Compliance Plus? Proposed Fine Reductions for Audited, Strengthened Compliance Programmes

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I. Introduction

Fire brigades have long since stopped seeing their job as simply putting out fires. They realised that one of the most effective ways that they can save lives and property is to spend time and money on fire prevention. This does not mean that they stop fighting fires; but it does reduce the number of fires they have to fight, which is better for society as a whole.

Competition authorities have a similar dual role. They exist to find and end infringements of the competition rules, but they also realise that preventing competition law infringements from happening in the first place is simply better for everyone. So they provide guidance on the interpretation of the rules; they establish penalties that not only punish the instant infringers, but also provide general deterrence to others from engaging in similar behaviour; they encourage companies to have effective compliance programmes.

In terms of establishing the appropriate level of punishment and deterrence, this article does not consider the possibility of introducing criminal sanctions to effectively fight cartels, or other sanctions on individuals such as director disqualification orders, because such proposals would require specific EU legislation, and likely would require many years of negotiations given its sensitive nature.1

Some competition authorities encourage companies to put in place effective compliance programmes, by reducing fines levied on infringements where the companies have compliance programmes in place. This article does not address the merits of giving credit to companies for existing compliance programmes, as the European Commission (‘Commission’) shows no signs of changing its opposition to this policy.

Key Points

- Compliance is fundamental to reducing competition law infringements but in-house counsel often face difficulties in getting the appropriate level of support and budget for effective competition law compliance.
- Within the context of settlements, the European Commission could support future increased compliance efforts by companies by granting a limited reduction in fine for auditable and enforceable commitments offered by companies for those increased future efforts.
- This proposal is straightforward, realistic, and easily and quickly implementable in the context of the existing legal framework. It benefits both the European Commission in terms of an enhanced management and optimisation of its internal resources and companies in terms of financial resources, which can be planned and spread over the years, for additional antitrust compliance.

Rather, the authors address here an approach to forward-looking compliance programmes that is consistent with the Commission’s current position, and which could be implemented immediately, without the need for new legislation.

If the Commission implemented this proposal, it could help make its enforcement more effective, decrease the risk of cartels forming in the future, and support in-house counsel by not only raising antitrust compliance up the list of their CEO’s priorities, but also enhancing the antitrust compliance culture of their companies, the most important requirement for compliance programmes to be truly effective.

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1 Under EU competition law, infringements can only be committed by undertakings or associations of undertakings, not by individuals; moreover, Regulation 1/2003 does not harmonise sanctions for infringements and prohibits the Commission from imposing fines ‘of a criminal law nature’ following its administrative procedure. It has however been argued that, since the area of competition law has been subject to harmonisation measures (e.g. Regulation 1/2003), Article 83(2) TFEU (‘If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned’) could confer the competence on the EU to indirectly introduce – via a directive – criminal sanctions for competition law infringements, should the latter be ultimately considered to be essential for the effective implementation of the EU competition policy.
This article sets out one way – building on, but differing from, earlier suggestions\(^2\) – in which this aim could be achieved in the context of the present legislative framework, by using limited fine reductions to incentivise increased and audited future antitrust compliance efforts.

While the authors believe that the present proposal will enhance the effectiveness of antitrust compliance programmes, they also acknowledge that it is only one ‘tool’ to achieve this aim, and not a panacea.

**II. The ‘status’ of compliance programmes at EU level**

First, a few words on the Commission’s current policy and its rationale.

In the now rather distant past, the Commission sometimes regarded a compliance programme as a mitigating circumstance; but its policy had changed by the late 1990s, and this policy change was upheld by the Court:

‘...the Court does not accept the argument drawn from the alleged implementation of a programme for compliance with competition rules. Admittedly, it is important that the applicant should take measures to prevent any future infringement of Community competition law by its staff, but that does not affect the fact and scope of the infringement found. The mere fact that, in certain cases, the Commission took account in earlier decisions of the introduction of an information programme as a mitigating circumstance does not mean that it was under an obligation to do so in this case.’\(^3\)

The European Commission has publicly ruled out using the existence of a compliance programme as a mitigating factor to justify any reduction in fine for cartelists. In a 2010 speech, then Competition Commissioner Almunia was unequivocal:

‘When I talk about these things, I am often asked whether companies should be rewarded for operating compliance programmes when they are found to be involved in illegal commercial practices.

