COMPETITION LAW COMPLIANCE PROGRAMS IN EUROPE: DO THEY MATTER?

Are competition law compliance programs helpful, harmful or a waste of time?

Harmful???

- They take resources better used elsewhere
- Will enforcers use it against you?
- Will it be harder to show you reformed?
- Is your program a sign that you are trying to break the law?
- Will it teach employees how to break the law?
- Do EU enforcers treat programs with contempt?
- Will your inhouse counsel's work be used for evidence to hurt you?
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A waste of time???

- Enforcers don’t think much of them since they give them no credit
- No program can possibly prevent every violation
- They take resources that could be used in the business
- They take resources that could be used in compliance areas that do matter, e.g., corruption

Helpful

- They matter in other jurisdictions, e.g., US, UK, Austria, Italy, Brazil, etc.
- Different violations may occur together, e.g., bribery & collusion, seen in Brazil
- They may matter in criminal cases, e.g., Germany, Czech Republic
- If an agency changes, you want to be the case they use as an example
- They may be required, e.g., part of fiduciary responsibility
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Helpful

- Economies of scale – part of your overall program
- Programs overall help build a positive, law abiding culture – you can’t carve out exceptions
- Help you prevent violations
- Help you discover violations for leniency
- Help you discover where you are a victim
- No matter what the official policy, it may influence individuals in enforcement

What happens when enforcers ignore antitrust compliance programs?

Marvin Price, Acting Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division:

“antitrust crimes often do not appear to garner the same compliance dollars as other types of white-collar crimes.

In our investigations we often see evidence of compliance training programs that contain just a brief mention of antitrust issues after a lengthy discussion of corruption and bribery."
What if they are mandatory?

- May be part of required fiduciary responsibility for board
- An easy answer for government?
  - E.g., the German response – they have to do it
- Problems with this quick fix
  - Incentive is for check-the-box programs
  - Rather than innovate, just do the minimum required
  - Just do what the lawyers say to do
  - Training - no one pays attention

What if they are mandatory?

Problems

- Codes of conduct - no one reads or uses
- Discipline – only for the workers
- Employees resent it and know it doesn’t matter
- It can backfire and breed contempt
- Burden of proof is on government to show you didn’t meet the standard
- In incentive systems, burden is where it should be, on companies
Competition Law compliance programs in Europe

Questions?