



**AAI Working Paper No. 12-02**

**Date:** August 13, 2012

**Title:** Antitrust Compliance: An Annotated Bibliography

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**Abstract:**

The purpose of this annotated bibliography is to survey the literature on antitrust compliance. The bibliography is organized into five sections: (1) current U.S. antitrust enforcement policy vis-à-vis compliance; (2) tools companies and in-house counsel can use to bolster existing compliance programs; (3) compliance in a globalized world; (4) recommended policy considerations; and (5) comparative policy considerations. Included are articles, commentaries, conference papers, essays, and books addressing one or more of the main categories into which the bibliography is organized.

**Keywords:** Compliance, Antitrust, Competition, Incentives, Compliance Programs

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<sup>2</sup> The author would like to thank AAI Advisory Board Member Professor Jonathan Baker for his guidance, supervision, and insight throughout the process of completing this project.



ANTITRUST COMPLIANCE: AN ANNOTATED BIBLIOGRAPHY

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SUMMER RESEARCH FELLOW 2012

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## Introduction

The purpose of this annotated bibliography is to survey the literature on antitrust compliance. The bibliography is organized into five sections: (1) current U.S. antitrust enforcement policy vis-à-vis compliance; (2) tools companies and in-house counsel can use to bolster existing compliance programs; (3) compliance in a globalized world; (4) recommended policy considerations; and (5) comparative policy considerations. Included are articles, commentaries, conference papers, essays, and books addressing one or more of the main categories into which the bibliography is organized.

Entries are organized first by category, and each author is listed alphabetically within each category that their work is listed<sup>3</sup>. Accompanying each entry is a brief summary of the subject matter or central points discussed in the article and any additional features of interest. Where available, links to each respective article will be provided. An alphabetical author index provides references to all entries for each author.

In compiling the bibliography, relevant material was identified by conducting searches of Westlaw, LexisNexis, *Competition Policy International*, *Corporate Compliance Insights*, the *Social Science Research Network (SSRN) Electronic Library*<sup>4</sup>, and *Google Scholar*<sup>5</sup>.

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<sup>3</sup> Entries are listed fully under the most appropriate topic, thus occasionally a cross-reference to an entry may appear before the main entry.

<sup>4</sup> The Social Science Research Network (SSRN) is an open access online repository for scholarly working papers and forthcoming papers in the social sciences, including law. See Social Science Research Network (SSRN), <http://www.ssrn.com>. The *SSRN Legal Scholarship Network* is located at <http://www.ssrn.com/lsn/index.html>.

<sup>5</sup> Google Scholar (<http://scholar.google.com>) searches a range of scholarly publications in several disciplines worldwide.

## Bibliography<sup>6</sup>

### Current U.S. Antitrust Enforcement Policy vis-à-vis Compliance<sup>7</sup>

1. ABA Section of Antitrust Law, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors*, (2d Ed., 2010).

This is an extensive resource manual for outside and in-house counsel charged with developing or updating their clients' antitrust compliance program, this volume contains detailed essays that explore specific compliance issues from the perspective of experienced practitioners.

2. Abrantes-Metz, Rosa M., *Libor Litigation and the Role of Screening: The Need for Enhanced Compliance Programs*, Competition Policy International (2011).  
<https://www.competitionpolicyinternational.com/libor-litigation-and-the-role-of-screening-the-need-for-enhanced-compliance-programs>.

(Abstract located at entry number 25).

3. Banks, Theodore L. and Joe Murphy, *The International Law of Antitrust Compliance*, 40 Denv. J. Int'l L. & Pol'y 368, 375 (2012).

(Abstract located at entry number 40).

4. Banks, Theodore L., *The Trouble With Antitrust Compliance and 10 Ways to Fix It*, Law Technology News (May 01, 2012).  
<http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1335713542002>.

(Abstract located at entry number 46).

5. Banks, Theodore L., *Dealing with Antitrust Compliance and Noncompliance*, 1739 PLI/Corp 777 (2009).

(Abstract located at entry number 29).

6. Beaton-Wells, Caron, *Normative Compliance – The End Game*, Competition Policy International (2012). <https://www.competitionpolicyinternational.com/file/view/6631>.

(Abstract located at entry number 30).

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<sup>6</sup> Despite division of entries by topic, all entries will be consecutively numbered for ease of reference and uniformity.

<sup>7</sup> The section surveys current United States Antitrust Enforcement policy and the incentives and disincentives inherent in such policy for corporations to implement compliance programs.

7. Calhoun, Mildred L., *Antitrust Compliance Programs—A View from the Trenches*, Practising Law Institute. 1603 PLI/Corp 693 (2007).

This article begins by noting the fact that despite the general guidance provided by the US Sentencing Commission and the Antitrust Division of the U.S. Department of Justice regarding compliance programs, nevertheless “there is a dearth of common sense advice for the in-house lawyer who actually has to implement these programs.” The rest of the paper addresses several of the most common questions facing in-house counsel. The article answers (1) what the purpose of an antitrust compliance plan is; (2) how the U.S. Sentencing Guidelines (USSG) impact the consideration of compliance programs; (3) whether having an “effective” compliance program can make any real difference in a company’s sentence if it is found to have violated the antitrust laws; (4) the elements of an “effective” compliance and ethics program; and other basic questions of setting up a compliance program. The article concludes by emphasizing that a compliance program should be designed to detect and prevent violations, be informed by the USSG, but also do what works best for that individual company.

8. Kaplan, Jeffrey M., Joseph E. Murphy & Winthrop M. Swenson, *Compliance Programs and the Corporate Sentencing Guidelines*, Thompson/West (2005).

This is a detailed treatise on the Federal Sentencing Guidelines and compliance programs. It includes general background on the history and the development of the Sentencing Guidelines as well as includes sections on establishing compliance programs, issues of privilege and waiver of privilege, codes of conduct, training, auditing and monitoring, whistleblowers, conducting internal investigations, employee discipline, and the use of compliance programs in court and to avoid prosecution. The included appendices include United States Sentencing Commission Guidelines Manual: Sentencing of Organizations; as well as a model compliance plan and tables of cases and statutes.

9. Kolasky, William J., *Antitrust Compliance Programs: The Government Perspective*, Antitrust Div., U.S. Dep’t of Justice (July 12, 2002).  
<http://www.usdoj.gov/atr/public/speeches/224389.pdf>.

This speech, given by then Deputy Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, William Kolasky, gives the government’s perspective on antitrust compliance programs. First, Mr. Kolasky discusses the Antitrust Division’s criminal enforcement program and the importance of an effective compliance program designed to prevent violations in order to detect them when they occur and be “first in the door” to take advantage of the DOJ’s leniency program. Next there is a discussion of the ten common characteristics of multinational cartels. Mr. Kolasky then goes on to discuss how to design an effective compliance program. He discusses the goals of a successful compliance program (prevention and detection) and the minimum requirements for an effective compliance program. Mr. Kolasky then identifies five common red flags that counsel should look for when advising

clients and conducting antitrust audits. In conclusion Mr. Kolasky warns that “[t]he stakes have never been higher.” An effective compliance program, according to Mr. Kolasky could “literally mean the difference between survival and possible extinction to a corporation” and that given this possible exposure “it would be difficult to overstate the value of a compliance program that prevented the violation in the first place. And if a violation does occur, it again would be difficult to overstate the value of a compliance program in detecting the offense early” to take advantage of the amnesty program.

10. Mintz Levin, *United States: Preventive Medicine: The Benefits of an Effective Antitrust Compliance Program*, Mondaq (2006).  
<http://www.mintz.com/newsletter/2006/Antitrust-Advisory-1-19-06-Preventative-Med/index.htm>.

This article reemphasizes the importance for a company of developing, implementing and continuously reviewing a comprehensive antitrust compliance program. It begins by reviewing some sobering statistics issued by DOJ: Antitrust Criminal Enforcement Division regarding the increased penalties and jail sentences the Antitrust Division has obtained. Thus, the article argues, prevention is imperative for companies to avoid the ever-increasing criminal and civil penalties. The article then goes on to explain some general principles that go into developing an effective compliance program, emphasizing that while a company’s compliance program should be written<sup>8</sup>, it should also “simultaneously creat[e] a company-wide culture of compliance that goes hand-in-hand with the written program.” Finally, the article concludes by discussing several important principles that a company should convey as part of their compliance program.

