Behavioral Remedies for Cartels? End to Fines for Leniency Applicants and the Case for Corporate Monitors
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Intro

In 2006, details began to emerge of a massive decade-long worldwide price fixing conspiracy involving air cargo. Seasoned international travelers will recognize a number of the members of the conspiracy, which included some of the best known airlines in the world—Air France-KLM, Alitalia, American Airlines, British Airways, Cathay Pacific Airways, Delta (via merged partner Northwest), Lufthansa, LAN, El Al, Emirates Airline, Singapore Airlines, Air India, All Nippon Airways, South African Airways, and Thai Airlines. The dollar amount of this price fixing cartel worldwide may make the air cargo cartel the largest of all time in terms of total fines. With all of the various compliance enforcement methods by antitrust agencies (imprisonment, individual and corporate fines, leniency), the number of antitrust agencies around the world spending resources to uncover cartels, and layers of compliance within a given company, it may be surprising that so many large and sophisticated companies around the world avoided detection for ten years. The cartel’s duration and composition is even more shocking given significant corporate governance changes and increased compliance that occurred as a result of corporate scandals around the world in the early 2000s. Given the number of companies and individuals involved in this collusive criminal activity, this cartel illustrates inadequate corporate governance on a massive scale.

Cartel crimes are different from many other types of white collar crime because cartels require coordination across multiple firms. Air cargo illustrates how sophisticated international cartel activity is. The amount of deception to prevent detection within each firm as well as by consumers and other third parties (gatekeepers such as outside law firms, accounting firms and consultants) suggest that the current mix of criminal and civil penalties are not significant enough at either the firm or individual levels to deter wrongdoing nor is the probability of detection sufficiently high. This article advocates a new approach to augment the current cartel enforcement system by creating stronger but different penalties than those already employed by the Department of Justice Antitrust Division (DOJ) and positive incentives to push greater compliance to firms within the industry and for increased self enforcement. The combination of new rewards and punishment will encourage firms to spend more of their internal resources to police against cartel formation and improve internal detection. In those cases where cartels do form, the policy suggestions will help to ensure that incentives are put in place to reduce

1 Associate Professor of Law, University of Florida.
2 Let us begin with a simple hypothetical to explain the problem of cartels. Cartels charge a price above the competitive price. For example, whereas the competitive price of apples may be $1, the four producers of apples (assuming a stable industry without easy entry by competitors) may instead collude with each other to charge $1.50 an apple. Consumers are harmed by such collusion and it creates a reduction in social welfare.
3 Parties to the various cases include over thirty airlines worldwide.
significantly the corrupt and illegal culture both within each given firm and within the entire industry that might otherwise allow for future cartel violations.

There has been a shift toward more significant penalties to deter wrongdoing and create more effective compliance and corporate governance by firms in other areas of white collar crime. Brandon Garrett in his 2007 article in the Virginia Law Review described a phenomenon in corporate crime which he termed “structural reform prosecution” in which prosecutors secured the cooperation of a business to adopt internal reforms. Similarly, Vik Khannah in his article in the Michigan Law Review the same year focused on the use of corporate monitors to make firms towards greater compliance with the law. Yet, the explosion of scholarship on corporate governance, compliance, and enforcement in the face corporate scandals as well as a similar increase in scholarship on white collar crime and corporate criminality has for the most part neglected antitrust. Likewise, antitrust scholarship on cartels overall has not imported the broader lessons of work on corporate and white collar scholarship and policy developments on incentives and structures across corporate boards, shareholders, senior and midlevel management.


and the interplay of firm versus individual incentives.\(^9\) Instead, overall antitrust scholarship continues to see the firm as a “black box.”

The present article bridges this important gap in the literature. First, it explores the interplay of cartel enforcement with incentives within the firm. This part applies theoretical and empirical literatures in organizational theory, finance, ethics, and accounting to corporate governance and compliance to suggest modifications to U.S. cartel enforcement. The article advocates two important policy changes – the use of corporate monitors for criminal antitrust and the elimination of all government civil penalties for the leniency applicant in a cartel.\(^{10}\) It explores the use of corporate monitors in antitrust and asks why antitrust remedies do not resemble remedies in other areas of corporate crime, where monitors may be imposed routinely, such as the Foreign Corrupt Practices Act (FCPA). In this sense, the article notes that the Department of Justice Antitrust Division (DOJ) is behind the times in its approach to compliance programs. DOJ does not require those admitted into the leniency program to have or implement compliance programs.

