

# REGULATORY OUTLOOK

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH

*Joseph Murphy  
and Nathalie Jalabert-Doury\**



Is it possible to influence business conduct to be respectful of the law, and to act within the boundaries of commonly accepted ethical values? Motivation is famously achieved through the use of the stick or the carrot. Which is the more effective, and what is the practice encouraged by society and the regulators representing its interests? Every day and across all sectors we are inundated by exhortations to implement and enhance “belts and braces” compliance systems and controls. All manner of questions of business conduct are subject to increasingly prescriptive, legal requirements. Financial market conduct and governance are the current focal points of the attack on unacceptable corporate culture. Extensive anti-money laundering legislation requires a widening range of businesses to engage in prevention activities. Are market actors sufficiently rewarded and incentivised to improve governance? The UK Bribery Act goes so far as to make an adequate compliance program a statutory defence, whilst other anti-corruption legislation make compliance programs an imperative for all companies. In curious contrast to this, the most prominent regulators in the field of antitrust and competition law have been unhelpful on the subject of compliance systems and controls. In this article, Joseph Murphy & Nathalie Jalabert-Doury consider this discrepancy and call for greater recognition of compliance programs to protect against anti-trust and competition law breaches.

\* **Joe Murphy** is Director of Public Policy for the Society of Corporate Compliance and Ethics and represented SCCE as a consultative partner to the OECD Working Group on Bribery.  
**Nathalie Jalabert-Doury** heads the Antitrust and Competition team in the Paris office of Mayer Brown.

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH

*Announcing that both agencies will consider the diligence of such programs in their approaches to enforcement, based on all the facts in each case, could dramatically change the balance (in favour of compliance programs)*

### **A sense of fatalism**

■ Antitrust and competition law is an area that continues to present considerable risk to companies, but appears to have faded somewhat from the lists of top compliance concerns. A recent survey by the Society of Corporate Compliance and Ethics<sup>1</sup> shows that the overwhelming majority of responding companies are not doing antitrust compliance audits at a level that would meet the minimum standard for an effective compliance program, at least as set out in the US Organizational Sentencing Guidelines.

In contrast to the “Yes we can” (stop misconduct) approach of other regulators, within antitrust circles, there is perhaps a sense of fatalism that you “can’t stop cartels”. They are hidden, after all, and the participants typically know they are doing wrong, so what is the use of training or policies? In this context there may develop a sense that programs, no matter how diligent, just do not matter. Listening to the two most prominent enforcement agencies, the US Antitrust Division and the EU’s Directorate General of

Competition (DG Comp), this is what practitioners are led to understand.

### **What would make a strong antitrust and competition compliance program?**

We choose to take issue with this pessimism. There are significant steps that could be taken by companies to make their antitrust and competition law compliance programs more effective in preventing and detecting cartels. Other areas in the compliance and ethics field have moved well past lectures by lawyers and legalistic compliance manuals in their efforts to prevent and detect misconduct. Why then is competition compliance viewed differently?

The US Antitrust Division and the EU’s DG Comp have unfortunately contributed to this negative atmosphere by their failure to recognize the value of compliance programs in their enforcement decisions. To date they have taken a “one size fits all” approach – they will never consider any compliance programs in any case, no matter how diligent a program

---

1 <http://www.corporatecomplianceinsights.com/antitrust-compliance-programs-scces-survey-says-they-are-less-than-they-should-be/>

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH

is or what the facts of a company or the circumstances of a violation. A few simple adjustments, such as announcing that both agencies will consider the diligence of such programs in their approaches to enforcement, based on all the facts in each case, could dramatically change the balance. Moreover, if it is clear that the enforcers will consider such programs, then the advice from those enforcers on how to energize and empower compliance programs is something companies and practitioners will have a reason to listen to and follow. The most basic and essential contributor to the effectiveness of any compliance program is the establishment of an independent chief ethics and compliance officer, and that person's effectiveness would be greatly enhanced if the main regulators acknowledged and promoted proactive compliance measures as a mitigant. As the Canadian Competition Bureau describes this: "The person or group responsible for compliance must be in a position to act effectively, in that there is independence, professionalism, empowerment, financial support and a solid understanding of what is taking place within the business".