The answer is no. There should be no reduction of fines or other preferential treatment for these companies.’ [emphasis in original]\(^4\)

There has been no suggestion that Commissioner Vestager is minded to reconsider her predecessor’s view. The Commission’s reasons for refusing the acceptance of existing compliance programmes as a mitigating circumstance include the difficulty of assessing whether a compliance programme was effective in practice or merely a paper programme.

But the Commission is not – yet – willing to grant a compliance reduction even where a compliance programme was demonstrably effective. The Commission would certainly accept, for example, that an effective compliance programme may have reduced, although not eliminated, the number of cartels a company enters into over any given period. The compliance programme would then not have been perfect, but it may still have succeeded in part. This would not, in the Commission’s view, argue for a reduction in fines as the Commission would then argue that the real benefit of the compliance programme is the cartels not entered into, where no fines would be levied at all.

The Commission has identified other difficulties in reducing fines based on existing compliance programmes, including, for example, that of potentially discriminating between different companies who had and did not have compliance programmes but both participated in the same cartel.\(^5\)

That said, the Commission does encourage compliance programmes. Commissioner Almunia explained the Commission’s view as follows:

‘We are trying to support the adoption of compliance programmes through different channels:

We disseminate comprehensive information on EU competition rules and their implementation through the web and other means.

We are also in constant dialogue with business people and other stakeholders to refine our guidelines, notes, and other information material.

And we never pass up an opportunity – such as your conference today – to encourage companies to build their own compliance and training programmes.’\(^6\)

And later that year the Commission also published a brochure on compliance – Compliance Matters – which,
although not setting out detailed guidance, did present a simple analysis of the risks, benefits and principles of competition law compliance.

Through various public interventions, the Commission has identified two main benefits for companies that invest in compliance programmes. First, it reduces the likelihood of entering into a cartel in the first place. Then second, if a company does find itself in a cartel, it makes it more likely that it will be uncovered quickly within the company which allows it to end the anticompetitive behaviour, and gives it an advantage in any leniency race. The Commission has stated that it does not believe that a reduction in fine would further incentivise compliance, and sees problems with putting a fine reduction policy into practice.

The Bundeskartellamt does not consider a compliance programme to constitute either a mitigating or an aggravating factor, arguing that ‘the mere existence of a corporate compliance programme is a neutral factor for determining the amount of fines and does not warrant reductions. Compliance is a legal obligation of undertakings – company law requires firms to make compliance efforts – and there can be no reward for not observing the law’.

The Bundeskartellamt argues that companies are already rewarded for their compliance programmes, as they allow for better detection of infringements and, consequently, fine reductions under the leniency programme.

III. The ‘status’ of compliance programmes in selected EU Member States

There is no common approach among the national competition authorities of EU Member States with regard to the role of compliance programmes in determining antitrust fines.

Some authorities (e.g. UK, Italy) specifically provide for the possibility of a fine reduction for companies that had a compliance programme in place at the time of the infringement. Other authorities (e.g. Germany) consider it a legal obligation to operate an effective compliance programmes and hence do not reward the fulfilment of this obligation. Others (e.g. France) reward only forward-looking compliance commitments by the infringing company. These various approaches are briefly summarised below with reference – by way of example – to those Member States that adopt such approaches.

A. No role for compliance programmes: the German example

The German Bundeskartellamt does not provide fine reductions for a compliance programme in place before or at the time of the infringement nor for a commitment by the company to adopt and implement one in the future.