11. Murphy, Joe, *Antitrust Compliance Programs: SCCE’s Survey Says They Are Less Than They Should Be*, Corporate Compliance Insights (June 2012).  
<http://www.corporatecomplianceinsights.com/antitrust-compliance-programs-scces-survey-says-they-are-less-than-they-should-be/>.

The article discusses a recent survey by the Society of Corporate Compliance and Ethics, which reports on “some of the compliance steps used by companies, and the impact of governmental approaches to compliance programs.” The report indicates the lack of credit given by the Antitrust Division of the Department of Justice for antitrust compliance programs, which is in direct contrast to the approach of the other units of the Department of Justice. DG Competition in Europe also fails to consider competition compliance programs where it helps companies, rather, it “only considers [programs] where it hurts companies.” As a result of this, according to the report, “while companies may do the relatively easy step of training..., the more important and difficult steps are alarmingly absent.” For example, 64% of companies surveyed do not perform the types of antitrust audits that would meet the standards of an “effective compliance program” under the Sentencing Guidelines. These results

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<sup>8</sup> The article emphasized that the written compliance program should be in terms that can be understood by non-lawyers.

suggest that while the Antitrust Division claims to be “sending a message,” companies do not seem to be getting the message. Furthermore, a vast majority of those surveyed highly value increased advice and some form of incentives. The author suggests that given the results, “doing more of the same by the government will likely produce only more of the same by companies.” The author concludes by making a plea for government to change its “irresponsible” approach.

12. Murphy, Joe, *How DG Competition and U.S. DOJ Antitrust Division Hurt Compliance Efforts*, Competition Policy International (2012).  
<https://www.competitionpolicyinternational.com/file/view/6634>.

This article begins by discussing what compliance programs are and why they matter. In particular, the author notes how effective compliance programs utilize the same management tools and techniques that all organizations utilize when there is any task they value and want to achieve. The article then surveys what the antitrust enforcers do, focusing on the U.S. Department of Justice, Antitrust Division and DG Competition in particular. With respect to the Antitrust Division, the author focuses on the use of the Sentencing Guidelines and the U.S. Attorney’s Manual and refers to the special carve-out that is “designed to ensure that no company can get credit and a sentence reduction for its program.” Furthermore, the author notes that unlike the other divisions of the Justice Department, the Antitrust Division’s leniency program does not require companies to institute or enhance their compliance programs when those companies voluntarily disclose violations, also noting that the Division has not offered any official guide for the tough compliance programs they advocate in speeches and the articles they put out. Next, the article discusses how the Antitrust Division and DG Competition’s approaches affect antitrust compliance programs, namely, dis-incentivizing managers from allocating the company’s limited resources to an adequate antitrust compliance program. The author then discusses various standards that should be included in anti-cartel compliance programs and concludes by discussing how to fix the current antitrust compliance policy within the U.S., followed by a demand for greater leadership and guidance from the DOJ: Antitrust Division and DG Comp.

13. Murphy, Joseph and William Kolasky, *The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior*, *Antitrust*, Vol. 26, No. 2 (2012).  
<http://www.wilmerhale.com/files/Publication/8859279d-3a5a-430d-9757-056feddc6b37/Presentation/PublicationAttachment/9989c14c-32b8-4e5a-ad28-0b0aa3caac6c/Spring12-MurphyCThe%20Role%20of%20Anti-Cartel%20Compliance%20Programs%20In%20Preventing%20Cartel%20B.pdf>.

The authors begin by pointing out how, despite the significant history of enforcement against infamous cartels in both the U.S. and the EU, cartel behavior continues in many sectors of the global economy. The U.S. DOJ has filed the highest number of criminal antitrust cases in the past 20 years, thus, the authors ask, what can be done to eliminate cartels and why hasn’t there been more success as a result of the increasing global emphasis on anti-cartel enforcement. The authors posit that too few

companies invest the time and resources that are necessary to develop and implement an effective antitrust compliance program as a result, in part, of the antitrust carve-out from the U.S. Sentencing Guidelines in the U.S. Attorney's Manual that allows the DOJ to refuse to give credit to companies for its *antitrust* compliance programs. The remainder of the article describes what is indispensable for an effective anti-cartel compliance program and what the competition authorities can do in order to encourage effective antitrust compliance programs by (a) addressing the problem with anti-cartel compliance programs; (b) describing what an effective antitrust compliance should look like; (c) the impact that current enforcement policies have on corporate incentives for allocating sufficient resources to their antitrust compliance program; and (d) concluding with how the government can encourage effective anti-cartel compliance programs.

14. Murphy, Joe, *The Key For An Effective Anti-Cartel Compliance Program*, Corporate Compliance Insights (March 8, 2012). <http://www.corporatecomplianceinsights.com/the-key-for-an-effective-anti-cartel-compliance-program/>.

(Abstract located at entry number 51).

15. Murphy, Joe, *Antitrust Compliance – A World Apart*, Corporate Compliance Insights (January 19, 2012). <http://www.corporatecomplianceinsights.com>.

The article begins by noting the importance placed on compliance programs in the U.S.. However, notwithstanding this widespread consideration of compliance programs in enforcement, the Department of Justice Antitrust Division is an outlier, refusing to consider or even require antitrust compliance programs as a condition to settlement for antitrust violations.<sup>9</sup> The author questions how this could be. The answer given in the U.S. Attorneys Manual is that antitrust goes to the heart of the business. The author questions this explanation given that other violations such as fraud, bribery, and cheating in government contracting also seem to go to the heart of business. As a result, Chief Ethics and Compliance Officers have an increasingly difficult time explaining to managers this apparent anomaly. The author concludes by noting the growing dissatisfaction among compliance and ethics practitioners who are tired of trying to explain the unexplainable to clients or, are not trying at all.

16. Murphy, Joe and Donna Boehme, *Fear No Evil: A Compliance and Ethics Professionals' Response to Dr. Stephan*, Social Science Research Network (2011). [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1965733](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965733).

This article is a response to Dr. Andreas Stephan's article entitled "Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels" in which Dr. Stephan raised questions about the application of competition law compliance programs in dealing with cartel behavior. The article begins by sharing the authors' experiences in conducting antitrust training. Next, the authors

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<sup>9</sup> The U.S. Attorneys manual tells federal prosecutors to consider diligent compliance programs but contains a special carve-out only for antitrust.



posit a hypothesis for Dr. Stephan to consider, namely, that the actual institutional interests of the U.S. and the EU enforcement authorities run counter to the interest in prevention that is embodied in compliance programs. The authors then go through each section of Dr. Stephan's article and provide their response. They conclude by positing to Dr. Stephan that if the tools management uses in making the organization operate effectively are applied to antitrust compliance, coupled with a more intelligent approach by the enforcement authorities, then that is when real progress will be made.

17. Saferstein, Harvey I. and John Anthony Chavez, *The Practical Aspects of Corporate Antitrust Compliance Programs*, Practising Law Institute, Corporate Law and Practice Course Handbook Series, 1291 PLI/Corp 659. (2002).

This paper focuses on the major pragmatic issues that surround corporate antitrust compliance programs, including the pros and cons as well as difficulties of corporate antitrust compliance programs. Furthermore, the paper contains an appendix which contains useful information in setting up a compliance program. The paper also describes what constitutes an "effective" compliance program with reference to the U.S. Sentencing Guidelines and the effect that an effective compliance program has on corporate and individual fines and sentencing.

18. Sokol, D. Daniel, *Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement*, *Antitrust Law Journal*, Vol. 78 (June 6, 2012). <http://ssrn.com/abstract=2079336>.