Compliance programs can achieve much by going beyond traditional awareness training and policy statements. One of the most intriguing and innovative steps is the use of computer-based screening to proactively detect red flags. Analyzing key company data relating to such elements as sales, costs and revenues, margins, and degrees of market penetration across a company's operations can reveal suspicious pricing or other patterns. Searches can also be used for suspicious word patterns that call for further intensive review. Although none of these techniques indicate, in black and white terms, that the law has been broken, they can definitely help tell compliance professionals and lawyers where to direct their energies. And the mere fact that a company uses such techniques sends a powerful signal that it is serious about compliance.

Cartels are typically profit-driven mechanisms for limiting competition, or artificially creating conditions in the market-place leading to higher profitability than would otherwise be achieved. As the pursuit of higher profitability is frequently a performance objective for management, compliance programs need to address

---

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH

*Incentives drive behavior, and if the compliance program is isolated from the determination of incentives then it is also isolated from the driving force of any business*

the topic of incentives. DG Comp has suggested “*putting in place positive incentives for employees to consider this [compliance] objective with utmost seriousness*” as part of an effective compliance program, referring more specifically to job descriptions and staff evaluation criteria<sup>2</sup>. Incentives drive behavior, and if the compliance program is isolated from the determination of incentives then it is also isolated from the driving force of any business. There are a variety of ways that incentives may be worked into an effective program<sup>3</sup>: one core element is making sure compliance and ethics is present in the process and have a say when any incentive and bonus plan is being considered.<sup>4</sup>

### **An ounce of cure is worth a pound of prevention**

Why then is there this sense of scepticism about antitrust compliance programs in this area, apparently fed by animosity

toward such programs from both the EU Competition Commission and the US Department of Justice Antitrust Division? These two agencies seem to have been following policies at odds with regulators in other spheres, as if compliance programs were merely diversions from the more exciting work of bagging bigger and more scandalous cartels. Finding, not preventing cartels, seems to be where the focus is for these two agencies.

The European Competition Commission’s policies make it plain that it does not consider that compliance efforts contribute to the fight against cartels in the same way as efforts to apprehend offenders. “The collaboration of an undertaking in the detection of the existence of a cartel” is rewarded under the leniency program. Indeed, companies presenting information on a cartel they participated in can obtain full immunity or a reduction of up to 50% depending

---

2 DG Competition, “Compliance matters : What companies can do better to respect EU competition rules”, 2012, page 21.

3 Murphy, “Using Incentives in Your Compliance and Ethics Program” (SCCE; 2012), <http://www.corporatecompliance.org/Resources/View/smid/940/ArticleID/724.aspx>

4 For guidance on what would constitute an effective anti-cartel compliance program, see Murphy & Kolasky, The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior, 26 ANTITRUST 61 (Spring 2012).

---

**CARTEL PREVENTION AND COMPLIANCE REGIMES:  
IT IS TIME FOR A SMARTER APPROACH**

*Companies engaging in robust  
compliance efforts cannot expect any  
lenient treatment from DG Comp*

on the added value of the elements they bring forward and the time at which they do so. Similarly, under the settlement procedure, 10% reductions in fines can be granted by reason of the procedural efficiencies gained by the Commission where a company agrees to admit its participation in a cartel. The quality of compliance diligence and culture at the time the infringement was committed, or efforts developed afterwards are not considered at all in these two procedures.

EU Commissioner Almunia has stressed in numerous speeches that the main tools for promoting compliance are the deterrent effects of fines and the leniency policy. Consequently, levels of fines have continued progressing, notwithstanding the overall economic context. Following a record year in 2010 (with almost €3 billion cartel fines), the total amount of fines has decreased in 2011 and 2012, but it is important to note that two of the three highest European cartel fines ever imposed were handed down in 2012<sup>5</sup>.