These modifications would improve deterrence \textit{ex ante} by limiting the incentives to join cartels and to invest in well functioning compliance programs as well as \textit{ex post}, by increasing the incentive to defect from cartels through increased penalties as well as through positive behavior reinforcement to increase the cost of joining a cartel. The article concludes that the increased positive and negative incentives for firms will lead to more optimal cartel enforcement.

I. The Important Negative Impact of Cartels

A. A Significant and Durable Problem

Cartel activity is a significant welfare loss to society. The emerging empirical scholarship in this area provides a sense of the cost of those cartels that have been detected. The total amounts of fines imposed against cartels by government actions for the period 2000 to 2010 is for EU a total of $31 billion and for the United States a total of $12 billion.\(^{11}\) Private actions against cartels during this period amounted to $34 billion.\(^{12}\) These numbers do not offer a sense of how high the overcharge was for cartel victims. For US cartels, overcharges averaged

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\(^{9}\) The closest antitrust has come in recent years to understanding how cartels work are Herbert J. Hovenkamp & Christopher R. Leslie, \textit{The Firm as Cartel Manager} 64 VAND. L. REV. 813 (2011)(describing cartel management) and D. Daniel Sokol, \textit{Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement}, \textit{ANTITRUST L.J.} (2012)(providing survey evidence of antitrust lawyers on the behavior of cartel clients).

\(^{10}\) The closest existing work to the idea of positive rewards for cartelists is Giancarlo Spagnolo, \textit{Divide et Impera: Optimal Deterrence Mechanisms Against Cartels and Organized Crime}, working paper (2006)(arguing that it is optimal to award full leniency plus a positive reward capped/financed by the fines paid by the others to the first spontaneously reporting firm (before an investigation by the antitrust agency is open)).


between 18 percent to 37 percent. For European cartels, the range was between 28 percent to 54 percent.  

Even with such large fines for illegal activity, there is a significant problem of detection of cartels, which suggests under-deterrence. Scholars have estimated the detection rate of cartels for US cartels at 13 to 17 percent. This number has not changed even after the introduction of the leniency program. Two recent papers on European cartels suggest a detection rate range from 12.9 to 13.3 percent or alternatively between 10 to 20 percent.

The average duration of a cartel is five years. Yet, cartels break up and reform with some frequency so that in some industries, there is recurring cartel activity for decades, though there is some debate about whether or not there is recidivism by cartel members. DOJ claims that there is no cartel recidivism. Yet, academic studies claim that recidivism may be significant. Harding and Gibbs suggest that there is an “awesome level of recidivism on the part of major companies who appear as usual suspects in the world of business cartels. In short this suggests a confirmed culture of business delinquency.” This trend has been confirmed by

17 Margaret C. Levenstein & Valerie Y. Suslow, What Determines Cartel Success?, 44 J. ECON. LIT. 43, 74 (2006)(providing a survey of the literature); Jaime Marquez, Life Expectancy of International Cartels: An Empirical Analysis, 9 REV. INDUST. ORG. 331 (2004); Andrew R. Dick, When are Cartels Stable Contracts?, 39 J. L. ECON. 241 (1996); Richard A. Posner, A Statistical Study of Antitrust Enforcement, 13 J.L. & ECON. 365 (1970). As a qualification to the five year average, this may represent cartels that are detected and prosecuted. Moreover, the cartel may last longer than the time charged in the indictment and unstable cartels may escape prosecution because they collapse earlier. To my knowledge, the current world champion for endurance is the Indo-Ceylon-Pakistan Shipping Conference, which was established in 1875 and dissolved by the Competition Commission of India in October 2008 – a life of 134 years.
20 Martin A. Carree et al., European Antitrust Policy 1957-2004: An Analysis of Commission Decisions, 1964-2004, 36 REV. INDUST. ORG. 97 (2010); John M. Connor & Gustav Helmers, ‘Statistics on Modern Private International Cartels, 1990-2005’ (Working Paper No 06-11, Department of Agricultural Economics, Purdue University, 2006); John M. Connor, Recidivism Revealed: Private International Cartels 1990-2009, 6 COMP. POL. INT’L (2010). Recidivism may be higher than the number suggest. Cartel members caught more than once may just be the cartelists who are bad at colluding, or at hiding it. There may be many more recidivists about whom we do not know simply because these cartelists get the second time around.
Wils, who notes that a quarter of leniency applicants in Europe are recidivists.\textsuperscript{22} Connor, using cross country data, also suggests that there is recidivism.\textsuperscript{23}

Given the pernicious effects of cartels, and low rates of detection and insufficient penalties, it does not seem that cartel enforcement globally has led to optimal deterrence.