This article discusses the limitations to the optimal deterrence based cartel enforcement policy currently used by the Department of Justice Antitrust Division. The author, using both quantitative and qualitative survey evidence of cartel practitioners, is able to bring light to the realities of U.S. cartel enforcement policy. The evidence the author provides of the practitioner surveys, questions the conventional suppositions behind the success of the DOJ's program. Most notably, the author finds that firms regularly game the leniency program to punish their competitors. The author argues that firms and the DOJ have strong incentives to settle rather than to litigate cases in which the legality of cartel conduct may be in doubt. The surveys also suggested that there is a need for enforcement to focus on the sub-units within the firm as well as various ways to change behavior that could help improve enforcement and deterrence. The survey results also indicated that successful cartel cases do not generate high levels of media and public awareness. The conclusion summarizes the article's findings and outlines potential future steps in cartel research.

19. Sokol, D. Daniel, *Detection and Compliance in Cartel Policy*, *Competition Policy International* (2011). <https://www.competitionpolicyinternational.com/file/view/6549>.

(Abstract located at entry number 56).

20. Van Fleet, G. Allen, *Antitrust Compliance in the Current Administration and the Next?*, Greenberg Traurig, LLP (February 11, 2012).  
<http://www.natlawreview.com/article/antitrust-compliance-current-administration-and-next>.

The article begins by noting the dramatic increase in antitrust enforcement that occurred when President Obama began his presidency. Within the first two years of President Obama's presidency the Department of Justice had either forced the abandonment of significant mergers that would have had anti-competitive effects or secured large dollar amounts for violations. The article then addresses the question of what this means for corporate counsel and their antitrust compliance programs and what will happen if there is a Republican administration next year. Next, the article discusses the steps companies can take to establish or reinvigorate an effective compliance program. For example, having an appointed Compliance Officer who is dedicated to keeping up with developments in the company's antitrust-sensitive dealings. The article then answered the question of whether these steps would be considered overkill if there is a new Republican administration in 2013 with a resounding absolutely not. For one thing, "antitrust enforcement—particularly against hard-core offenses—enjoys rare bipartisan support." Furthermore, all 50 states have antitrust divisions. Thus, "an effective antitrust compliance program and a strong compliance policy remains essential for all companies in this administration—and the next."

21. Volkov, Michael, *Antitrust Enforcement and Compliance Keeps Chugging Along*, Corporate Compliance Insights (June 2012).  
<http://www.corporatecomplianceinsights.com/antitrust-enforcement-and-compliance-keeps-chugging-along/>.

The author begins by noting that the United States Department of Justice's criminal enforcement of antitrust laws "is a model of success." This is primarily due to (1) the adoption of a corporate leniency program; and (2) enforcement against international cartels. In the last decade the U.S. collection of fines has been surpassed by the EU's which aggressively assesses penalties but only in the civil context. The Antitrust Division, on the other hand, imposes criminal penalties including jail sentences. Recently, the Antitrust Division has also begun prosecuting foreign nationals as well. The rest of the article is divided in to three sections. First, the amnesty and leniency program. This section discusses the leniency program and the incentive it creates for cartel members to self-report a violation. Second, there is a discussion of international enforcement and cooperation. There is a growing trend in other countries, such as Canada and the European Commission, to model after the success of the U.S. leniency programs and the U.S. is also relying on coordination and cooperation with other international enforcement agencies to identify and convict antitrust conspirators. Lastly, the article discusses the Sentencing Guidelines and compliance.

22. Werlen, Dr. Thomas, *Promoting a Culture of Compliance*, International Bar Association, 6 No. 2 In-House Perspective 23 (2010).

The article makes the assertion that in the aftermath of the financial crisis and the concomitant increase in antitrust scrutiny by the Obama administration, it is essential to be mindful of how business is done, not only to avoid coming under scrutiny but also because it is essential to the restoration of corporate trustworthiness. The article is thus devoted to describing the role of in-house counsel in ensuring both the protection of the corporation's reputation as well as the trust of its stakeholders. The author touches on two sectors in particular—the technology industry and the pharmaceutical industry—and the lessons to be learned by the antitrust challenges faced by key players in each respective industry. The author then briefly discusses the culture of compliance for the company he is general counsel of as well as the role of in-house counsel in ensuring ethical business practices.

23. United States Department of Justice, *Corporate Compliance Programs*, US Attorney's Manual, USAM 9-28.800 (2008).

This section of the U.S. Attorney's Manual issued by the Department of Justice discusses corporate compliance programs. In addition, the U.S. Attorney's Manual provides for a carve-out for antitrust compliance programs. The carve-out allows for ignoring a company's antitrust compliance program for the purposes of an enforcement action and the imposition of penalties.

*Tools Companies and In-House Counsel Can Use  
to Bolster Existing Compliance Programs*

24. ABA Section of Antitrust Law, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors* (2d Ed., 2010).

(Abstract located at entry number 1).

25. Abrantes-Metz, Rosa M., *Libor Litigation and the Role of Screening: The Need for Enhanced Compliance Programs*, Competition Policy International (2011).

<https://www.competitionpolicyinternational.com/file/view/6521>.

This article focuses on allegations by the U.S. Department of Justice and the SEC, of a possible conspiracy to manipulate the U.S. dollar Libor rate by several major banks, and uses this as an example of the use of *screens*<sup>10</sup> to flag unexpected patterns in the Libor. The author then notes that competition authorities as well as other agencies around the world have begun using screens as a method of detecting market conspiracies and manipulations. The rest of the article focuses on whether screens can be used by private companies, in-house, as a supplement to internal monitoring and compliance efforts. The author points out that screens can be helpful in

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<sup>10</sup> Screens, according to the author, “use commonly available data such as prices, costs, market shares, bids, transaction quotes, spreads, volumes, and other data to identify patterns that are anomalous or highly improbable.”

narrowing the scope of potentially illegal conduct thus allowing for more extensive review on a smaller set of possible conspiracies. In conclusion, the author notes that with regard to cartel matters, the U.S.'s leniency programs reward the first member of a conspiracy to come forward, thus there is a great incentive for a company to use all the tools at their disposal, such as screens, in an effort to be the first to come forward.

26. Abrantes-Metz, Rosa M., *Why and How to Use Empirical Screens in Antitrust Compliance*, CPI Antitrust Chronicle (February, 2012).  
<https://www.competitionpolicyinternational.com/file/view/6629>.

The author begins by discussing the motivation for using empirical screens by noting how despite some success, antitrust compliance programs continue to play a minor role in detecting and deterring antitrust violations. A major reason, according to the author, is that key jurisdictions such as the U.S. and the EU do not offer credit to corporations for implementing an “effective” compliance program. Nevertheless, the author argues, companies need to improve their compliance programs through the use of empirical screens given the current antitrust enforcement environment which focuses more and more on increased penalties, leniency programs, as well as the enforcement agencies’ increased use of empirical screens. Thus companies would be well served to be the first to detect and report and thus benefit from leniency rather than facing the severe consequences of an enforcement action. Next the author discusses the power of screens to detect potential anticompetitive behavior. The author discusses screens and how they use commonly available data to identify patterns of anomalous or improbable behavior. The article then attempts to make a case for screening in compliance programs, discussing the various incentives corporations have for using screens, such as the efficient allocation of resources to address potential problem areas detected by screens. The author then discusses what corporate counsel needs to know about implementing screens and the practical questions that corporate counsel may have about the use of screens in compliance. In conclusion, the author argues that there is both the room and the incentive for corporations to enhance their antitrust compliance programs and when properly designed and implemented, they can be a very powerful tool.

27. Abrantes-Metz, Rosa M., Patrick Bajari, and Joe Murphy, *Antitrust Screening: Making Compliance Programs Robust*, Social Science Research Network (July, 2010).  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648948](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648948).

This article begins by discussing the importance of an effective compliance program for the deterrence and detection of antitrust violations. However, the authors note that given the nature of cartels, where the violation’s are typically willful, reliance on the good faith of the employee to read compliance materials and abide by them are not sufficient to ensure compliance. A more intrusive technique must be used to detect misconduct, such as screens. The authors describe what screens are and why they are relevant to antitrust compliance. Here the authors discuss various types of screens and their applications as well as several examples of screens that have been used in practice. The authors note the particular urgency for the use of screens in

antitrust given the DOJ Antitrust Division's Leniency Program which requires the company to be the first in the door. Next the authors discuss the power of screens as well as their limitations, such as false positives and/or negatives. The authors argue, however, that despite the potential for false positives and negatives that screens are beneficial because they can narrow the scope of an internal investigation allowing for the efficient allocation of resources. The authors also list what a good screen should possess and conclude by reemphasizing the importance of sophisticated tools like screens and how they can help to deter or uncover misconduct; and the authors even posit that should we see a proliferation of the use of sophisticated tools, such as screens, the enforcement agencies may very well reconsider the antitrust compliance "carve out" in the U.S. Sentencing Guidelines.