Against this backdrop, companies engaging into robust compliance efforts cannot expect any lenient treatment from DG Comp. Even if a compliance program can reduce the risk of further participation in illegal behavior, it is not considered as a mitigating circumstance by the Commission<sup>6</sup> in the fight against cartels, but merely a “*natural obligation of each company*”, to act in their own best interests<sup>7</sup>. Of course, one could also say exactly the same about voluntary disclosure, yet such disclosure is richly rewarded.

In the US, when pressed on the point about ignoring compliance programs, the Antitrust Division believes that compliance efforts are simply irrelevant because of their voluntary disclosure program, which offers leniency. This is taken to such an extreme in the Antitrust Division that, unlike in the rest of the US Department of Justice, a company that admits to the worst kind of cartel offence (through the leniency program) is not even required to institute

---

5 European Commission Cartel Statistics, 1.1 Fines imposed – period 1990-2012.

6 See for example Case COMP/39181 – Candle Waxes, para. 698.

7 Joaquín Almunia, “Compliance and Competition Policy”, Speech/10/586, October 25, 2010.

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH

*DOJ and SEC understand that “no compliance program can ever prevent all criminal activity by a corporation’s employees”, and they do not hold companies to a standard of perfection*

a compliance program going forward. This stance is at odds with the rest of the Department of Justice, as well as other enforcers and regulators. In a guide on FCPA enforcement jointly issued by the Justice Department and the Securities and Exchange Commission, the point was made very clear:

*“A well-constructed, thoughtfully implemented, and consistently enforced compliance and ethics program helps prevent, detect, remediate, and report misconduct, including FCPA violations.”*

These considerations reflect the recognition that a company’s failure to prevent every single violation does not necessarily mean that a particular company’s compliance program was not generally effective. DOJ and SEC understand that “no compliance program can ever prevent all criminal activity by a corporation’s employees”, and they do not hold companies to a standard of

perfection. An assessment of a company’s compliance program, including its design and good faith implementation and enforcement, is an important part of the government’s assessment of whether a violation occurred, and if so, what action should be taken. In appropriate circumstances, the DOJ and SEC may decline to pursue charges against a company based on the company’s effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation”<sup>8</sup>.

The Department of Justice generally follows a flexible approach to corporate crime enforcement, taking into account a number of factors; compliance programs are included among those factors. If a company can show that it has a strong program but an employee ran afoul of those efforts, companies can receive, and in fact have been given, a pass on prosecution. The government sees no point in expending its scarce resources on companies that have already shown that

---

8 <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>

---

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH

they have partnered with the government to fight corporate crime. Nor is there anything unique to competition law in this philosophy. The Federal Trade Commission, in the areas where it has jurisdiction to impose penalties, also takes good faith compliance efforts into consideration<sup>9</sup>.

### **The best medicine**

In contrast, a number of Competition Authorities have developed much more proactive approaches towards compliance programs. The French Competition Authority (FCA) counts among those authorities, as it has a settlement procedure based, on the one hand, on an admission of participation in an infringement and, on the other hand, on a commitment to remedy the situation in the future. This commitment may include, along with other remedies, the adoption of an effective compliance program, which is approved and monitored by the FCA. The FCA can grant up to a 25% reduction in the fine on that basis (10% for not

challenging the objections, 10% for the compliance program and 5% for other remedies, such as limitations on bidding consortia or trade union meetings).