**B. The Optimal Deterrence Approach is not Leading to Optimal Results**

Optimal deterrence constitutes the basis for cartel enforcement. The importance of an optimal regime is to “yield the ‘right’ amount of compliance with legal rules – bearing in mind that enforcing these duties is itself costly.”\textsuperscript{24} Deterrence is another way of asking whether firms comply with the law and if not, how to create an optimal compliance based system.\textsuperscript{25} Becker, in his seminal article, suggested that optimal deterrence is a function of the expected costs of the illegal activity being greater than the expected benefits.\textsuperscript{26} Landes extended Becker’s idea to antitrust.\textsuperscript{27}

The harm that cartels cause is a net loss to social welfare. It therefore follows that sufficient ceilings are required to optimally deter firms against participating in cartels.\textsuperscript{28} Yet, penalties cannot be set too high. Penalties that are too harsh may undermine optimal deterrence.\textsuperscript{29} If compliance costs are too high, then these extra costs will be borne by consumers because of higher marginal costs of production.\textsuperscript{30} Optimal deterrence also requires considering enforcement costs. Such enforcement costs would include direct costs of the enforcement activities (the cost of the compliance program to the firm, the cost of monitoring by government,

\textsuperscript{22} Wouter P.J. Wils, \textit{Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis}, 34 \textsc{World Competition} \textit{[__]} (2011).
\textsuperscript{25} For previous antitrust assessments of compliance, see e.g., Stephen Calkins, \textit{Corporate Compliance and the Antitrust Agencies’ Bi-Modal Penalties}, 60 \textsc{Law & Contemporary Problems} 127 (1997); Alan R. Beckstein & H. Landis Gabel, \textit{Antitrust Compliance: Results of a Survey of Legal Opinion}, 51 \textsc{Antitrust L.J.} 459 (1982).
\textsuperscript{29} Assaf Hamdani & Alon Klement, \textit{Corporate Crime and Deterrence}, 61 \textsc{Stan. L. Rev.} 271, 276 (2008); Office of Fair Trading, Assessment of Discretionary Penalties Regime 6 (2009) (“Higher fines can increase the cost of errors, may (in some situations) lead to insolvency and may not deter individual managers.”).
private rights, etc.), plus the cost of error (which deters socially valuable behavior). Moreover, uncertainty in administrability may increase compliance costs.

US antitrust law has creating a mix of criminal and civil penalties for both firms and individuals under Section 1 of the Sherman Act to deter cartel formation and participation. Antitrust creates jail time for individuals (and potentially for firms) for those who participate in cartels and treble damage fines for those caught participating in cartels. Theory suggests that by holding both individuals and corporations accountable, this mix of punishment improves the probability detection and lead to more optimal deterrence.

The mere threat of criminal sanctions is enough for nearly all firms and individuals to settle with DOJ through a plea agreement. The importance of criminal sanctions is that it creates some incentive for firms to monitor its agents. Yet, because the firm and its agents’ interests differ, criminal penalties are also used for individuals. In addition to government civil damages, private rights of action allow for victims of cartel crimes to sue for treble damages and attorneys’ fees.

**B. More Effective Punishment for Cartels in Antitrust**

Most antitrust scholars suggest that more fines and more jail time will lead to optimal deterrence for cartels. This article takes an alternative approach to the school of thought that believes that traditional enforcement tools based on increased jail and financial penalties can feasibly lead to significantly improved enforcement. Most importantly, there are limits to how

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31 We assume that cartels will enter into an illegal agreement when \( E(c) > E(p) \), the expected value of the cartel is greater than the expected value of the punishment. The cartels have an information advantage because they are in a better position to calculate this. This results in an incentive to engage in a cartel if the price is right. Ideally, we want \( E(c) = 0 \). If the magnitude of the punishment is potentially severe, and say the new \( E(p^*) = X \), then applying standard corporate finance and insurance analysis to the problem would result in a premium for a severe loss such that \( E(p^*) = X + p \) where \( p \) represents the increased cost of capital associated with a severe loss due to increased bankruptcy risk or the transaction cost of raising new capital.