B. ‘Existing’ or ‘New’ compliance programmes: the Italian and UK examples

In the UK, the Office of Fair Trading – now Competition and Markets Authority (‘CMA’) – issued guidance documents that explicitly provide for a fine reduction of up to 10 per cent in case of a compliance programme implemented at the time of the infringement.

However, the CMA does not consider a compliance programme to automatically lead to a fine reduction. The mere existence of a compliance programme is not sufficient, the company must adduce evidence of a ‘clear and unambiguous commitment’ to compliance throughout the organisation. For a fine reduction to be granted by the CMA, ‘adequate steps with a view to ensuring compliance’ with competition law must have been taken by the company. Such adequate steps may include competition law risk identification, risk assessment, risk mitigation and review activities. These ‘adequate steps’ may also include post-infringement compliance efforts, according to the CMA – in theory, as well as in practice. This approach has been followed and confirmed by the UK Competition Appeal Tribunal.

Similarly to the UK approach, under the 2014 Fining Guidelines issued by the Italian Competition Authority (‘ICA’), the ICA may take into account, as an attenuating circumstance rewarded with a fine reduction of up to 15 per cent, the adoption of a specific antitrust compliance programme to the extent the latter is adequate,

7 OECD Roundtable on promoting compliance with competition law, Note by the Delegation of Germany, 20 June 2011, paragraphs 32.
8 Ibid., paragraph 33.
10 OFT’s guidance as to the appropriate amount of a penalty (OFT423), 1 September 2012 (Ibid.), paragraph 2.15 and footnote 26.
11 OFT, ‘How your business can achieve compliance with competition law’ (OFT1341), 1 June 2011, paragraph 7.4.
12 Property sales and lettings, Case CE/9827/13, 8 May 2015, paragraph 6.43; Supply of healthcare products, Case CE/9627/12, 20 March 2014, paragraph 7.30.
effective and in line with the EU and national best practices. The mere adoption of a compliance programme will not suffice, as a reduction will only be accorded in case of an ‘adoption and implementation of a specific compliance programme, in line with the best European and national practices’ and a concrete and effective commitment by the company to applying the programme must be shown.14

C. ‘Forward looking’ compliance programmes: the French example

On the basis of the framework-document on Antitrust Compliance Programmes,15 the French competition authority (‘FCA’) takes an approach to compliance programmes similar to the US (see Section IV) and to the one proposed in this article (see Sections V–X).

The FCA does not reward a company for a compliance programme already in place at the time of the infringement: ‘[t]here is no reason to treat a compliance programme, per se, as a mitigating circumstance. […] the Autorité considers that this fact [existence of compliance programme] should not be taken into consideration in itself when making an individual decision on the amount of the financial penalty to be imposed, insofar as it did not prevent the occurrence of the infringement’.16

However, it provides for the possibility for a fine reduction of up to 10 per cent in specific settlement procedures (‘Procédures de non-contestation des griefs’) – in addition to the 10 per cent reduction for the settlement procedure and 5 per cent reduction for other commitments – for commitments by the company to adopt and implement a compliance programme or to improve its existing compliance programme according to the best practices set out in the framework-document.17 In practice, the FCA has, on several occasions, granted an 18 or 19 per cent (total) fine reduction in this type of settlement procedures including future compliance commitments.18

IV. The ‘status’ of compliance programmes in North America

In theory, the strict EU approach would appear to contrast with the position of the US, whose Federal Sentencing Guidelines allow for reductions in fines where the company had an ‘effective compliance and ethics programme’. However, in practice, the position of the DOJ has essentially been the same as that of the European Commission:

‘the fact that the company participated in a cartel, and did not detect it until after the investigation began, makes it difficult for the company to establish that its compliance program was effective’19

However, in recent years, there have been some signs of movement with regard to so-called ‘forward looking’ compliance programmes as acknowledged by an Antitrust Division official who recently indicated that the Antitrust Division has ‘changed its position on compliance [programmes]’.20

