Editorial

Compliance as Antitrust Cooperation: An Incentive for Cartel Enforcement

Gianni De Stefano*

With competition law enforcement focusing on the big (tech) companies in the last couple of years, one is left to wonder what is good compliance generally, outside of the hot cases that make the headlines. Because there is an antitrust commandment that is even stronger than the one of not squeezing out competitors when you are too big: thou shall not collude with thy competitors, do not enter a cartel. An evergreen that hits rarely, but – once it does – you feel it for years (as do the shareholders of the involved companies).

Compliance programmes to avoid this big-no of antitrust enforcement require significant efforts and investments. Often, competition law stakeholders are misled into thinking that all they should do is to think about the ideal compliance programme in abstract terms: involvement from the top, risk assessment, monitoring, etc. We all know those lists, thanks to the commendable job of certain authorities that have issued best practices (the UK CMA on top), and the tool-kits prepared by business associations (based on the macros offered by the International Chamber of Commerce).

What is often overlooked is how competition law compliance really breaths in a corporation. If we had to allocate percentages to how much time is dedicated by management and legal to competition law matters, and discounting all the inevitable big cases that eat up entire weeks (or months!) of the boardroom agendas and of the lawyers’ calendars, I would think that commercial matters is the biggest chunk. A company lives and thrives on its business models, its contracts and its commercial choices. Business strategy is the heartbeat of competition law.

Merger control will also represent a significant slice of the pie, if M&A (either acquiring or selling) is an important part of a company’s strategy. That is particularly true when consolidation takes place within the industry. In these circumstances, competition law becomes part of the strategic advice on where the company should be heading.

What is left is compliance intended as installing a culture of good conduct in relation to the competition rules, preparing the company for the unexpected, and being fit-for-purpose when it will be necessary. Yet, this is easier said than done. Albeit an evergreen, the boundaries of cartel conduct are far from clear. Think of hub-and-spokes, signalling or pricing software. And liability remains strict: there is no rogue-employee defence (VM Remonts), and even a one-off event (T-Mobile Netherlands) or pre-pricing discussions (Bananas) can get you in trouble.

This type of competition law compliance is only a fraction of the compliance programmes run by a large multinational: anti-bribery and corruption (ABC), export control, privacy, to name but a few, are also subject to such programmes. The latter sometimes may carry an even heavier role than competition law, depending on the relevant company and the industry.

Against this background, compliance remains a cost, an investment cost for which there needs to be a business case, unlike what happens in actual cases (it would be difficult to argue that no outside counsel is needed when you have the competition inspectors at the reception).

As for the value to give to compliance programmes, many have fed into the debate (e.g., Wils 2013, on the one side, and Riley & Bloom 2011 and Coates & Zulli 2017, on the other side). What strikes me the most is how authorities can change their policies: until the early Nineties the European Commission granted fine reductions for compliance programmes set up after the start of the investigations, whereas in 2012 the policy became that ‘Compliance matters’, but not so much to take it into account in setting the fines. In that same year, the French Autorité published a framework-document introducing a non-rebuttal procedure where compliance programmes could be awarded a fine reduction, but that policy would have been withdrawn in 2017. Similarly, some authorities do not consider compliance pro-

* Global Director Competition Law at AkzoNobel and General Co-Editor of the Journal of European Competition Law & Practice (JECLAP)

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grammes as worthy of a fine reduction (European Commission, China, Taiwan), whereas others do (either expressly such as Italy and the United Kingdom, or in practice such as Australia, Brazil, Netherlands, Japan, Switzerland). Other remain in between or, rectius, ‘in progress’ (United States).

It is a tale of incentives and future enforcement, really. It started with deterrence: the sweet carrots of compliance can happen because of the hard sticks of penalties and damages. For example, AkzoNobel introduced in 2000 an Internal Amnesty Programme after having expanded through a series of acquisitions and having been caught in a number of cartels through its relatively autonomous divisions.

Can deterrence be the only response? Future cartel enforcement will actually be about incentives from both sides. Leniency programmes are not as effective as they used to be. In Europe, statistics show that leniency applications have declined by half, compared to the past few years. And it is not a given that ex officio investigations will compensate for this decline. Companies need to receive more incentives to blow the whistle and, more generally, cooperate with enforcers.

A proposal is that the European Commission and, more generally, authorities, use their current tools to foster cooperation and thus enforcement. In recent year, for example, the European Commission has been using the so-called Antitrust Cooperation Procedure (as it has been referred to in recent speeches). See, for instance, the ARA case in 2016, where the company found guilty of an abuse was granted a 30 per cent reduction for its cooperation in the proceedings and in devising a remedy. Or the Facebook/WhatsApp case in 2017, where the cooperation of a merging party (that had been fined for having provided misleading information) was recognised as a mitigating circumstance. Or the Consumer Electronics or the Guess cases in 2018, where manufacturers fined for their behaviour in vertical relations (including RPM and territorial restrictions) obtained significant reductions (from 40 to 50 per cent) for their cooperation. The Commission recognised their disclosure of an infringement not yet known to the Authority, acknowledgement of facts and liability, evidence collection and procedural rights’ waiving. What the company gets in return is a case-specific recognition of their cooperation. A win-win, especially in the current times.

If all those non-cartel cases can constitute cooperation that is relevant for fine-reduction purposes, a compliance programme can, too. What is more, the legislative framework is already in place: the EU Fining Guidelines. It is proposed that authorities give credit to a particular compliance programme, not any compliance programmes. Not the ‘mere existence of a compliance programme’ (as per policy statements), and no ‘obligation to grant a reduction’ (as per the case law). But the effective cooperation in a specific case which helps enforcement move forward and is in the public interest.

That would constitute a recognition that incentives matter in cartel enforcement. For leniency programmes. For compliance programmes. As that is where actual enforcement is heading.

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