much jail time and fines courts and juries will allow to be imposed upon cartel members, whether at the firm or individual level.\textsuperscript{37}

Part of the limit is structural. The fact that nearly all antitrust cases end in plea bargain exacerbates the tendency to have low levels of punishment.\textsuperscript{38} Plea agreements mean less jail time than litigated cases but plea agreements also are a safe choice for DOJ, which gets a “win” without a significant personnel expenditure of a fully litigated trial and without the risk of losing such a case. Judges get skittish about imposing too much jail time for economic crimes generally and get worried about overly high fines.\textsuperscript{39} Indeed, the lack of parity for sentencing of white collar crimes\textsuperscript{40} is one of the reasons that Congress created the Sentencing Guidelines.\textsuperscript{41}

Prison sentences seem to be effective in changing the deterrence calculations for individuals within firms for cartel activity.\textsuperscript{42} However, while jail time may impact individual participation in a cartel, it does not seem to impact significantly firm level decision-making. This difference leads to a more fundamental point regarding deterrence and the distinction between firm and individual - recent reviews of the empirical scholarship suggests that jail is not as much a deterrent for firms as seems to be popularly believed.\textsuperscript{43}

If in fact, criminal sanctions are not the only factor, nor even the primary factor for deterrence, then other factors such as organizational factors within the firm perhaps play just as significant a role.\textsuperscript{44} This article’s suggestions regarding firms and individual’s incentives takes an alternative approach – create different penalties that go to the root behavior that motivates illegality and create a set of incentives that better addresses the core problems of firms incentives and organization that lead to illegality within a given firm and industry.


\textsuperscript{39} See e.g., \textit{Sackett v. U.S. E.P.A.}, 622 F.3d 1139 (9th Cir.2010).

\textsuperscript{40} Kristy Holtfreter et al., \textit{Public perceptions of white-collar crime and punishment}, J. CRIM. JUSTICE 50, 51 (2008)(“[The public] still expects common offenders to be sentenced more harshly.”) but notes also that this perception seems to be changing.

\textsuperscript{41} U.S. Sentencing Comm’n, \textit{Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 14} (2004)(“The Commission also sought to correct past under-punishment of crimes, such as ‘white collar’ crimes.”).


\textsuperscript{44} Caron Beaton-Wells & Brent Fisse, \textit{U.S. policy and practice in pursuing individual accountability for cartel conduct: A preliminary critique}, 56 \textit{ANTITRUST BULL.} 277, 283 (2011).
Financial penalties for firms may be costly and impact firm decision-making.\textsuperscript{45} One literature review of antitrust sanctions finds that “at a fundamental level, the most important result [of a review of the literature] is that high fines are a crucially important element of deterrence.”\textsuperscript{46} Yet, fines seem to be insufficient as a deterrent as well, even when one includes both government and private enforcement.\textsuperscript{47} As Harrington concludes, “[F]inancial penalties fall significantly short of making collusion unprofitable.”\textsuperscript{48}

Most cases settle for closer to single damages than for treble damages.\textsuperscript{49} In the United States, there are not additional forms of punishment that get used to deter cartel activity such as director disqualification (as there is in the United Kingdom),\textsuperscript{50} whistleblowing rewards for individuals,\textsuperscript{51} or something analogous to criminal sanctions for CEOs under Sarbanes-Oxley certification of compliance\textsuperscript{52} to encourage greater compliance with antitrust law.

Firm employees have different incentives to comply with antitrust law than does a firm itself. Sometimes even if the firm wants to comply with antitrust law, its agents may not.\textsuperscript{53} Antitrust academic discussions are different than other types of law in that fields do not continue to believe in a “black box” of firm compliance but instead analyze the various incentives of firm, managers and employees.\textsuperscript{54} While the optimal magnitude of types of sanctions has been discussed in great detail, these broader discussions have not been a significant part of the