28. Banks, Theodore L. and Schoeman Updike Kaufman & Scharf, *Antitrust Compliance—It's All About the Culture*, Competition Policy International (2012).  
<https://www.competitionpolicyinternational.com/file/view/6630>.

The author begins by posing the question, "what does it take to develop an antitrust compliance program that works"? He then proceeds to delineate four key features necessary to develop an antitrust compliance program that "works."<sup>11</sup> The author then notes that despite the voluminous quantity of information available vis-à-vis antitrust compliance, violations continue to occur. The real deficiency, is a failure of corporate culture rather than a lack of information. The author then proceeds to discuss the "five major dimensions of corporate culture" that are a part of compliance.<sup>12</sup> The rest of the article is devoted to describing the various dimensions of corporate culture and suggesting ways that a company's Chief Compliance Officer (CCO) can be more effective in "getting the right information to the right people in a way consistent with the corporate style." The author concludes by emphasizing that by using the company's corporate culture, CCO's can better achieve corporate compliance.

29. Banks, Theodore L., *Dealing with Antitrust Compliance and Noncompliance*, 1739 PLI/Corp 777 (2009).

This article begins by describing corporate liability and individual actions and how corporations may be held, and often are held, responsible for the actions of its employees despite the assertion that the employee was acting for his own benefit. Furthermore, the author touches on other theories of corporate liability and why noncompliance can exacerbate the problem through the doctrines of collective knowledge, willful blindness, and the flow of liability to corporate officers who may be held personally liable for the acts of the corporation despite no direct participation. Next the article discusses compliance programs and antitrust punishment and the

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<sup>11</sup> The four features are: (1) the employees must be presented with materials that are directly relevant to each of their jobs; (2) it must be done in a way that is easily understandable; (3) it must be ubiquitous, so that little or no effort is needed to gain access to information; and (4) there should also be business controls so that violations are not easy to accomplish or difficult to detect.

<sup>12</sup> Geographic, management, industrial, professional, and structural.

history of the courts and the enforcement agencies' responses to compliance programs and the effect that they have had on the severity of punishments as well as the part they have played in antitrust enforcement. The author concludes by discussing what companies should focus on in effectively implementing and monitoring an antitrust compliance program.

30. Beaton-Wells, Caron, *Normative Compliance – The End Game*, Competition Policy International (2012). <https://www.competitionpolicyinternational.com/file/view/6631>.

The focus of this article was that one consequence of an overriding focus on deterrence, such as in the U.S., is that it may detract from a focus on compliance (i.e., Prosecutorial decisions in the U.S. are made without regard to efforts made by the company to ensure compliance). The author discusses the three motivations that drive the responsive regulation doctrine, namely, economic<sup>13</sup>, social<sup>14</sup>, and normative<sup>15</sup> motivations, and argues that compliance may be seen as a secondary or separate concern of the enforcement authorities and that the relationship between deterrence-oriented enforcement action and compliance, particularly on normative compliance, is rarely considered by enforcement authorities. The author goes on to argue that there is substantial research supporting the proposition that a “broader approach that encompasses a range of strategies, formal and informal, that are employed in a contextually sensitive way” should be adopted and that enforcement agencies should be “cognizant of potential conflicts between the different motivations at play.”

31. Hannay, William M., *Preventive Medicine: The Benefits of an Effective Antitrust Compliance Program*, 2006 WLNR 2054894 (February, 2006).

This article discusses the many benefits of establishing and monitoring an antitrust compliance program. The author focuses on six substantial benefits: (a) the internal discipline and managerial rethinking of business strategies, goals, and priorities; (b) avoidance of fines, settlements, and judgments, that is, civil and criminal fines as well as imprisonment; (c) avoidance of defense costs, which ties in to the previous benefit; (d) avoidance of harm to corporate reputation; (e) avoidance of personal impact on executives, focusing primarily on the humiliation and disgrace facing executives who are criminally prosecuted as a result of antitrust violations; and (f) satisfaction of corporate director obligations imposed by the *Caremark* decision.

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<sup>13</sup> Compliance based on “[e]conomic motivation is not only influenced by the costs and gains associated with the activity that may ultimately be found to be in breach of the law (i.e., with non-compliance). Firms also weigh the costs of investing in compliance programs and training, for example, against the benefits of improving customer and employee retention and satisfaction through a demonstrated commitment to compliance.”

<sup>14</sup> Socially motivated compliance focuses on a businesses concern “to preserve the respect and esteem of (‘third parties’) including customers, shareholders, employees, and business partners and that, in respect of some of these stakeholders (customers and employees especially), such concerns have a positive impact on compliance behavior.”

<sup>15</sup> Normative Compliance is defined by the author as “compliance based on a voluntary normative commitment to adhere to the law...Compliance is internalized by a sense of duty and does not require activation by some external force or pressure.”

32. Klawiter, Donald C., *Conspiracy Screens: Practical Defense Perspectives*, Competition Policy International (March 2012).  
<https://www.competitionpolicyinternational.com/file/view/6643>.

This article discusses screens as a tool, in addition to leniency programs, that can help detect and deter cartels. The article begins by pointing out that despite the enormous success of the Antitrust Division's corporate leniency program, wide segments of the economy have been ignored by antitrust enforcement because of both the sheer workload of the enforcers as well as their limited resources. Contemporaneously, there has been an increasing use of econometric analysis to determine if collusion is likely in a given market. The author argues that during this period where enforcers across the globe are looking to new detection methods, defense counsel should utilize this opportunity to use screens as a part of their compliance and internal investigation efforts, which, if it becomes ubiquitous, could help shape the way Judges think about and consider screens in litigation. The article also discusses when defense counsel should consider using screens. The author concludes by noting that with aggressive compliance, due diligence, econometric analysis, leniency programs, and careful observation of markets, enforcers and compliance counsel can detect more cartel activity.

33. Klawiter, Donald C. and Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Leniency for Executives*, 22-SUM Antitrust 77 (2009).  
[http://www.mayerbrown.com/files/Publication/dd5b0cf5-5724-4d6b-af9a-7f3a03f809cf/Presentation/PublicationAttachment/a9269d2d-bb8f-4848-ac58-d543f2789aa4/art\\_leniency\\_summer08.pdf](http://www.mayerbrown.com/files/Publication/dd5b0cf5-5724-4d6b-af9a-7f3a03f809cf/Presentation/PublicationAttachment/a9269d2d-bb8f-4848-ac58-d543f2789aa4/art_leniency_summer08.pdf).

This article provides an alternative incentive mechanism for corporate executives and other officers with substantial authority to reveal cartel activity that they either participated in or condoned. The authors provide a model that is based on the DOJ Leniency Policy, which they have named the Corporate Leniency Policy. The authors argue that the leniency programs established by the United States and now other enforcement authorities have been among the most effective vehicles for detecting illegal cartel activity. Thus, according to the authors, because being the "first in the door" is imperative to receiving leniency, implementing a corporate leniency policy would provide company executives the added incentive needed to disclose illegal cartel activity to the company earlier so the company can take advantage of the DOJ Leniency Policy. The article then goes through the list of conditions to leniency required by the DOJ as a model of the conditions that would be a part of the purported Corporate Leniency Policy. The authors conclude by arguing that a true corporate leniency policy would provide executives the necessary inducement to self-report when they would otherwise be more inclined to stay silent.

