

Building a culture of compliance to deter infringements

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How to achieve real compliance – a perennial dilemma

Sir Thomas More's "Utopia" – published 1516

An English lawyer was there ... speaking enthusiastically about the stern punishment for thieves [offenders] .. He said:

"That's what I find so odd ... Considering how few of them get away with it, why are we still plagued by so many offenders?"

"What's odd about it?" I asked ...

"this method of dealing with offenders is both unjust and socially undesirable. As a punishment it is too severe, and as a deterrent it is quite ineffective ... and since it goes on merrily in spite of the penalty, what power on earth could stop it? What possible deterrent could be effective? ... Surely any reduction of sentence would be interpreted as a positive invitation to commit a crime?"

Introduction: Policy considerations

- The ultimate goal of antitrust policy should be to **encourage** businesses to develop a real **commitment** to and **culture** of compliance so that infringements can be avoided in practice:

Commissioner Joaquin Almunia 25/10/2010:

“The ultimate aim of our cartels and antitrust policies is not to levy fines – the objective is to have no need for fines at all” (SPEECH/10/586)

- Some antitrust regimes focus on punishment without proactively encouraging genuine efforts to reach a culture of compliance
- Deterrence through fines and other penalties – and even leniency - may not on their own be enough to ensure real compliance, because deterrence and leniency do not address business or societal perceptions of the “morality” of the behaviour in question and therefore does not foster a real ethical business culture

Encouraging a shift in thinking – in the agencies

- Agencies should consider a combination of strategies that are aimed at both:
 - » Encouraging “voluntary” compliance (a normative commitment to compliance – changing corporate **CULTURE** on a sustainable basis) AND
 - » Ultimately securing compliance by applying all the enforcement measures available (as required)
- Arguably it is more efficient and contributes more to consumer and societal welfare to minimise the need for enforced compliance by maximising (real) voluntary compliance through changing business culture
- This is **not** a plea for reduced enforcement or reduced fines where suitable “punishment” is required: it is an encouragement to look at advocacy tools to educate business and society about the normative value of compliance:

In other words encourage compliance so that it is understood to be the “right thing to do” – to motivate a desire to comply in business and an expectation of corporate compliance in society at large

Encouraging a shift in thinking – in business and in society

- By engaging in suitable advocacy efforts, antitrust agencies can share the message – and importance - of a (real) antitrust compliance culture as being a “public good” – and vital to good corporate governance
- This is perhaps even more important than merely emphasising the negative consequences of a failure to comply
- BUT: increasing the level of general knowledge (both within business and in society more widely) of the aims of antitrust law and the damage caused by violations is also important

So much for the theory.

What can be done in practice?

Much can be done to achieve a shift in thinking

- Both business organisations and antitrust agencies can do more to promote the compliance message
- What is Business doing?



- Compliance support by business for business
- 46 antitrust compliance workshops since 2013
- New focus on SME compliance advocacy



Practical suggestions for **agencies** – encouraging compliance culture - 1

- More actively and visibly encourage genuine antitrust compliance efforts and programmes which are genuinely aimed at trying to change corporate culture for the better
- Encourage appropriate corporate resources to be committed internally to antitrust compliance activities – because of the focus on punishment rather than rehabilitation, antitrust is now a “poor relation” to ABC (anti-bribery and anti-corruption) where agencies focus on encouraging cultural change
- Understand that that despite a company’s best efforts, people are people and problems will still occur: that does not mean the company is not committed to doing better and trying to change its culture
- Require credible programmes to be adopted in the event of a compliance failure (leverage experience in other compliance areas such as ABC)

Practical suggestions for **agencies** – encouraging compliance culture - 2

- Merely publishing information about fines and the possibility of litigation on a web site – or even the occasional press release, speech or article from an antitrust agency is not enough to get the message over and get society to change
- Dialogue with business (including SMEs) and with business organisations such as the ICC on what it takes to comply
- Express views on the adequacy of compliance efforts (programmes) and provide guidance on the typical elements in a credible programme and consider ways to publicise positive examples of antitrust compliance culture
- Use the ICN and other fora to share experience of “good” compliance programmes / efforts to establish and sustain a culture of good corporate ethics

Some practical suggestions for agencies – other advocacy efforts

- Do not just rely on websites and speeches to the *legal* community: get out to business on the ground (but do not just focus on penalties leniency and dawn raids: focus on the importance of compliance and ethical behaviour to welfare and economic growth):
 - *Business Schools*
 - *Business organisations (trade associations, industry conferences, Institutes of Directors, Chambers of Commerce)*
 - *Business Leaders*
 - *The investment community, other regulatory bodies (SEC, FSA etc)*

- Get the message out to society (not everyone reads the Business Press!):
 - *Schools and Universities (not just the Law Schools)*
 - *To the public at large (“Competition Days” involving more than just the agencies and the private legal bar ...)*

And some final words on compliance in Utopia

Sir Thomas More's "Utopia" – published 1516

*"The Utopian system includes not only **deterrents** from crime but **incentives** for good behaviour in the form of public recognition [of efforts towards good behaviour] ... partly to recognise [compliance efforts by the offender] and partly to spur on others to greater [compliance] efforts ... if they [the offenders] show signs of feeling really sorry – not merely for themselves, but for what they have done – their sentence is either reduced or cancelled altogether"*

[The Governing Body]

*"Should prevent crime by sound administration rather than allowing crime to develop and then punishing it ... [but] what you cannot put right you must try to make as little wrong as possible. **For things will never be perfect until human beings are perfect** – which I don't expect them to be for a number of years!"*

Questions?

Why comply?

Because compliance is part of the ethical basis
on which good corporate citizens should do
business

Thank you