The rationale of such reductions is that effective compliance programs are in the interest of companies implementing them “*while at the same time providing added guarantees of responsible behavior and security to shareholders and to the general public*”<sup>10</sup>. The FCA is therefore not only recommending companies implement compliance programs, but actively encouraging such programs, both in the context of a settlement procedure and more generally. Indeed, a company with a compliance program discovering misconduct other than a cartel which ceases and redresses the practice of its own volition may have the benefit of a mitigating circumstance. More generally, the FCA values compliance commitments in cases which are closed on the basis of commitments. In guidelines released in February 2012, the FCA defined the general conditions for a proposed

---

9 «The FTC and antitrust compliance programs» Compliance and Ethics Professional (July/August 2012), available at [http://www.joemurphycecp.com/wp-content/uploads/2012/08/Finalpublishedarticle\\_Murphy\\_ARTICLEcopy.pdf](http://www.joemurphycecp.com/wp-content/uploads/2012/08/Finalpublishedarticle_Murphy_ARTICLEcopy.pdf)

10 Framework Document of 10 February 2012 on Antitrust Compliance Programmes, para 13.

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH

*The French Competition Authority expects a firm, clear and public commitment by the entire board and management to comply with competition rules*

compliance program to be considered as effective. Recognising that there is no ‘one size fits all’ program, the FCA defines best practices, rather than precise lists of items to be contained in programs. However, in all cases, the FCA expects a firm, clear and public commitment by the entire board and management to comply with competition rules. In addition, the FCA states that an effective program necessarily entails the appointment of a compliance officer with the necessary authority, resources and a direct access to the top management to implement and oversee the program. More classically, a program is expected to include training tools and effective control.

The UK Office of Fair Trading (OFT) has also engaged in a number of positive

initiatives in the field of compliance. As early as 2004, the OFT published its first guidelines on how businesses can achieve compliance with competition law and indicated that a reduction in penalties of up to 10% could be considered on such grounds. Deeper research into the drivers of compliance have been undertaken and resulted in the publication of a report in May 2010<sup>11</sup>.

*“the decision-maker should in our view take such a [compliance] programme into account in assessing any deterrent element in the penalty”.*

Competition Appeals Tribunal, 11 March 2011  
(case 1114/1/1/09 e.a., para. 217)

Guidance by the UK Office of Fair Trading in June 2011 suggests a four-step process to be developed on the basis of a clear and unambiguous commitment to competition law compliance:

■ Risk identification    ■ Risk assessment    ■ Risk mitigation    ■ Review

11 Drivers of Compliance and Non-compliance with Competition Law, May 2010, [http://www.offt.gov.uk/shared\\_offt/reports/comp\\_policy/oft1227.pdf](http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft1227.pdf)

---

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH

Updated guidance was published in June 2011 suggesting a four-step process to be developed on the basis of a clear and unambiguous commitment to competition law compliance: risk identification, risk assessment, risk mitigation and review<sup>12</sup>. In a separate document the OFT also stressed the key role of directors in establishing and maintaining a compliance culture within their company and ways to eliminate the risk that a Company Disqualification Order would be made against them by reason of their company's participation in a competition infringement.

Other recent examples of Competition Authorities putting in place such mitigating factors include the Swiss Competition Authority and the Bulgarian Competition Commission.

So far, these initiatives have however not convinced the European Commission to go much further than acknowledging that *"compliance matters"*. This is striking when one considers that the European Commission encourages compliance efforts much more actively in other fields such as adopting the OECD Anti Bribery Convention, which includes a

recommendation that *"Member countries take (...) into account where appropriate the individual circumstances of a company, including (...) internal controls, ethics and compliance (...) fully used in order to prevent and detect bribery"*.

### **A first step**

In 2012, the European Commission has however started showing more interest in compliance efforts, releasing a brochure entitled "Compliance Matters", and it is indeed important that the European Commission does not remain silent, but supports compliance efforts of one form or another. This still falls short of suggesting any evolution in the decisional practice detailed above; further initiatives should be pursued.