34. Kobak, James B., Jr. and Jeffrey R. Coleman, *Antitrust Compliance Programs – Taking the Next Step*, ABA Section of Antitrust Law, Antitrust Compliance Bulletin (2007).  
<http://www.hugheshubbard.com/files/Publication/5b08eebc-8821-4db7-b61b->

[f3fc9e4208cc/Presentation/PublicationAttachment/50286342-a39b-491e-aa87-f5e39df13122/Antitrust%20Compliance%20Bulletin%20March%202007.pdf](https://www.f3fc9e4208cc/Presentation/PublicationAttachment/50286342-a39b-491e-aa87-f5e39df13122/Antitrust%20Compliance%20Bulletin%20March%202007.pdf).

This is a summary of some of the key questions answered by Carole Basri, a corporate governance and compliance expert, in an interview conducted by the authors. Ms. Basri discusses what she views as the next logical step in antitrust compliance, a systematic follow-up to assess the compliance program and monitor its efficacy. She also discusses what people can do to improve or add to their program and why that is important. Furthermore, she discusses her involvement in implementing a program for a client using this approach and the processes of implementing and integrating this new approach into the client's existing antitrust compliance program. Finally, this approach of systematically following up and assessing a company's antitrust compliance program should be viewed as a supplement to other mechanisms that companies currently use to monitor their antitrust compliance program.

35. Lipsky, Abbott B., Jr., *Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement*, 75 *Antitrust L.J.* 965 (2009).  
[http://www.lw.com/upload/pubContent/\\_pdf/pub3989\\_1.pdf](http://www.lw.com/upload/pubContent/_pdf/pub3989_1.pdf).

(Abstract located at entry number 44).

36. Lipson, Barry J., Esq., *Adopting an Effective Antitrust Compliance Program*, *The Trade Association Connection*, 3 No. 16 *Lawyers J.* 5. (2001).  
<http://www.scribd.com/doc/34344108/Adopting-An-Effective-Antitrust-Compliance-Program-by-Barry-J-Lipson-A-Corplaw-Commentary>.

This article focuses on monitoring and supervision of trade association activities for antitrust compliance and its importance to a successful and effective antitrust compliance program. The author emphasizes the element of *combination* that is supplied by the mere existence of a trade association and the prevalence of trade association activity in antitrust enforcement investigations of *per se* violations such as price-fixing and market division. Given the U.S. Supreme Court's jurisprudence vis-à-vis vicarious liability for a corporation whose employee was acting within the scope of his/her apparent authority, the author argues that "all who engage in trade association activities...[should be] mindful of the antitrust risks inherent in their participation and/or membership." The author emphasizes the importance of making it clear to all employees that what is learned through the company's antitrust compliance program apply with the same force to all trade association activity. The rest of the article is devoted to discussing (a) the constant re-evaluation of whether trade association memberships be abandoned or prohibited based on a cost-benefit analysis of the importance of the membership to the corporate objectives; (b) special seminars which counsel on the "Do's and Don'ts of Trade Association Membership"; (c) the most prevalent antitrust problem areas that arise in the trade association setting that must be covered in the seminar; (d) the proper course of conduct and what to be weary of during participation in Trade Association Meetings; and (e) the importance



of periodic refresher seminars and audits. The author concludes by stating the importance of a company's antitrust counsel to be charged with the authority to assure that the trade association has its own effective antitrust compliance program and to ensure that participation in the trade association's activities does not expose the company to antitrust risks.

37. Murphy, Joseph and William Kolasky, *The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior*, Antitrust, Vol. 26, No. 2 (2012).

<http://www.wilmerhale.com/files/Publication/8859279d-3a5a-430d-9757-056feddc6b37/Presentation/PublicationAttachment/9989c14c-32b8-4e5a-ad28-0b0aa3caac6c/Spring12-MurphyCThe%20Role%20of%20Anti-Cartel%20Compliance%20Programs%20In%20Preventing%20Cartel%20B.pdf>.

(Abstract located at entry number 13).

38. Murphy, Joe, *Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play?*, Organization for Economic Co-Operation and Development (OECD) (October 7, 2011).

<http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/48849071.pdf>.

(Abstract located at entry number 53).

39. Van Fleet, G. Allen, *Antitrust Compliance in the Current Administration and the Next?*, Greenberg Traurig, LLP (February 11, 2012).

<http://www.natlawreview.com/article/antitrust-compliance-current-administration-and-next>.

(Abstract located at entry number 20).

#### *Compliance In A Globalized World*

40. Banks, Theodore L., and Joe Murphy, *The International Law of Antitrust Compliance*, 40 Denv. J. Int'l L. & Pol'y 368, 375 (2012).

The article begins by describing the progression of international criminal law around the world and the growing consensus that companies should “adopt compliance and ethics programs to utilize management techniques to foster compliance with law.” Furthermore, given that it can be said that it is now commonplace for companies to have compliance programs (or elements thereof), the authors submit that it is time for compliance and ethics programs to be recognized in the antitrust law field by US and other governments as a standard of international law. The authors then discuss the concept of organizational liability and the sometimes draconian effects of liability that is imputed to the organization despite its best efforts to stop the violation from occurring and thus it is the diligence of the corporation in enforcing its compliance policy that should be the key factor in determining whether it is the kind of program

that is entitled to some mitigation of legal penalties for acts of employees that disobeyed the policy. The authors posit that enforcement agencies should focus more on the prevention of violations rather than trying to figure out who to punish after the harm is done. The article then discusses the recognition of the importance and value of compliance and ethics programs inherent in the U.S. Sentencing Guidelines. The trend, according to the authors, has developed because of a recognition that corporations are comprised of individuals whose every actions cannot be controlled by the corporate entity. Next, the article addresses the U.S DOJ Antitrust Division's divergent policies compared to the rest of the DOJ being that it is the only division in which compliance programs are not taken into consideration nor are they required as a condition to leniency or settlement. Furthermore the authors noted the dichotomy within the antitrust community with the DOJ Antitrust Division on one side and a growing number of countries on the other side where competition compliance programs are taken into consideration and the importance of which is recognized, such as Canada, the UK, Australia, and even the U.S.'s own Federal Trade Commission. The authors conclude by discussing the types of steps needed to make a program actually work, those that may be missing in jurisdictions that follow the DOJ Antitrust Division model, and how to bridge the gap created by that model by giving proper consideration to competition compliance programs.

41. Hall, Matthew, *Key EU Competition Law Compliance Issues*, Corporate Compliance Insights (April 2012). <http://www.corporatecomplianceinsights.com/key-eu-competition-law-compliance-issues/>.

This article discusses four key EU competition law compliance issues. First, cartels are the highest risk area. Here, the article discusses the fact that cartels are the highest risk area and as such should be the focus of any good corporate compliance program. Furthermore, the EU has recently held that a parent corporation can be held liable for the activities of a partly owned subsidiary thus serving as a reminder that companies cannot ignore their partly owned subsidiaries when assessing competition law risk in the EU. Second, the article discusses information exchange as a risk in competition compliance noting that “competing companies need to be aware that any exchange of commercially sensitive information that may impact business in the EU is dangerous and may be treated as...a cartel.” Next, the article discussed issues related to parallel trade, noting that agreed restrictions on trade between EU member states is a serious infringement of competition law in the EU. Finally, resale price maintenance (RPM) is discussed. A key distinction between U.S. and EU competition law concerns RPM, where the EU has a more draconian view of RPM and is thus seen as the most serious infringement of EU competition law vis-à-vis vertical relationships. The article concludes by discussing the increased support of compliance programs by the European Commission as evidence by the guidance on EU competition law compliance it produced and that an appropriate compliance regime must be put in place that takes account of the peculiarities of EU law.

42. Kaplan, Jeff, *Competition Law Risk Assessments*, Corporate Compliance Insights (Dec. 2011). <http://www.corporatecomplianceinsights.com/competition-law-risk-assessments/>.

The author begins by pointing out that the frequency with which large fines are imposed, signals that no compliance risk is greater than in the area of antitrust/competition law. The article next discusses the new guidance document issued by the European Commission entitled, *Compliance matters: What companies can do better to respect EU competition rules*. The article then discusses the basic framework articulated in the EC's guidance. The benefit of this guidance is that "coming from the European Commission, the imperative of conducting competition law risk assessments...will now be harder to ignore." The author concludes by pointing out that for global companies, their competition law risk assessment should be broader than just the U.S. and EU related risks.

