignores compliance programs. This leads to the truly bizarre: In the recent Bridgestone plea agreement involving violations of both the antitrust laws and the Foreign Corrupt Practices Act (“FCPA”), the company had to upgrade its FCPA program, but had no requirement at all for an antitrust program.

The Antitrust Division disparages any program that is not perfect as a “failed program” that merits no consideration by the Division. In civil cases it still falls back on requiring legalistic

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and shallow compliance provisions, with no resemblance to the tough provisions used by the Criminal Division or called for in the Sentencing Guidelines standards. Consistent with this seeming disdain for compliance programs, while representatives of the Antitrust Division have called for tough compliance programs in speeches and articles, the Antitrust Division has offered no official guide for this purpose, either alone or jointly with the Federal Trade Commission (“FTC”).

Unfortunately, and probably not as a matter of mere coincidence, in the European Union, the Directorate-General for Competition (“DG Comp”) has followed this same antagonistic route, even going so far as to use exactly the same language to denounce as a “failed” program any program that allows any form of violation to occur and does not result in the company being the first to disclose. DG Comp trumpets the fact that it will give programs no consideration for any purpose, no matter how diligent they may be. While DG Comp will reduce penalties for a cartel participant who is so incompetent that it cannot operate profitably even when boosted by an illegal cartel, it absolutely refuses even the slightest break in penalties for diligent programs.

DG Comp is also known to seek evidence of a company’s program to use against it to prove that violations were willful. It also seeks records of in-house legal counsel, effectively undercutting counsel’s role as a bulwark against violations. Recently DG Comp did take a step beyond the Antitrust Division by issuing a guidance document on compliance programs. However, while the guidance did include some good points, such as an emphasis on the use of incentives and the need for an executive to be in charge of the program, it undercut its own message by failing to offer any incentive to companies to adopt such programs. It also curiously eschewed any form of program structure whatsoever (directly conflicting with the views of other authorities, including those in the antitrust field, which have followed the practical model of offering structured flexibility), and did not bother to post a draft for comment before issuing its guidance. The failure to seek public comment was particularly ironic. Given that DG Comp has said vehemently that programs are irrelevant to it for any purpose, how could it then expect industry to respect it as a source of expertise?

III. HOW THESE APPROACHES AFFECT ANTITRUST COMPLIANCE PROGRAMS

The approach of these antitrust enforcers is certainly confusing. It is extremely difficult to explain to managers how so many other government enforcement authorities consider compliance programs to be good things, worthy of recognition, and yet have an entire enforcement area where the government disdains having anything to do with compliance programs. It becomes exceedingly problematic for company compliance and ethics professionals to make a case for more resources to enhance something the government has said it will not even consider. Managers, who have a duty to the owners to allocate resources rationally, can hardly be blamed for shifting compliance resources to areas like anti-corruption programs, where enforcement authorities have emphasized the point that programs count, as long as they are diligent. But for antitrust, diligent programs and sham programs are equal in the enforcers’ eyes.

What is the result? At one time antitrust compliance was a leader in the compliance and ethics field. Now it appears to have become something of a backwater, isolated and siloed from the broader field. Among practitioners there seems to be a sense of ennui. It is difficult to sustain growth and development against the palpable disdain of the Antitrust Division and DG Comp. Even a cursory comparison of what is happening in FCPA and anti-corruption compliance to what is done today in antitrust is disheartening.

There may be optimists who believe managers will spontaneously push for enhanced and increasingly effective compliance programs, notwithstanding the absence of support from the antitrust enforcers. But I am an “anti-trust” lawyer; I don’t believe in things I have never seen. In my lifetime, when government has made it clear that programs matter, amazing things have happened. But when government scoffs at programs no matter how diligent, logic and experience both tell me the result is predictable—atrophy.

IV. WHAT SHOULD BE IN ANTI-CARTEL COMPLIANCE PROGRAMS

There are a number of standards available today as guides to designing a good compliance and ethics program. Among competition law enforcement authorities, for example, the Canadian Competition Bureau offers what could be considered the gold standard in its bulletin on compliance programs. The following is the author’s own list, based on a number of these sources. This is only in summary form, but covers the basics. In the author’s experience, lists like this are rarely applied in antitrust and competition law compliance, at least in the jurisdictions that have made a practice of denouncing programs. If these standards and practices were used by businesses, and valued by competition authorities, much more could be achieved in the fight to prevent and detect cartels.

1. **Risk Assessment:** Periodically assessing the risks of cartel conduct occurring including identifying “at risk” personnel, and focusing programs and allocating resources based on that assessment.
2. **Integrated Approach:** Integrating the competition law compliance program into the compliance and ethics infrastructure, not remaining stand-alone and isolated.
3. **Standards:** Clearly articulating standards and policies designed to prevent and detect cartels. Standards include codes of conduct and organizational policies that incorporate values such as a commitment to free-market competition.
4. **Controls:** Designing controls to raise barriers to engaging in violations, and even making violations as close to impossible as a management system can reasonably get, e.g., requiring prior approvals to attend trade associations.
5. **Empowered CECO:** Having a senior chief ethics and compliance officer (“CECO”), responsible for the compliance and ethics program, who is independent, empowered, professional, and participates in senior management decision making.
6. **Board Oversight:** Giving oversight of the compliance and ethics program to the highest governing authority of the organization or an appropriate subgroup of that authority, including requiring direct reporting by the CECO and control over that officer’s appointment and role in the organization.
7. **Active Senior Management Support:** Charging senior management with actively supporting and participating in the compliance and ethics program, characterized by action and leading by example, and not just words.
8. **Company-wide Infrastructure:** Having appropriate resources and infrastructure for the program, so that the CECO can operate effectively, and ensuring the program has an effective presence (e.g., compliance liaisons) in all parts of the organization that are at risk.
9. **Diligent Personnel Practices:** Creating diligent personnel practices, including measures to prevent delegation of authority to those likely to engage in cartels based on prior anticompetitive conduct or conduct inconsistent with the organization’s code of conduct.

