The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior

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T HAS BEEN OVER HALF A CENTURY since the infamous electrical equipment price-fixing conspiracy was front-page news and more than a quarter century since cartel behavior became a felony in the United States. And it has been over a decade since the European Union joined the United States in making anti-cartel enforcement its number one antitrust priority and in persuading other jurisdictions around the world to join their common crusade against cartels. Between 2000 and 2010, the United States and the EU imposed over $4.6 billion and €13 billion in fines against cartels, and the United States put more than 200 executives involved in cartels in prison, with sentences now averaging nearly three years.

Yet cartel behavior continues in many sectors of our global economy—so much so that the U.S. Department of Justice Antitrust Division filed ninety criminal cases during the last fiscal year, the highest number filed in the past two decades. Why then haven’t the increasing global emphasis on anti-cartel enforcement and the harsh sanctions been more successful in deterring cartel behavior? What more can be done to stamp out cartels?

A strong antitrust compliance program is key to preventing cartel behavior within a company. Unfortunately, experience teaches that too few companies—especially non-U.S. companies—invest the time, resources, and imagination necessary to develop and implement effective anti-cartel compliance programs. This may be partly because the antitrust enforcement agencies, especially the U.S. DOJ Antitrust Division and the European Commission, have not put sufficient emphasis on encouraging companies to implement strong antitrust compliance programs to prevent cartel behavior. To the contrary, senior U.S. and EC antitrust officials, unlike their counterparts in other law enforcement areas, such as anti-corruption, refuse to give companies any credit in their fining and other enforcement decisions for a compliance program that fails to prevent or detect cartel behavior, regardless of the program’s rigor. This policy may serve to reduce the incentive companies would otherwise have to invest in developing a strong compliance program.

No company should receive credit for merely going through the motions and paying lip service to compliance. Programs that are well-designed and implemented, however, should be taken into account in enforcement decisions where, despite the companies’ best efforts, they fail to detect cartel behavior.

This article describes what is needed for an effective anti-cartel compliance program and what competition authorities can do to encourage strong antitrust compliance programs that can help prevent cartel behavior.

The Problem with Anti-Cartel Compliance Programs

Their lack of success suggests that something may be missing in anti-cartel compliance programs today. Antitrust compliance exists in a much broader universe of compliance and ethics programs. Since the adoption of the U.S. Sentencing Commission’s Organizational Sentencing Guidelines in 1991, a distinct field of compliance and ethics has evolved to develop and implement the management steps required for an effective compliance and ethics program. Programs now aspire to meet the rigorous but practical standards spelled out in the Sentencing Guidelines, as well as other governmental standards around the world that have emulated the Guidelines’ approach. Under those standards, a company may no longer claim that written manuals and a few lectures constitute a compliance program. Today, anything less than the rigorous application of a broad range of management tools does not qualify as an effective compliance program. These tools include an executive-level empowered compliance officer reporting to the board, auditing and monitoring designed to detect misconduct, and an incentive program that promotes the compliance program. An effective program also requires reporting systems, means for employees to raise issues safely, and ongoing evaluation and assessment of the program itself.

Unfortunately, antitrust compliance has too often become “silod” within companies—the domain of the antitrust lawyer, separated from developments in other parts of the compliance and ethics field. For example, little seems to be said or understood about the essential role of the chief ethics and compliance officer in antitrust compliance. Indeed, the rare government consent decrees that require compliance programs appear satisfied to designate a lawyer as the “antitrust compliance officer.” “Tone at the top” is recited, but in some companies this means only that the lawyer writes a statement and the CEO signs it. Compliance audits are mentioned, but may more accurately be described as risk assessments; little is ever said about how to conduct actual audits designed to identify potential crimes. Screening, a
potent tool as an adjunct to auditing, may not even be on the antitrust compliance lawyer’s list of possibilities. Little if anything is ever said about incentives, the strongest driver of corporate conduct and an essential part of any program. Antitrust lawyers who do compliance may talk about training, yet little if any study or consideration is given to using what is known about adult learning, and rarely is sufficient attention devoted to a high risk group: the senior executives.

Creating an Effective Anti-Cartel Compliance Program

There is a question regarding whether even a strong company compliance and ethics program can be effective in fighting cartels. But fundamentally this skepticism is premised on an obsolete approach to compliance that was discredited under the Sentencing Guidelines. The kinds of programs that are effective to fight cartels are those that incorporate the same elements necessary to deal with any business crime. They call for rigorous management steps, as outlined in the Sentencing Guidelines and enumerated below. These types of methods do work.