43. Lee, Michele, White & Case LLP, *Building an Effective Antitrust Compliance Program: International and Cultural Challenges*, ABA Section of Antitrust Law (2006).  
[http://www.whitecase.com/files/Publication/3e25b0bf-5925-497a-9cd7-c62ea2a0867f/Presentation/PublicationAttachment/61c41d99-b21a-471f-ac15-c8c7a56b23be/Article\\_compliance%20article.pdf](http://www.whitecase.com/files/Publication/3e25b0bf-5925-497a-9cd7-c62ea2a0867f/Presentation/PublicationAttachment/61c41d99-b21a-471f-ac15-c8c7a56b23be/Article_compliance%20article.pdf).

The article begins by emphasizing the importance of preventing an antitrust violation as opposed to "curing" a violation in the form of prison sentences, criminal fines and treble civil damages, and reputational damage. An effective compliance program, according to the author, includes three objectives: (1) development; (2) implementation; and (3) monitoring. The rest of the article is devoted to examining the "challenges multi-national corporations face in developing a compliance program that satisfies these objectives." The author concludes that the stakes are high for a company, and that failure to consider the laws and business practices of regional offices prevent the company from effectively educating its employees around the world, thus, "companies should invest in developing a global policy, but remember to 'think locally.'"

44. Lipsky, Abbott B., Jr., *Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement*, 75 Antitrust L.J. 965 (2009).  
[http://www.lw.com/upload/pubContent/pdf/pub3989\\_1.pdf](http://www.lw.com/upload/pubContent/pdf/pub3989_1.pdf).

This article describes the antitrust compliance challenges facing the increasing number of multinational business firms and the main tasks these firms are forced to confront given the continuing surge of global antitrust enforcement. The article is divided into three categories: (1) awareness and acceptance by the firm of the significant potential impact of this global surge in enforcement as well as how the company reacts, that is, how and whether it decides to take on significant compliance efforts; (2) finding compliance resources, *i.e.*, the identification and obtaining of resources needed by the business to reach an acceptable degree of antitrust compliance; and (3) managing those resources. The article concludes with some observations about the evolution of the global antitrust milieu and the importance for multinational enterprises of "adopt[ing] a global perspective on antitrust compliance."

45. Ray, Neil, *Why You Need a Robust EU Antitrust Compliance Program & How to Implement It*, Corporate Compliance Insights (April 12, 2012).  
<http://www.corporatecomplianceinsights.com/why-you-need-a-robust-eu-antitrust-compliance-program-how-to-implement-it/>.

The focus of this article is on explaining why it is important to have a robust EU antitrust compliance program and also gives some guidance on how to implement such a program. The determinative reasons for having a robust EU antitrust compliance program are the potential to incur serious penalties for violations and the likelihood of adverse publicity if the company is found to have infringed EU antitrust laws. The author then gives factors that go into a robust EU antitrust compliance program: (1) tailor your program to your business sector; (2) enlist management support; (3) know your employees' work; (4) draft an easy-to-understand compliance manual; (5) mention the disciplinary consequences; (6) do compliance training; (7) monitor compliance; and (8) do not destroy documents.

*Recommended Policy Considerations*

46. Banks, Theodore L., *The Trouble With Antitrust Compliance and 10 Ways to Fix It*, Law Technology News (May 01, 2012).  
<http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1335713542002>.

This article begins by discussing how the American Bar Association Antitrust Section's emphasis on compliance, enforcement, increased penalties, and international cooperation highlight the importance of an antitrust compliance program. Yet companies continue to violate the antitrust laws. The author discusses the history behind antitrust compliance, noting that it was less than 60 years ago that antitrust compliance programs "got their first exposure" and companies began to pay attention to antitrust compliance. The article then proceeds to discuss 10 ways to "fix" antitrust compliance.

47. Klawiter, Donald C. and Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Leniency for Executives*, 22-SUM Antitrust 77 (2009).  
[http://www.mayerbrown.com/files/Publication/dd5b0cf5-5724-4d6b-af9a-7f3a03f809cf/Presentation/PublicationAttachment/a9269d2d-bb8f-4848-ac58-d543f2789aa4/art\\_leniency\\_summer08.pdf](http://www.mayerbrown.com/files/Publication/dd5b0cf5-5724-4d6b-af9a-7f3a03f809cf/Presentation/PublicationAttachment/a9269d2d-bb8f-4848-ac58-d543f2789aa4/art_leniency_summer08.pdf).

(Abstract located at entry number 33).

48. Kobak, James B., Jr. and Jeffrey R. Coleman, *Antitrust Compliance Programs – Taking the Next Step*, ABA Section of Antitrust Law, Antitrust Compliance Bulletin (2007).  
<http://www.hugheshubbard.com/files/Publication/5b08eebc-8821-4db7-b61b-f3fc9e4208cc/Presentation/PublicationAttachment/50286342-a39b-491e-aa87-f5e39df13122/Antitrust%20Compliance%20Bulletin%20March%202007.pdf>.

(Abstract located at entry number 34).

49. Murphy, Joe, *Antitrust Compliance Programs: SCCE's Survey Says They Are Less Than They Should Be*, Corporate Compliance Insights. (June 2012).  
<http://www.corporatecomplianceinsights.com/antitrust-compliance-programs-scces-survey-says-they-are-less-than-they-should-be/>.

(Abstract located at entry number 11).

50. Murphy, Joe, *How DG Competition and U.S. DOJ Antitrust Division Hurt Compliance Efforts*, Competition Policy International (2012).  
<https://www.competitionpolicyinternational.com/file/view/6634>.

(Abstract located at entry number 12).

51. Murphy, Joe, *The Key For An Effective Anti-Cartel Compliance Program*, Corporate Compliance Insights (March 8, 2012). <http://www.corporatecomplianceinsights.com/the-key-for-an-effective-anti-cartel-compliance-program/>.

The author begins by asking how one can ensure that they have an effective corporate compliance program that fights cartels, the greatest antitrust risk. A central part of the answer is having a person in charge of the program who is “empowered, autonomous, properly positioned and professional, with sufficient resources to do the job.” It is particularly important in antitrust, for improving the positioning of the company’s chief ethics and compliance officer (CECO) given that the most egregious antitrust violations tend to involve senior officials. On this point, the author references Canada’s guidance in positioning the CECO to a effectively by making him/her accountable to the board with sufficient independence, empowerment, and financial resources. However, the author notes that the US DOJ Antitrust Division and the EU’s treatment of antitrust compliance programs has all but eliminated its leverage in offering guidance on compliance because “neither agency considers compliance programs for any enforcement purpose, and neither one even imposes programs when companies admit to cartel violations.” Corporate officers are thus less inclined to view seriously any advice given by these agencies because the “agency itself has said it does not care whether [the company] follow[s] that advice or not.”

52. Murphy, Joseph and William Kolasky, *The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior*, Antitrust, Vol. 26, No. 2 (2012).  
<http://www.wilmerhale.com/files/Publication/8859279d-3a5a-430d-9757-056feddc6b37/Presentation/PublicationAttachment/9989c14c-32b8-4e5a-ad28-0b0aa3caac6c/Spring12-MurphyCThe%20Role%20of%20Anti-Cartel%20Compliance%20Programs%20In%20Preventing%20Cartel%20B.pdf>.

(Abstract located at entry number 13).

53. Murphy, Joe, *Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play?*, Organization for Economic Co-Operation and Development (OECD) (October 7, 2011).  
<http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/48849071.pdf>.