10. **Training and Communication:** Providing ongoing effective and results-oriented communications, including practical training and other guidance, for the highest governing authority, senior management, and all other managers and employees who, by the nature of their work, may participate in or be in a position to become aware of cartels.
11. **Addressing Third Parties:** Creating systems to address any cartel risks associated with third parties such as trade associations and those acting for the company, including due diligence in retaining and monitoring such parties, and requiring that such third parties institute effective anti-cartel compliance and ethics programs.
12. **Auditing and Checking:** Auditing, monitoring, and reviewing processes designed to detect cartels and violations of the company's compliance and ethics program.
13. **Measuring Effectiveness:** Developing systems to measure compliance and ethics program performance and effectiveness on an ongoing basis.
14. **Reporting and Advice Systems:** Developing systems for employees and agents to obtain advice and to report any suspicion of cartel behavior without fear of retaliation—and without first having to raise these issues with their supervisors—and for such reports to be acted on promptly and effectively.
15. **Protections From Retaliation:** Providing strong protections against retaliation for those who raise concerns or cooperate in investigations.
16. **Appropriate Discipline:** Consistently applying appropriate discipline to address violations, at all levels of the company, of laws against cartels and the company's compliance and ethics program, including disciplining managers for failure to take reasonable steps to prevent and detect violations.
17. **Incentives:** Providing incentives, including rewards and employee evaluation and promotion systems, to encourage and provide positive support for the observance and promotion of the compliance and ethics program, and the laws of free market competition.
18. **Response to Violations:** Responding reasonably to violations, and allegations of violations, by conducting investigations professionally and enhancing the program to prevent recurrence of violations.
19. **Diligence and Industry Practice:** Maintaining ongoing efforts to keep the program diligent, and at least as good as industry practice.
20. **Documentation:** Keeping the program sufficiently well documented to demonstrate the organization's diligence.

V. HOW TO FIX THIS

There is nothing unusual in cartel violations that merit this odd policy carve-out. Indeed, there are other competition law enforcement authorities that have found it unnecessary to attack company self-policing efforts. Competition authorities in Canada, the United Kingdom, France, India, Israel, Singapore, Pakistan, and Australia have all found reasons to do more than the Antitrust Division or DG Comp. Even in the United States, the FTC, which does not have criminal enforcement authority, has taken a more responsible approach. For example, its settlement in the National Association of Music Merchants case included specific compliance program steps beyond the Antitrust Division's formalism. And in those areas where it may impose penalties, programs can count in deciding how the FTC proceeds and in imposing penalties.

Outside of the competition law area, authorities have seen the virtue of the carrot and stick approach. In anti-corruption, for example, all 38 signatories to the OECD anti-bribery convention have signed off on a model guidance on compliance programs (the “Good Practice Guidance”) and issued recommendations calling for, *inter alia*, the use of incentives by government to promote compliance programs. The Criminal Division of the Department of Justice is not only on record as considering compliance programs in its enforcement decisions, but it has established a clear record of what should be in programs in its settlement agreements in cases.

What needs to be done to fix this harmful and dysfunctional policy? In the United States:

1. Fix the U.S. Attorneys Manual by removing the odd carve-out for antitrust cases.
2. Fix the Sentencing Guidelines by removing the language inserted to prevent any credit for antitrust compliance programs at sentencing.
3. Have the Antitrust Division follow the well-established model of the Criminal Division in requiring compliance programs for companies that settle, including those that voluntarily disclose and escape all other penalties in the leniency program.
4. Include real compliance programs in settled civil cases, drawing on the Sentencing Guidelines standards.
5. Develop in-house expertise on compliance and ethics programs, so the Division’s litigators who do not like this work can continue to avoid it.
6. Provide specific, official guidance, perhaps in concert with the FTC, following the excellent model of the Canadian Competition Bureau.

What needs to be done to fix this in the European Union:

1. Revise DG Comp’s policy on fines to include good faith and diligent compliance programs.
2. Recognize the existence of a parent company’s diligent program when determining shared liability with a defendant subsidiary and whether the parent’s turnover applies for setting penalty limits.
3. Instruct staff not to seek evidence of compliance programs to use against companies.
4. Require companies admitted into the leniency program to institute strong, effective compliance programs
5. Instruct staff not to seek the records and communications of in-house counsel, unless there is cause to believe counsel was engaged in crime or fraud.
6. Develop in-house expertise on compliance and ethics programs.
7. Follow the Canadian Competition Bureau’s model in issuing guidance: Provide incentives for strong compliance programs, provide structured guidance and not a mere list of random “food for thought,” and begin with a comment draft to enhance the Commission’s learning process

Finally, both agencies should work together to lead the OECD Competition Committee to develop a model guidance document on compliance programs, following the example of the OECD’s Working Group on Bribery in issuing its Good Practice Guidance.

V. CONCLUSION

The battle against cartel conduct is too important to tolerate dysfunctional policies. As enforcement authorities have recognized in the fight against corruption and other offenses, a core mission is to recruit the private sector into the battle. Those of us who have been committed to this fight in-house have the right to expect leadership from the Antitrust Division and DG Comp.

For more background on these points, the author has written a white paper for the OECD Competition Committee: *Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play?*²

² Published in fall, 2011. Available at <http://www.oecd.org/dataoecd/12/13/48849071.pdf>.