More specifically, in a September 2014 speech, the Antitrust Division’s Deputy Assistant Attorney General for Criminal Enforcement first signalled that the Division was considering changes in its long-held policy. He said the Division was ‘actively considering ways in which we can credit companies that proactively adopt or strengthen compliance programmes coming under investigation’.21 And in two recent cases, the Antitrust Division has modified its longstanding opposition to giving companies any credit at sentencing for their compliance programmes. In United States v. Barclays,22 a prosecution for price fixing of foreign exchange, a defendant was given credit for the first time in an antitrust prosecution for a compliance programme. The Barclays plea agreement stated that the recommended sentence considered ‘the substantial improvements to the defendant’s compliance and remediation program to

V. A proposal for the European Commission

Although the Commission has ruled out providing fine reductions for existing compliance programmes, the concerns which the Commission has – and which are shared by many other agencies – would not apply to a forward looking policy to encourage future compliance efforts.

We propose that the Commission offer limited reductions in fines for competition law infringements, against auditable and enforceable commitments by the affected companies to spend that fine reduction on increased future compliance efforts. In order to make the implementation of this proposal simpler, and more effective from the Commission’s perspective in terms of optimal use of its resources, the proposal is targeted at those companies willing to settle. Settling parties are already in a ‘cooperative’ mindset, and, from the Commission’s point of view, it provides greater incentives on parties to settle, which may lead to yet more settlement cases, fewer hybrid settlements, and fewer appeals. (Nevertheless, this might also benefit enforcement to promote compliance in companies that are not willing to settle in a particular case; while this possibility would be procedurally more difficult, it is open to the Commission to make that policy decision.) The incremental resources required to monitor implementation by the companies are likely to be less than the saved resources from the greater use of the settlement procedure.

Whilst this proposal focuses on increased future compliance and is primarily aimed at companies that already have an antitrust compliance programme in place, it could in theory also be applicable to companies that do not; in this case, the improvement would be equal to the introduction of an effective compliance programme. As discussed in Section VII, this is an open point and the authors can see arguments on both sides. In any case, as explained in Section IX, the level of fine reduction should, however, reflect the fact of whether a company has already invested in antitrust compliance in order to avoid any discrimination.

VI. Rationale of the proposal

Compliance is the most efficient means to protect competition.

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23 Id. at 16.
25 Brent Snyder, Deputy Ass’t Att’y Gen., Antitrust Div., Deputy Assistant Attorney General Brent Snyder Delivers Remarks at the Sixth Annual
26 Id.
27 Id.
Despite significant penalties for cartel infringements, cartels continue. The Commission’s recent decision in Trucks\(^{28}\) shows that even large, multinational groups that would be expected to be fully aware of the costs of infringements, can still end up in breach of competition law, a breach which affected a significant value of sales for a significant period of time.

Unless it is believed that there is nothing more to be done – that the rate of infringements cannot be reduced further – then companies, their advisers, and competition authorities should always be looking for opportunities to strengthen antitrust compliance still further (as mentioned above, introducing criminal sanctions would require EU legislation and would thus not be implementable in the immediate future). While not eliminating the risk of cartels, this proposal would increase incentives for improved antitrust compliance efforts.

And it does so against a background of the difficulties that in-house counsel invariably face to get an appropriate level of budget for an effective antitrust compliance programme (in particular, since compliance budgets are often spread too thin among multiple legal areas). Legal departments are typically a cost centre for a business, and getting a continuous and adequate budget for antitrust compliance is hard. Although anecdotal evidence suggests that compliance – and not just competition compliance – is being taken far more seriously and in more companies now than it was a decade ago,\(^{29}\) getting approval to spend money on antitrust compliance efforts is – and will always be – difficult.