The author begins by asking, “[w]hat is a compliance and ethics program”? The answer, according to the author, is a management commitment to do the right thing coupled with effective management measures and steps to make that happen. Next there is a discussion of the role that compliance programs should play in enforcement, focusing on the effect that enforcement agencies should give to compliance programs, ranging from a complete “pass” for having a compliance program to completely ignoring a company’s compliance program. The possibility of a middle ground is then discussed, where the question to be considered is one of degree as to what types of corporate compliance efforts should be recognized. The author then discusses the dichotomy in competition law compliance, distinguishing compliance efforts for economically complex matters (rule of reason violations) from the hardcore cartel (per se) violations.<sup>16</sup> Next the author discusses what is wrong with current company competition law programs, discussing the apparent diminution in competition compliance program innovation, reach and effectiveness.<sup>17</sup> Additionally, the author notes the lack of any assurance that even a vigorous and expensive compliance program will result in the company being the first to disclose and enjoy the benefits of leniency by noting several examples to support this assertion. The author then asks whether compliance and ethics programs can have any effect in preventing cartels. Here the author discusses how training, techniques that go beyond merely sending a message to employees and hoping for the right response, and screening<sup>18</sup> can help surface even hidden misconduct. Thereafter the author briefly discusses whether compliance and ethics programs are prohibitively expensive for small and medium sized enterprises (SMEs) and concludes that SMEs do in fact have cost-effective methods of compliance. The article briefly survey’s the different approaches taken vis-à-vis competition law compliance programs around the world, with a focus on the United States and the EU. The author then looks to whether there is anything to take away from approaches taken to compliance and ethics programs in other areas of the law such as anti-corruption enforcement and bribery. Finally, there is a discussion of how governments can promote and practically assess the diligence of an effect compliance program.

54. Murphy, Joe and Donna Boehme, *Fear No Evil: A Compliance and Ethics Professionals’ Response to Dr. Stephan*, Social Science Research Network (2011).

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<sup>16</sup> The author notes that it is in the area of cartels where compliance programs both face the greatest challenge and have the greatest potential to make an impact.

<sup>17</sup> In this context, the author notes, with concern, that despite increases in both corporate fines and individual prison terms, large companies are still susceptible to recidivism. With respect to leniency programs, there is a discussion of the inherent short-comings in such programs given that a conspiring company makes use of such program after the violation has already occurred (likely after a substantial time) and the damage done.

<sup>18</sup> The author notes that screening is a technique that is rarely if ever used but is one that can readily help a company to more efficiently direct their limited resources to target violations on a more cost-effective basis.

(Abstract located at entry number 16).

55. Sokol, D. Daniel, *Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement*, *Antitrust Law Journal*, Vol. 78 (June 6, 2012).  
<http://ssrn.com/abstract=2079336>.

(Abstract located at entry number 18).

56. Sokol, D. Daniel, *Detection and Compliance in Cartel Policy*, *Competition Policy International* (2011). <https://www.competitionpolicyinternational.com/file/view/6549>.

The author begins by noting how companies have “spent an increasing amount of resources addressing...compliance,” but that despite increased literature focusing on improved detection of wrong-doing it is surprising that U.S. antitrust “has not been on the cutting edge of compliance and detection,” primarily relying on leniency programs. But, argues the author, leniency may not detect and deter the worst cartels<sup>19</sup>, but rather may be going after those cartels that are “easy to find.” Recent work suggests that the U.S. leniency program does not lead to optimal cartel deterrence. The author then goes on to suggest some additional ways to promote cartel detection, but primarily focuses on a need for increased incentives for whistle-blowers. Because studies suggest that “employee incentives are not aligned with the firm in terms of compliance,”<sup>20</sup> the author suggests the use of a bounty to increase the incentive for whistle-blowers to come forward. The author uses South Korea which has implemented a system of *qui tam*<sup>21</sup> rewards, as an example. In conclusion, the author opines that cartel detection in the U.S. can be improved with improved incentives within the firm that combine increased penalties and rewards.

#### Comparative Policy Considerations

57. Autorité de la concurrence, *Framework-Document of 10 February 2012 on Antitrust Compliance Programmes* (Feb. 2012).  
[http://www.autoritedelaconcurrence.fr/doc/framework\\_document\\_compliance\\_10february2012.pdf](http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf).

This guidance on antitrust compliance programmes put out by the Autorité de la concurrence discusses the Autorité’s view on compliance programs and the treatment companies get for having a antitrust compliance program in place. The document is broken down into four sections. First, the article discusses objectives and tools of competition law enforcement such as the policy of “ensuring the competitive

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<sup>19</sup> “The worst offenders in terms of overcharges.”

<sup>20</sup> This is because an employee or a lower level manager faces the risk of losing his/her job if he/she comes forward and discloses information of illegal activity. Thus, the author argues, the cost of coming forward with information outweighs the benefits of keeping silent.

<sup>21</sup> *Qui tam* refers to payment of some or all of the penalty imposed to the person who assists the prosecution by providing information.

functioning of the economy” and the punitive or corrective instruments to carry out that policy. Second, the benefits of competition law compliance programmes are discussed. The Autorite considers effective compliance programmes those programs that seek to (1) “prevent the risk of committing infringements”; and (2) “provide the means of detecting and handling misconducts that have not been avoided in the first place.” Next, the document lays out the Autorité’s requirements for effective competition law compliance programmes. Lastly, the Autorite delineates the consequences attached to competition law compliance programmes. Namely, that the “existence of an effective compliance programme is beneficial because it enables infringements to be avoided in the first place.”

58. Autorité de la concurrence. *Antitrust compliance and compliance programmes: Corporate tools for competing safely in the marketplace* (2012).  
[http://www.autoritedelaconcurrence.fr/doc/brochure\\_conformite\\_uk.pdf](http://www.autoritedelaconcurrence.fr/doc/brochure_conformite_uk.pdf).

This brochure by the French competition enforcement authority addresses antitrust compliance and tools that enterprises can use to compete in the marketplace in conformity with competition rules. The brochure discusses (a) promoting a culture of compliance with a view to obtaining concrete results; (b) why an enterprise should set up a compliance program; discussing the heavy penalties along with the other risks associated with infringing competition law; (c) how to structure a compliance program; providing five key features for the development of an efficient program; and (d) discussing the significance of the fact that compliance programs may be taken into consideration even in the event of anticompetitive agreements or abuses of a dominant position.

59. Banks, Theodore L. and Joe Murphy, *The International Law of Antitrust Compliance*, 40 *Denv. J. Int'l L. & Pol'y* 368, 375 (2012).

(Abstract located at entry number 40).

60. Banks, Theodore L. and Nathalie Jalabert-Doury, *Best Practices for Compliance Programs: Results of an International Survey*, *Concurrences: Revue des droits de la concurrence*, *Competition Law Journal*, *Concurrences* N 2-2012 (2012).

This article surveys several countries regarding competition compliance programs and the treatment that they receive within each of the participating countries’ respective jurisdictions. The article begins by listing some of the essential attributes of a successful competition compliance program. It is followed by a brief history of competition law in the U.S. and the EU, noting that in each jurisdiction, given the lack of acknowledgement given to competition compliance programs, companies have grown cynical towards antitrust compliance despite the recognition that compliance is nevertheless important to the overall ethical corporate culture. The survey is divided into six sections. The first section provides an introduction whereby each participant is asked to describe how antitrust enforcement is organized in their respective jurisdiction(s). Second, the survey addresses compliance advocacy and guidance; each participant is asked to provide an overview of any compliance



guidance released by the competition authority or court in their respective jurisdiction. The next section addresses voluntary ex-ante compliance programs and asks whether in each jurisdiction there are any benefits or risks in entering into voluntary compliance programs ex-ante (pre-enforcement). The U.S. may reduce a fine in the presence of a compliance program, however there appear to be no statistics to support the assertion, rather merely anecdotal evidence is available. Similarly, many of the countries do not appear to find the presence of an ex-ante compliance program to be an aggravating factor, most countries appear to recognize that even a genuine competition compliance program might not be 100% effective. Sham programs however, may be considered in fine assessment. The fourth section deals with compliance programs in leniency or settlement proceedings. While some countries may require the implementation of a compliance program as a condition to settlement, there appears to be an overwhelming number of countries which do not take compliance programs into consideration in granting leniency nor require them as a condition to settlement. Most notably, the U.S. Antitrust Division appears to take the position that a compliance program serves the benefit of allowing for speedy detection so the company can be the first to take advantage of the leniency program but does not require a compliance program as a prerequisite to leniency nor is it required as a condition to settlement. The FTC, however, regularly imposes compliance requirements in its decrees. The next section discusses whether companies that have already been involved in an enforcement action face any risk for not implementing a compliance program. Again, the majority of jurisdictions appear to disregard the lack of a compliance program for a repeat violator while a minority such as Australia and Canada may either seek a court order requiring implementation of a compliance program or subject the company to further enforcement action. The final section addresses compliance programs in other fields and asks whether in their respective jurisdictions, the participants were aware of a more proactive policy towards compliance programs.

