Rethinking Compliance

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Previous Literature

- Riley and Bloom (2011)
- OECD (2011) (and Riley contribution)
- Sokol (2012)
- Sokol (2013)
- Sokol, Ezrachi & Crane (2014)
- Blair and Sokol (2014 forthcoming) (and Abrantes-Metz & Sokol contribution)
The relationship between antitrust law compliance and broader issues of corporate governance

- Optimal deterrence and its limits
- Need proactive compliance
- Antitrust out of step with other areas of white collar crime like anti-bribery and corruption
Drivers of Illegal Behavior

- Lack of commitment by management
- Unethical corporate culture
- Legal uncertainty
- Employee error
- Rogue employees
- Arrogance
- Competing interests from other compliance areas
Antitrust Authorities and Compliance

- Strict liability
  - DOJ & DG Competition
- Negligence liability
- Composite regime of strict and negligence (leading to optimal outcome)
  - US Sentencing Guidelines
  - FCPA Guidance
  - World Bank
  - UK Anti-Bribery
How the Market Responds to Compliance Failures

- Negative stock returns
- Sometimes there are reputational effects, sometimes there are not, for publicly traded companies reputational effects is a driver of behavior
- Shifting perceptions in Europe and Asia over time will create greater reputational penalties
- Increased linkage with CSR and antitrust will add to reputational penalties
Focusing on creating credible and robust antitrust law compliance programs

- Self policing to optimize enforcement
- Agency guidance
- ICC toolkit
Internal Management Issues

• Organizational Design and Management Commitment

• The role of the General Counsel and Chief Compliance Officer

• Relationship between Legal and Compliance and the business unit
Ensuring the program has the right elements

- Risk Analysis (Identifying and Minimizing Legal Risk)
- Training and raising concerns
- Incentives That May Create Risk and Discipline to the Risk
- Compliance after an Infringement
ICC Toolkit

- ICC Commission on Competition
- Working group on Antitrust Compliance and Advocacy
- Ongoing dialogue with regulators
- Ongoing advocacy to business
- Dialogue with ECN, ICN and OECD
- Promoting consistently high global standards for antitrust compliance to assist companies – and ultimately stimulate trade and investment
- Developed a practical Toolkit for companies
- Complement existing materials – from agencies and organisations
- Toolkit should assist companies of all sectors and sizes
- No “one size fits all” or overnight solutions
- No such thing as “zero risk”
- What are effective controls?
- The people factor (controls alone don’t change behaviour)
- Alignment with broader programmes
- Reconciling regulatory requirements
- Championing compliance for vibrant businesses
Questions and Chair’s conclusions from the OECD 2011 Compliance roundtable
(OECD summary from DAF/COMP/M(2011)2/ANN/4)

- The question is how far should competition authorities go? [in defining standards of agency expectations of best practice]

- One approach is to leave the responsibility for compliance programmes with the business community, given they are for the benefit of the firm

- However, if competition authorities want to *promote compliance* with competition law, it is arguably the responsibility of competition authorities to engage in a discussion with the business community and work together towards some common standards.
A Toolkit of 11 Chapters:

1. Compliance embedded as company culture and policy
2. Compliance organization and resources
3. Risk identification and assessment
4. Antitrust compliance know-how
5. Antitrust concerns-handling systems
6. Handling internal investigations
7. Disciplinary action
8. Antitrust due diligence
9. Antitrust compliance certification
10. Compliance incentives
11. Monitoring and continuous improvement
Compliance embedded as company culture and policy:

- Companies to recognize antitrust risks that they face
- Adopt appropriate company standards of behaviour (e.g. Code of Conduct)
- Encourage business leaders to show active and committed personal support for ethical business practices
Compliance organization and resources:

- Senior individual to supervise the implementation of the antitrust CP
- Ensure Compliance Officer / Head can make reports to highest levels of management
- Decide how to develop policies and/or guidance (depends on resources)
Risk identification and assessment:

- Decide how to identify antitrust risks and trends, ideally as part of a general risk management process.
- Consider what controls are needed to manage, minimize or eliminate the risks identified.
- Share insights on the assurance process and scope for improvements with senior management.
Antitrust compliance know-how:

- Tailor antitrust know-how guidance to the risk profile and needs of the company
- Decide on the best way to deploy interactive training and updates
- Use business language, not legal jargon
- Work to ensure the message is understood
Reinforcement of an existing programme:

5. Antitrust concerns-handling systems
6. Handling internal investigations
7. Disciplinary action
8. Antitrust due diligence
9. Antitrust compliance certification
10. Compliance incentives
11. Monitoring and continuous improvement