This proposal will help improve the approval process by, in effect, creating available financial resources for additional antitrust compliance; in this context, it will also allow the company to plan and spend these financial resources for additional antitrust compliance over a number of years which is a critical element to achieve an effective antitrust compliance culture in a company. If the company does not agree to spend such financial resources on such compliance, then those financial resources will go to the fine. If the company does invest properly the additional financial resources on antitrust compliance over the years, then such continuous and enhanced antitrust compliance reduces the risk of future infringements, and hence the company’s potential future liabilities for fines and civil damages. That, the authors believe, should be a straightforward choice for CEOs.

One possible criticism of this approach is that financial resources that would ultimately be returned to EU Member States via the budget procedure are instead diverted to antitrust compliance efforts. Whilst this is technically true, the impact of this proposal would be negligible: in the period 2013–2016, the Commission averaged around 1.8 billion in fines each year in cartels.\(^{30}\) If we assume that the total fines are reduced by no more than 10 per cent, then that would reduce the monies returned to EU Member States by around 180 million, so roughly 0.1 per cent of the total EU budget. That would seem a reasonable price to pay for increased antitrust compliance, and hence enhanced competition in the EU. Another possible criticism of this proposal is that companies already benefit from fine reductions from the leniency and settlement procedures that are available in the EU and an additional ‘third type’ of fine reduction may undermine the level of fines’ deterrence. The authors believe that this risk is highly unlikely since, as mentioned above, this proposal is aimed at companies that are willing to settle so that the fine reduction would be granted in the context of a settlement procedure and the limited amount of fine reduction - namely up to 5 per cent as illustrated in more detail in Section IX below – would not have any material effect on the level of deterrence provided by the fines determined by the Commission.

Finally, while the authors expect that the present proposal would be an effective additional tool in the enforcers’ toolbox, this can only be an incremental improvement in compliance.

**VII. Undertaking by the company to improve its compliance programme**

Before looking at how this proposal would fit into the Commission’s current procedures, we need to look in more detail at what a commitment on the part of the company could look like.

Above, we referred to the proposal as offering a limited reduction in fine for auditable and enforceable commitments on increased future antitrust compliance efforts. We will look at each of these requirements in turn.

First, any commitment would need auditing, both at the stage of submission to the Commission and as the initial handful of in-house competition lawyers back in 2005, today ICLA counts as members around 360 in-house competition lawyers who practice in 23 countries around the world. ICLA regularly holds meetings with competition authorities at a global level, in particular when legal or policy reforms are being discussed.

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29 The increased importance of antitrust compliance for companies is also confirmed by the activities and success that the In House Competition Lawyers’ Association (ICLA) has enjoyed over the last ten years. From an

funds were being spent. At the stage of submission, the Commission would have to be satisfied that the proposal was a meaningful one (in particular in terms of its ability to enhance the effectiveness of the compliance programme), and that any reduction in fine could in reality be spent on increased compliance. A company could not simply say, ‘give us 10 million euros and we promise to spend it on antitrust compliance.’ The company would have to explain in detail how the money would be spent – on training or internal monitoring, on audits, on salaries for additional compliance officers, and so on. At the stage of spending the monies, the Commission would also need to be kept informed in order to monitor that the promises are being kept. Both of these would require independent analysis, either mirroring the Commission’s use of monitoring trustees in many non-cartel cases or, if the Commission preferred, having the company’s independent auditors detail how much money is spent in the company annual report or in a report to the Commission. Independent reports from either a monitoring trustee or the company’s independent auditors would require a minimal use of the Commission’s internal resources, with that being materially outweighed by the Commission’s internal resource savings and optimisation due to more settlements, fewer hybrid settlements, and, consequently, fewer appeals.

Second, any commitment would have to be enforceable. This is a related point to the one above. A commitment to increase compliance efforts must be sufficiently precise that a failure to fulfil the commitment would be sufficiently clear that the Commission could take action to recover the fine reduction granted.