Drawing from developments in the compliance and ethics field, starting with the Organizational Sentencing Guidelines, what should an effective antitrust compliance program look like? There are a number of sources that provide guidance, but across all of these there are certain fundamental standards. The typical approach is one described as “structured flexibility.” These standards provide specific guidance, with companies left to their own experience to determine what works best for them. Although details vary, an effective program needs to cover each of these fundamental points:

1. **Risk assessment.** Periodically assess the risks of cartel conduct occurring, including identifying “at risk” personnel and focusing the program and allocating resources based on that assessment.

2. **Integrated approach.** Integrate the anti-cartel compliance program into the compliance and ethics infrastructure so that it is not isolated.

3. **Standards.** Clearly articulate standards and policies designed to prevent and detect cartels. Standards include codes of conduct and organizational policies that incorporate values, such as commitment to free-market competition.

4. **Controls.** Implement controls designed to raise barriers to cartel conduct and make violations difficult, such as requiring prior approval to attend trade association functions.

5. **Empowered CECO.** Designate a senior chief ethics and compliance officer (CECO) responsible for the compliance and ethics program who is an independent, empowered professional who participates in senior management decision making.

6. **Resources and infrastructure.** Allocate appropriate resources and infrastructure for the program so that the CECO operates effectively and the program has an effective presence (e.g., compliance liaisons) in all parts of the company that are at risk.

7. **Board oversight.** Have the company board or an appropriate subgroup appoint the CECO and oversee the compliance program, and require the CECO to report directly to the board or that subgroup.

8. **Senior management support.** Require senior management to actively participate in and support the compliance program.

9. **Personnel practices.** Implement diligent personnel practices, including measures to prevent delegation of authority to those who may engage in cartels based on prior anti-competitive conduct or conduct inconsistent with the company’s code of conduct.

10. **Training and communication.** Promote ongoing results-oriented communications, including practical training for the highest governing authority, senior management, and other managers and employees who, given their position, may participate in cartels or become aware of them.

11. **Third parties.** Implement systems to address cartel risks from third parties, such as trade associations and those acting for the company, including monitoring such parties. Require that such third parties institute effective anti-cartel compliance and ethics programs.

12. **Audit and monitor.** Institute auditing and monitoring processes to detect cartels and violations of the company’s compliance program.

13. **Measure effectiveness.** Implement systems to regularly measure the compliance program’s performance and effectiveness.

14. **Reporting systems.** Institute systems for employees and agents to obtain advice and report suspicions of cartel behavior without fear of retaliation and without initially having to raise these issues with their supervisors. Ensure that such reports are acted on promptly and effectively.

15. **Protection from retaliation.** Incorporate strong protections against retaliation for those who raise concerns or cooperate in investigations.

16. **Discipline.** Ensure appropriate and consistent discipline for compliance program violations at all levels of the company, including discipline of managers for failure to take reasonable steps to prevent and detect violations.

17. **Incentives.** Provide incentives to promote the compliance program, including rewards and employee evaluation and promotion systems.

18. **Response to violations.** Respond to violations and allegations of violations by conducting investigations professionally and enhancing the program to prevent recurring violations.

19. **Diligence and industry practice.** Implement ongoing efforts to keep the program diligent and at least as good as industry practice.

20. **Documentation.** Sufficiently document the program to demonstrate the company’s diligence.
The Impact of Current Enforcement Policies

Why don’t more companies invest the necessary resources to develop effective anti-cartel compliance programs? One reason may be that the antitrust authorities, both in the United States and the European Union, place little emphasis on the importance of an effective compliance program to prevent cartel behavior.

The Antitrust Division’s approach to compliance appears to be simple. Fines are enormous and individuals who break the law go to jail. Those who violate the antitrust laws are subject to private treble damage claims. Although the threat of huge fines and jail would seem to be an effective deterrent to cartel conduct, companies are by nature insular. The internal pressures tend to outweigh more remote, external threats. The need to keep a tough boss happy can overshadow any remote concern about laws and government. Moreover, responsibility is dispersed, so individuals do not necessarily perceive the same elements of culpability that companies do. As Professor Christopher Stone observed, corporations, in a very real sense, are “where the law ends.” Moreover, one of the most striking characteristics of the types of senior level executives who often engage in cartels is arrogance; they view themselves as too smart to be caught. If offenders believe they will never be caught, deterrence through severe sanctions alone is likely to be ineffective. More is needed for deterrence, and that is why an effective anti-cartel compliance program is important.