Among the policy changes that might be expected, two rather immediate grounds for action stand out. First, the Commission has considered in a number of past cases that a group-wide compliance program illustrates the influence exercised by the holding company on its subsidiaries for the purpose of determining whether the fine shall be imposed and calculated on

---

12 [http://www.of.gov.uk/shared\\_of/ca-and-cartels/competition-awareness-compliance/oft1341.pdf](http://www.of.gov.uk/shared_of/ca-and-cartels/competition-awareness-compliance/oft1341.pdf)

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH



the basis of the whole group or only the subsidiary involved in anticompetitive behavior. This is not far from considering a compliance program as an aggravating circumstance and the practice should therefore be amended. Second, in recent EU competition cases, which have been closed on the basis of remedies offered by the companies concerned, the Commission has appeared uninterested in compliance commitments such as on the topic of e-books. While compliance commitments have been offered in the parallel US procedure, the commitments accepted by the European Commission from the same companies do not include anything related to compliance programs.

Similarly in the recent US case regarding AU Optronics, a company was tried and convicted in a criminal case and a compliance program was then imposed on it under the US Sentencing Guidelines. In this unusual circumstance the Antitrust Division of the Department of Justice did submit a proposal with a level of detail that was quite unusual for that Division. The Division did miss some essential points in its proposal (e.g., there was no requirement for conducting audits, even though prior Division spokespersons

had always spoken strongly about the need for audits in compliance programs). Perhaps the Division is beginning to open up on this point, but practitioners have a right to expect more, and at least an approach that is consistent with the rest of the Department of Justice and does not undercut the impetus for developing strong programs.

### **Conclusion**

If we are to prevent cartels and all the harm they cause, we need smarter company anti-cartel programs, and smarter government approaches to make that happen. Paper and preaching alone (e.g., manuals and legal lectures), as part of company programs are ineffective in fighting cartels. Nor does paper and preaching by governments work in promoting effective programs in companies. Rather, as shown by the US Department of Justice's Criminal Division and the global approach to fighting corruption, governments must play an active role to lead companies to do more.

The EU's initial step in issuing a guidance document could have been a milestone, but the EU missed on two important steps. First, it failed to follow

## CARTEL PREVENTION AND COMPLIANCE REGIMES: IT IS TIME FOR A SMARTER APPROACH

the excellent French model – learn from actual case experience in requiring companies to institute programs to settle cases, study the subject of compliance programs in depth, and review a draft of the guide with practitioners. Even more importantly, DG Comp offers nothing to back up its words. Instead, DG Comp expressly ignores compliance programs in its enforcement. This being the case, how can its words move industry to upgrade its efforts?

When agencies make it clear that strong, but only strong, programs count, industry will listen. If the EU Competition Commission and the US Department of Justice Antitrust Division shift their focus from exclusively generating big fines to preventing cartels, and make it clear that truly effective programs will count significantly, then we can see the type of impetus that causes companies to take steps that can effectively prevent cartels. In the interim, the wise Director of Risk will evaluate the antitrust and competition law risk facing the firm and recognize it is not merely a matter for settlement in the law courts, but belongs on the “to do” list of an independent compliance officer who reports to the

board, to oversee a proactive program for the prevention (as much as possible) of such risk in the first place. ■

---

**Joe Murphy**, of counsel to Compliance Systems Legal Group, and co-founder of Integrity Interactive Corporation (now part of SAI Global), has worked in the compliance and ethics area for over thirty years, including establishing the global corporate compliance program for Bell Atlantic. Joe is a contributing editor to *ethikos*, a bi-monthly publication on corporate compliance and ethics and sits on the board of the Society of Corporate Compliance and Ethics where he is Editor-in Chief of SCCE’s magazine. He has assisted the OECD, and governments in the US, Australia, Canada and the UK, amongst others, on compliance, corruption and ethics matters. He is also the author of “501 Ideas for Your Compliance & Ethics Program” and has co-authored other publications.

---

**Nathalie Jalabert-Doury** is the head of Antitrust and Competition for Mayer Brown’s Paris office. She joined the firm in 2010 to create the Antitrust and Competition department in Paris, after practicing in two successive French law firms. She has developed an extensive practice in all aspects of competition law at both a national and European level, notably in the area of international cartels. She has published a Practical Guide on antitrust inspections (Feduci-Bruylant) to assist companies in their upstream preparation to handle such procedures.

---