Third, the commitment would have to cover increased compliance efforts that aim at enhancing the effectiveness of the antitrust compliance programme. Increased compliance efforts and their effectiveness need to be assessed against the company’s existing antitrust compliance efforts, including those a company would usually put in place as an immediate reaction to a cartel investigation – such as verifying via internal audits the extent of the company’s involvement in the cartel, whether such behaviour covers related markets, and so on. Such analysis needs for obvious reasons, to be conducted on a case by case basis, since compliance efforts vary from company to company.

For example, companies that already have in place a limited/simple compliance programme could easily enhance it by following the recommendations put forward by the Commission and a number of National Competition Authorities (NCAs). Companies that already have an extensive, sophisticated compliance programme could strengthen specific aspects of it (which can always be improved) such as additional training, additional monitoring activities and audits, or the hire of additional compliance personnel, such as a dedicated antitrust compliance officer. It goes without saying that the burden of proof in presenting an appropriate, detailed and convincing commitment rests on the company, with the Commission retaining its discretion in assessing it.

As indicated above in Section V, whether this proposal may in theory be applicable to companies that do not have a compliance programme in place is an open point and the authors can see arguments on both sides: on the one hand, those companies that do not have an existing programme are likely to be most in need of one; on the other, refusing to give these fine reductions to those that had not already put in place some compliance efforts would give a greater incentive to put a compliance programme in place before discovery of an antitrust violation.

VIII. The proposal in practice

As mentioned above, this proposal could be implemented in the context of the present legislative framework, without the need for any additional legislation.

Paragraph 29 of the Commission’s fining guidelines allows the Commission to reduce the basic amount of a fine, ‘[…] where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so […]’.

A legally binding undertaking to improve its compliance programme offered by a company and accepted by the Commission could be regarded as effective cooperation with the Commission that is ‘outside the scope of the Leniency Notice and beyond its legal obligation to do so’, and can thus qualify as a mitigating circumstance in terms of a fine reduction.

Alternatively, and possibly more in line with the Commission’s most recent approach to rewarding cooperation in terms of fine reductions, the Commission


One obvious question is what level of reduction of fine should be available for such increased compliance efforts.

As a reminder, it is worth highlighting that companies can already benefit from immunity, and reductions of up to 50, 30, and 20 per cent for leniency, as well as 10 per cent for settlements.

Against this background, it seems difficult to justify a maximum reduction of more than a (further) 5 per cent.

The Commission may thus want to take this into account and indicate that 5 per cent would be the maximum reduction rather than an automatic one. In this way, as settling parties are already in a ‘cooperative’ mindset, and from the Commission’s point of view, it provides parties with an additional incentive to settle, which may lead to more settlement cases, fewer hybrid settlements, and fewer appeals. So from the Commission’s resources point of view, the proposal may even be neutral or positive. Nevertheless, it might benefit enforcement to promote compliance also in companies that are not willing to settle in a particular case. This would be procedurally more difficult but remains open to the Commission should it so wish.

If the Commission wished to introduce this as an option, then it would likely need to introduce some mechanism after the reply to the Statement of Objections. Given the change in Commission practice about including basic fine calculation information in the Statement of Objections itself, an addressee of a Statement of Objections would, at the time of receipt, be in a roughly comparable position to a company after the third settlement meeting in that they would know in broad terms the duration and value of sales that the Commission considers relevant. This would tend to be a maximum and of course subject to the company’s reply to the Statement of Objections, but it would at least provide a broad idea of the potential fine.

A company could then, in parallel to its reply to the Statement of Objections, submit a proposed commitment on future compliance efforts, which the Commission could take into account as a mitigating factor for the fine, just as in a settlement case. This would imply no admission of liability on the part of the company, only a commitment to enhanced compliance efforts in the future.
determining the exact percentage of fine reduction, the Commission could – by exercising its administrative discretion – take into account not only the ‘quality’ of the commitment offered by a company but also other factors such as whether or to what extent a company has already invested in an antitrust compliance programme, whether the case is a settlement, whether a company offers an undertaking to apply for immunity for those hard-core price fixing/market sharing/customer allocation cartels that are discovered in the context of implementing the enhanced compliance efforts/programme, and so on.