The antitrust field at one time led in the development of compliance program techniques. When antitrust violations became felonies in the mid-1970s, approaches to compliance started to move from mere lawyer lectures to more advanced means of communications. For example, the whole concept of using docudramas for compliance purposes started with the film, “The Price,” in the antitrust field.

Ironically, in 1991, when the Sentencing Guidelines upped the ante and other enforcement authorities began emphasizing the importance of effective compliance programs, the antitrust authorities began moving in the opposite direction. Today, DOJ Antitrust Division spokespersons label any program that allows even one violation as a “failed program,” for which no credit will be given. Although the U.S. Attorneys’ Manual instructed federal prosecutors to consider compliance programs, the Antitrust Division obtained a complete carve-out for itself. The Division has also obtained language in the Sentencing Guidelines that restricts any reduction in sentence for a compliance program that has failed to prevent or at least detect a violation. By contrast, in other enforcement areas, compliance programs are routinely taken into account in enforcement decisions.

In addition, when companies disclose violations to law enforcers in other enforcement areas, they are expected to implement or substantially enhance compliance programs. But this is not required by the Antitrust Division. Thus, companies that admit the most serious kinds of antitrust crimes and enter into the leniency program face no fine, no prison time for anyone in the company, and, what is most striking, no requirement to reform by implementing or improving anti-cartel compliance programs. Ultimately, this has reached a point where, in one instance, when two different Divisions in the DOJ, Antitrust and Criminal, resolved a case, the agreement required a company to institute an FCPA compliance program but said nothing about anti-cartel compliance. This failure arguably sends the message that the Antitrust Division does not view compliance programs as important. Given that price fixing is a serious crime, a consistent message of criminality should be sent to law violators. Those receiving leniency should at least be expected to implement an effective compliance program.

How Government Could Encourage Effective Anti-Cartel Compliance Programs

Government recognition of effective compliance programs is a powerful motivator, not just for the institution of programs, but for efforts to make them truly diligent and effective.

Anti-cartel compliance programs should be recognized at the earliest stages of an investigation. The government should gather information about a company’s program from the witnesses interviewed even before a company knows it is being investigated. This builds an important base for determining whether any program is bona fide. Later, when the company knows it is being investigated, it can be allowed to present further information about its program. Based on this information, the law enforcers can then consider the program as appropriate for enforcement decisions, including whether to proceed, whether to prosecute criminally or civilly, what charges to bring, whether to charge individuals rather than the company, whether to pursue a subsidiary instead of a parent, and whether to seek additional relief, such as a monitor and an imposed compliance program obligation. This is the model established by the U.S. Attorneys’ Manual and followed by other enforcement officials in the Department of Justice. The Antitrust Division should consider following suit.

The Division can also use affirmative outreach to promote more effective programs. Currently, when Division representatives participate in industry and compliance presentations, most of the time is spent talking about leniency. More focus, however, needs to be given to prevention. The Division can follow the example of other agencies like the Canadian Competition Bureau and issue a guidance document on compliance programs. The Division can also work with the OECD Competition Committee to issue an international model guidance document on programs. The OECD’s Working Group on Bribery followed this approach in its issuance of the Good Practice Guidance, addressing anti-corruption compliance programs.

Fighting cartels is obviously a critical enforcement mission. Government leniency programs are one weapon in the bat-
Effective and aggressive anti-cartel compliance programs are another, and the Antitrust Division should recognize, promote, and reward them.


2 In our discussion we focus only on anti-cartel compliance efforts and not other types of antitrust matters that are subject only to civil enforcement.


10 For examples of the types of specific steps companies can take in implementing the fundamental points, see Joseph Murphy, 501 Ideas for Your Compliance and Ethics Program: Lessons from 30 Years of Practice (Soc’y of Corp. Compliance and Ethics (SCCE) 2008).


12 For examples of how executives can show such commitment, see Joseph Murphy, How the CEO Can Make the Difference in Compliance and Ethics, 20 ETHIKOS, May/June 2007, at 9.


14 Scott D. Hammond, Dep. Ass’t Att’y Gen., Agency Update with the Antitrust Division DAAGs, Comments at ABA Section of Antitrust Law Spring Meeting (Mar. 30, 2011).


16 See U.S. SENTENCING GUIDELINES MANUAL §§ 2R1.1(d) & 8A1.2, app. note 3(C).