61. Berzins, Michelle and Sofo, Francesco, *The Inability of Compliance Strategies to Prevent Collusive Conduct*, Corporate Governance, Vol. 8 Iss: 5, pp.669-680 (2008).

The purpose of this paper is to demonstrate that cartel conduct is a common example of non-compliance with competition laws and analyze two areas of cartel behavior in order to shed light on the lessons to be learned regarding aspects of corporate governance. The first is the extent to which employees of organizations were aware of the seriousness and illegality of their cartel conduct, and the second is the extent to which determining bodies acknowledged the presence or absence of compliance strategies within corporations being prosecuted for cartel conduct. In total, 69 publicly available investigatory outcomes sourced from 11 different jurisdictions were analyzed. The findings, according to the authors, suggest a need for competition regulators to educate and raise awareness amongst business people to improve understanding of the harmful effects of cartels and of relevant legislative provisions in order to achieve better corporate governance and adherence to enacted laws.

62. Dee, Bill, *The Australian Approach to Competition Law Compliance Programs*, Competition Compliance International (Feb. 2012).  
<https://www.competitionpolicyinternational.com/file/view/6638>.

This article discusses Australia’s approach to competition law compliance programs. It begins by discussing the two “players” when it comes to compliance law and the role of compliance programs: (1) Australia’s enforcement agency, the Australian Competition and Consumer Commission (“ACCC”); and (2) the Australian Federal Court. The rest of the article is divided into three sections which discusses (1) the ACCC’s approach to compliance programs; (2) enhancing the ACCC’s advice by the inclusion of structural, operational, and maintenance elements of a compliance management system; and (3) the judicial view of compliance programs. In sum the article concluded by reemphasizing that the pleading of compliance programs as a mitigating factor in an enforcement action is not clear cut in Australia. Rather at the enforcement agencies, there is no readily accessible document produced by the ACCC which delineates (a) what it considers are the essential elements of a compliance program or (b) that the ACCC will consider submissions on a compliance program when considering enforcement action. With regards to the Federal Court level, the article concludes by noting that there are “developments towards identifying indicia of compliance programs as constituting mitigation factors for a competition law breach” but further judicial development is needed.

63. Hall, Matthew, *Key EU Competition Law Compliance Issues*, Corporate Compliance Insights (April 2012). <http://www.corporatecomplianceinsights.com/key-eu-competition-law-compliance-issues/>.

(Abstract located at entry number 41).

64. Murphy, Joe, *How DG Competition and U.S. DOJ Antitrust Division Hurt Compliance Efforts*, Competition Policy International (2012).  
<https://www.competitionpolicyinternational.com/how-dg-competition-and-u-s-doj-antitrust-division-hurt-compliance-efforts/>.

(Abstract located at entry number 12).

65. Murphy, Joe, *Lessons On Antitrust Compliance from South America*, Corporate Compliance Insights (August 2012).  
<http://www.corporatecomplianceinsights.com/lessons-on-antitrust-compliance-from-south-america/>.

This article focuses on what the U.S. enforcement agencies—primarily the U.S. Department of Justice Antitrust Division—can learn from competition policy vis-à-vis compliance in South American. In the U.S., argues the author, “as long as [the Antitrust Division’s] ‘pipeline’ of cartel cases remains full, [the Antitrust Division] appear[s] to be quite content.” Furthermore, with respect to compliance programs, the DOJ does “nothing of any substance to promote compliance programs.” The

author thus suggests looking at enforcement agencies in South America for a more proactive approach. As one example, the Chilean competition authority has issued a comprehensive guide on compliance programs that explains steps companies should consider taking in their compliance programs and why doing so can “result in concrete benefits under the Chilean enforcement system.” In Chile, companies are given clear notice that the enforcement authority will consider a company’s diligent compliance program in making recommendations for penalties. The author then discusses several other aspects of the Chilean policy and concludes by recommending that other enforcement authorities consider this Chilean model.

66. Soltész, Ulrich, *Antitrust Enforcement In The European Union – Muscles From Brussels*, Corporate Compliance Insights (April 2012).  
<http://www.corporatecomplianceinsights.com/antitrust-enforcement-in-the-european-union-muscles-from-brussels/>.

The article begins by discussing the European Commission’s aggressive enforcement of competition laws, with fines set at levels designed to punish and deter companies that have or may break the law. The EU’s competition rules have been largely inspired and modeled after the United State’s Sherman Antitrust Act. The article discusses three areas of competition policy and whether the United States and the EU converge or diverge on particular issues of competition law. First, the article discusses the similarities of the U.S. and the EU vis-à-vis cartel enforcement. For example, the U.S. and EU both prohibit agreements between competitors to restrict competition and have no countervailing efficiencies. Second, the article discusses the increasing importance of private enforcement in the EU. Despite the fact that 95% of all antitrust cases in the U.S. are brought by private claimants, the importance of private enforcement has significantly increased in EU competition policy. The article then discusses the use of class actions in Europe. Whereas in the U.S. class actions are regularly used, in the EU, the Commission, while recognizing the importance of collective redress nevertheless recognized that safeguards must be implemented in order to avoid the perceived drawbacks of the U.S. system. The message to be gleaned by this article is that compliance efforts matter.

67. Stephan, Andreas, *Why the U.K.’s New Approach to Competition Compliance Makes for Good Enforcement*, Competition Policy International (2012).  
<https://www.competitionpolicyinternational.com/file/view/6635>.

In this article the author discusses how the U.K.’s approach to business compliance has significantly diverged from that of both the European Commission and the U.S. Department of Justice Antitrust division.<sup>22</sup> “Neither the [EC] nor the [DOJ Antitrust] reward infringing firms for their compliance efforts.” These jurisdictions believe, according to the author, that stiff sanctions should be enough incentive for firms to

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<sup>22</sup> “In June 2011 the U.K.’s regulatory authority [OFT] announced a fresh approach [relative to the European Commission and the DOJ: Antitrust] to competition law compliance.” Two key components in this approach are (1) a compliance guide published for businesses and directors; and (2) a willingness to grant a fine discount (up to 10%) where appropriate compliance efforts are taken.

prevent infringements and that a failure to do so deserves harsh treatment. The author goes on to suggest three flaws in the “assertion that such a restrictive approach to compliance will be deterrence enhancing.”<sup>23</sup>

68. U.K., The Office of Fair Trading, *Competition Law Compliance*, U.K. OFT (2011).  
<http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/>.

This is the United Kingdom’s website for the Office of Fair Trading (OFT). In June 2011 the OFT published new guidance for businesses on competition law compliance. This includes specific advice for directors, general guidance for all businesses, a quick guide to competition law compliance as well as a short film which includes acted out footage of a “dawn raid” as well as interviews with competition law specialists explaining what competition law is, why it is important, and how businesses can implement the OFT’s suggested four-step process for competition law compliance. The four-step process is presented in what the OFT calls the “four step compliance wheel” which explains the four steps which the OFT recommends businesses take to ensure compliance with competition law. Importantly, the OFT “believes that directors are key to establishing and maintaining an effective compliance culture within their company. In order to determine the extent of the director’s responsibility for the infringement of competition law, the OFT will take into account the individual director’s level of commitment to competition law compliance and the steps he/she took to prevent, detect and bring to an end infringements of competition law by the company.”

69. Volkov, Michael, *Antitrust Enforcement and Compliance Keeps Chugging Along*, Corporate Compliance Insights (June 2012).  
<http://www.corporatecomplianceinsights.com/antitrust-enforcement-and-compliance-keeps-chugging-along/>.

(Abstract located at entry number 21).

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<sup>23</sup> (1) It wrongly assumes that infringements are committed by the firm as an institution rather than by individuals; (2) Even if corporate fines in cartel cases were at “optimal” levels, they would still be unlikely to deter the most deliberate violations of competition law; and (3) Information about competition law enforcement and the size of fines will not necessarily disseminate far beyond the industries involved in an infringement decision.

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