Antitrust compliance programmes & optimal antitrust enforcement

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King’s College London
5 December 2012

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All views expressed are strictly personal
Often expressed criticism

"[...] 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. [...] 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 [...] is not hard to miss.[...]

(Caron Beaton-Wells, 'Normative Compliance – The Endgame', 2012)
The radical position

"If a company has made a reasonable effort to comply with the antitrust law, and an employee nevertheless engages in price-fixing, then it makes no sense to fine the corporation, or to sanction the directors or officers."

Should companies with compliance programmes receive lower fines or even immunity from fines?

answer based on analysis of

• nature of antitrust infringements
• rationale of company liability for antitrust infringements
• value of antitrust compliance programmes (including possible positive and possible negative effects)
The nature of antitrust infringements

a) antitrust infringements involve employees that have been given substantial authority by their company

b) antitrust infringements are financially beneficial to the company

c) employees are primarily motivated by what they perceive to be their company's interest, or what they think is expected from them, and/or the incentives the company has set for them

d) importance of performance targets and incentives
The rationale of company liability for antitrust infringements

1) companies are generally best placed to prevent antitrust infringements, and to do so in the most cost-effective way

2) avoiding perverse incentives

3) avoiding unfairness

(these reasons equally justify parent company liability)
## Possible positive and possible negative effects of antitrust compliance programmes

<table>
<thead>
<tr>
<th>Positive effects:</th>
<th>Negative effects:</th>
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<tbody>
<tr>
<td>➢ prevention of infringements that would otherwise have happened</td>
<td>➢ perverse learning effects</td>
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<td>➢ earlier termination of on-going infringements</td>
<td>e.g. mock dawn raids</td>
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Empirical evidence?

Positive effects:
- Prevention of infringements that would otherwise have happened.
- Earlier termination of ongoing infringements.
- Infringements reported to the authorities, thus allowing punishment and redress (earlier or at lower cost).

Negative effects:
- Perverse learning effects, e.g., mock dawn raids.
- Infringements detected, but evidence concealed or destroyed.

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A tale of 4 companies

(types of situations that can realistically arise)

- **Company A**: never commits infringements; has no compliance programme

- **Company B**: history of infringements; successful cultural change, including through compliance programme

- **Company C**: history of infringements; compliance programme introduced, but same excessive performance targets and incentives; infringements continue

- **Company D**: compliance programme as a calculated attempt to project a misleading image of compliance
Conclusion ...

it is not possible for authorities and courts to distinguish reliably and at reasonable cost between situations where antitrust compliance programmes are part of a culture and practice of real compliance and situations of symbolic or cosmetic compliance
... confirmed by compliance research

"The influence of regulator-mandated formal compliance systems on culture and agency – how they are implemented and understood in practice, and how they interact with pre-existing motivations and commitments – cannot be engineered or predicted in detail."

(Christine Parker & Sharon Galid, in Parker & Lehmann Nielsen (eds), Explaining Compliance – Business Responses to Regulation, 2011)
... confirmed by compliance research

"To merely measure implementation of a formal compliance management system is to grasp at an epiphenomenon."

(Christine Parker & Sharon Galid, in Parker & Lehmann Nielsen (eds), Explaining Compliance – Business Responses to Regulation, 2011)
Should companies with compliance programmes be granted immunity from fines?

- would create perverse incentives for companies to set up a compliance programme to obtain immunity, while maximising infringements through excessive performance targets and incentives
- compliance programme thus becomes a cheap insurance policy against antitrust liability
- sends wrong normative message that antitrust infringements are part of the normal course of business, like natural accidents, and that companies have no responsibility to avoid infringements
- creates unfairness in that companies keep the financial benefit of infringements while escaping liability
- undermines incentives created by leniency programmes
Should companies that had a compliance programme at the time of the infringement be granted a reduction in the amount of fines?

- same negative effects as granting immunity from fines (see slide 13 above), only to a lesser extent, depending on the size of the discount

- subsidies for compliance programmes should not be conditional upon an antitrust infringement being committed
Response to some concerns

✓ "current antitrust enforcement policy is not working"
✓ "it makes no sense to punish a company which has done everything it could"
✓ "current policy neglects the need to create proper incentives for companies to monitor, investigate and report employee wrongdoing"
✓ "current antitrust enforcement policy is not in line with enforcement policies in other areas"
Should companies that did not have a compliance programme at the time of the infringement be fined more heavily?

- unless baseline level of the fine is lowered correspondingly: no weakening of incentives for real compliance and no unfairness
- no undermining of the normative message that companies are responsible for avoiding antitrust infringements
- comes down to adding to the obligation not to commit antitrust infringements a second, implied obligation to have a compliance programme: hard to justify, given that compliance programmes are not a necessary condition for real compliance
Should companies that set up a compliance programme after the detection of an infringement be granted a reduction in the amount of the fine?

- sends normative message that companies are responsible for avoiding antitrust infringements, and, when found to have committed an infringement, should take measures to avoid repeat infringements

- risk of weakening incentive to avoid first infringement, and to set up a compliance programme before a first infringement

- risk of symbolic or cosmetic compliance

- limit to cases where first infringement not contested
- increased fine if nevertheless later new infringement
Should the adoption of a compliance programme be imposed as part of infringement decisions or settlements?

- no weakening of incentives for real compliance, nor undermining of the normative message that companies are responsible for avoiding antitrust infringements, nor unfairness

- higher risk of negative effects of compliance programmes (see slide 7 above) when the compliance programme has been imposed on the company

- prohibit certain particularly risky elements of compliance programmes, e.g. mock dawn raids

- leniency programmes
What else can or should be done to encourage genuine compliance efforts?

- authorities should prosecute and punish many infringements
- add individual penalties to fines on companies
- ensure that the content of the antitrust prohibitions is sufficiently clear and clearly communicated
paper

« Antitrust Compliance Programmes & Optimal Antitrust Enforcement »

http://ssrn.com/paper=2176309