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Credit for Compliance?

Stephen Kinsella (Flint, United Kingdom) · Thursday, March 21st, 2013

In sport it used to be said that it is not the winning that counts but the taking part. That approach to professional sport would now seem rather quaint, but the debate has been recycled somewhat in relation to antitrust compliance programmes. The question currently being debated is whether companies that in good faith invest in a compliance programme that they take seriously, should get some credit for doing so when they are ultimately fined for behaviour that the programme failed to prevent or detect.

Views on this question even within Europe are diametrically opposed. For instance the UK's Office of Fair Trading ("OFT") will now grant a reduction where it "sees evidence of a clear commitment to competition law compliance from the top and throughout the organisation." As its chairman recently stated,[1] the programme must reflect the size of the undertaking and the risks it faces in order to qualify. Other agencies such as the Autorité de la Concurrence of France, do not give credit for having a programme in place *ex ante*, at least in cases involving hardcore cartels, but may give a form of retrospective credit against the fine for instituting a programme as part of a settlement. At perhaps the other end of the scale, the European Commission regards the effectiveness of the compliance programme as "the sole benchmark of success," and states in its *Compliance Matters* brochure that "efforts will be assessed on the basis of results, in other words they will be judged by their success in avoiding infringements." It therefore seems to have set its face, for now at least, against giving credit where a programme fails to capture a serious infringement.

One can certainly understand the argument that rewarding companies merely for their unsuccessful attempts at compliance makes no sense given that compliance with laws – not just competition law – is an obligation and should be part of the culture of the company. The consequence of Company A's breakdown in its "culture of compliance" (or failure to adhere to its compliance programme) is an infringement of the same law breached by Company B, even if Company B had never paid any attention to compliance, and so the punishments should be commensurate.

There are other approaches to the impact of a compliance programme. For example Canada adds an additional punishment for compliance failures in exceptional circumstances where senior management were involved in or condoned the anti-competitive conduct and the company is not able to show that it "exercised due diligence to prevent the commission of the offence". In those circumstances "it will be apparent to the Bureau that senior management's commitment to compliance was not serious and the programme was neither credible nor effective".[2] A sham compliance programme can therefore aggravate both sentences and fines in Canada. Although the

OFT would not ordinarily regard the existence of a compliance programme as an aggravating factor when assessing fines, it can do so in exceptional circumstances including where the programme was used to facilitate the infringement, conceal the infringement or mislead the OFT during its investigation into the infringement.[3]

How to square this circle? I am not necessarily advocating what follows but as an intellectual exercise you could suggest the following. In principle where Company A and Company B are equally implicated in a cartel, the starting point for the fine should be the same. Company A may have invested in compliance but that should bring its own rewards in terms of having possibly in some other way minimised involvement in anticompetitive behaviour, even if it proved unsuccessful in this particular instance. By the same token, there should be no additional punishment for having sincerely tried but failed. On the other hand, Company B is able to show no commitment to compliance and therefore its failure to take the issue seriously could be seen as an aggravating factor justifying an increased penalty. As a result, those who did pursue compliance would be seen to emerge relatively better off for having done so.

One can anticipate some criticisms of this approach but it would provide a clear incentive to institute a compliance programme, which in turn would likely produce rewards through reinforcement of a culture that would deter rogue behaviour.

The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP, its partners, or clients. The author would like to thank Stephen Dnes and Rosanna Connolly for their valuable comments.

References[+]

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