As any reduction would have to be audited both at the time of proposal and once the compliance efforts had been carried out, the cost of auditing itself would be an additional factor that the Commission would take into consideration in determining the size of the appropriate reduction.

X. Benefits

Rewarding future compliance efforts is a win-win approach. Companies benefit from an effective financial support, that can be spent over a number of years, to increase their compliance efforts, such an increase, in turn (and to the extent it is properly invested), decreasing the likelihood that they will be involved in future cartels. The Commission benefits from these greater compliance incentives as well, as its goal of reducing antitrust infringements is strengthened and, more importantly, it benefits in terms of an enhanced management and optimisation of its internal resources. Consumers – who at least theoretically would have benefitted from the foregone fines via the monies returned to national budgets (obviously a highly theoretical possibility) – benefit from decreased anticompetitive activity and the enhanced competitive landscape.

The proposal differs from other previously made, in that it neither requires the Commission to impose a compliance programme on companies, or grants an automatic percentage reduction which would appear arbitrary and unrelated to the costs of the increased compliance efforts.

In addition, the proposal also avoids questions of discrimination as it could be open to all companies (including in theory those that do not have a compliance programme in place), as all companies can increase their future compliance efforts. Theoretically, companies who already have sophisticated – and expensive – compliance programmes could argue that it would be more difficult for them to benefit from such a system as it would be difficult for them to show auditable increases in their future efforts. The authors doubt that any company will make that argument: it is usually possible to increase compliance efforts, through additional training or monitoring, through spot-checks or in-depth house auditing activities or through the introduction of a dedicated antitrust compliance officer or expanded in-house compliance or legal teams.

As for companies that do not have an antitrust compliance programme, should the Commission ultimately decide to apply this proposal to them, it would be easier for them to show auditable increases in their future compliance efforts by introducing an effective antitrust compliance programme but the (likely lower) fine reduction would take into account this element to restore a level playing field with the companies that already have a compliance programme in place.

XI. Conclusion

Though the incidence of cartels and other anticompetitive activity may have decreased over the years with increased penalties and more effective enforcement, as well as because of a stronger compliance culture among companies, antitrust infringements continue to exist. The question that any competition authority has to ask itself is: ‘What else can be done?’

Criminalisation is of course an option heavily advocated by US authorities. As mentioned above, looking at EU competition law, however, the legal and political obstacles appear high, and there seems no reasonable prospect of criminalisation at the EU level, at least in the short to medium term. Some jurisdictions have non-criminal sanctions on individuals – director disqualification orders and similar. These are options that are not mutually exclusive with the proposal addressed here but again highly unlikely to be implementable in the immediate future in light of the legal and political obstacles likely to be faced at the EU level.

Further fine increases seem unlikely to have a noticeable incremental impact. Fines are already at a level which make CEOs pay careful attention, even if some economists argue that they remain below the optimal deterrence level, and, in the EU, the escalating use of civil damages actions is already increasing the amount of money that companies have to pay out for antitrust infringements –

36 See footnote 5 above.

37 See Mario Mariniello ‘Waging war on cartels’ available at http://bruegel.org/2013/06/waging-war-on-cartels/.
and civil damages actions are not capped at 10 per cent of worldwide turnover in the way that Commission fines are.

So, increasing financial penalties are unlikely to make a major difference.

Against the above, our proposal is simple, straightforward, and easily, and quickly implementable – even in respect of pending cases. It would mean that the Commission would become a leading competition authority in innovative approaches to encouraging effective compliance. And, of course, although this proposal is targeted to the Commission at EU competition law level, and explained in terms of Commission procedures, it could be implemented by any competition authority, and should, we believe, be implemented by all.

Ultimately, given that anticompetitive activity, including the most egregious forms such as cartels, continues, the question for the Commission is perhaps not whether or not this should be done, but, if not this, then what?

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