\textsuperscript{45} OFT, An Assessment of Discretionary Penalties Regimes, OFT1132 (2009) at 8.
\textsuperscript{47} Joseph Harrington, Antitrust Enforcement, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., 2008).
\textsuperscript{50} D. Daniel Sokol, Detection and Compliance in Cartel Policy, CPI Antitrust Chronicle, September 2011(describing the South Korean antitrust experience); Cécile Aubert et al., The Impact of Leniency and Whistleblowing Programs on Cartels, 24 INT’L J. INDUST. ORG. 1241 (2006)(offering a theoretical model for whistleblowing and cartel detection).
\textsuperscript{51} D. Daniel Sokol, Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement, [] ANTITRUST L.J. [____] (2012)(advocating a similar approach in the antitrust setting).
\textsuperscript{52} Louis Kaplow, An Economic Approach to Price Fixing, 77 ANTITRUST L.J. 343, 417, 427 (2011).
The broader non-antitrust literature suggests that many firms behave illegally and take in many factors into their decision to comply or not to comply based on the relative costs and benefits of compliance. Cartels are similar to other areas of white collar crime such as bribery in that the economic and moral calculus of participating in criminality may benefit the company and individual if undetected is that both benefit (and that individuals can justify their involvement as somehow saving jobs in the company) as the harms are externalized. This is unlike tax evasion or accounting fraud where the individual’s actions hurt the company.

A system that enforces individual liability only raises the individual’s expected cost of liability for their wrongdoing. The costs are different for company level liability where liability imposes costs not on the individual but on the shareholders of the company. Thus, even if firms want to create effective compliance for antitrust law, individuals within firms may have a different set of calculations that may trigger illegal behavior. These “bad apples” may act illegally no matter how strong the corporate monitoring and compliance program implemented.

Sometimes the particular individuals involved in the cartel behavior have moved on to other companies and are not around to deal with the negative consequences of their illegal activity. There is evidence in the airline industry that financially weak firms are more likely to cause price wars - and thus more likely to cheat on a collusive arrangement. The conjectured reason for this is that they effectively have a short time horizon since there is a non-negligible probability they will exit the industry through bankruptcy or acquisition. In other cases, the individuals remain within the company for a long time because they enjoy the rewards of their illegal activity, think that they will not be caught or because they know that even if they move to a different company, they will still be criminally liable but no longer have the ability to cover up their misdeeds.

Previous antitrust scholarship on the effectiveness of cartel compliance in the United States suggests that antitrust compliance programs are not effectively integrated within firm

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culture.62 Instead, only a select group of management (such as at the senior management level and the general counsel level) understand the importance of antitrust compliance whereas much of mid-level management and employees do not seem sensitive to the importance of such compliance generally, seem to forget their training or to the particular nuances of what type of collaboration across competitors is illegal versus legal.63 Because of the importance of norms within an industry and within firms, subsequent generations of employees and managers get trained by their more senior colleagues in industry practices. In a number of cases, these practices include illegal coordination by competitors as part of the norm.64

C. Lack of Incentives for Companies to Monitor

The overview in the previous section suggests that there is a problem of effective monitoring. To understand this lack of effective monitoring, one must first understand why firms should monitor their agents and the nature of various organizational structures within the firm to better align firm incentives with those of its agents. The frustration of cartel policy is that firms seem unwilling (or have rationally affirmatively decided not to) take more effective steps against cartel behavior.

One aspect to the sometime anemic cartel compliance efforts by companies is that corporate law does not provide sufficient incentives to create the sort of internal compliance process that may actually create effective compliance for antitrust.65 These incentives suggest why antitrust compliance seems to encourage only weak compliance.66 The impact of corporate law on compliance also creates limits to the effectiveness of compliance codes. Scholarship regarding the implementation of corporate codes of conduct post Sarbanes-Oxley finds that implementation has been more rhetorical than actual.67 As a result, many compliance programs are merely cosmetic.68

64 Margaret C. Levenstein & Valerie Y. Suslow, Cartel Bargaining and Monitoring: The Role of Information Sharing, in THE PROS AND CONS OF INFORMATION SHARING 24–29 (Swedish Competition Authority 2006) (suggesting that trade associations in the United States seem to have learned and changed the culture, while trade associations in Europe have not).
65 The present article will not focus on the fiduciary duties owed to monitors and what the appropriate role should be. For such treatment, see Vikramaditya Khanna & Timothy Dickinson, The Corporate Monitor: The New Corporate Czar?, 105 MICH. L. REV. 1713, 1735-40 (2007)(discussing the types of fiduciary duties that a monitor may have).
66 Yet, even some minimal compliance may be better than no compliance. James E. Gruber, The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment, 12 GENDER & SOC'Y 301 (1998)(noting the role of compliance in the sexual harassment setting and what makes for more and less effective compliance).
68 Donald C. Langevoort, Monitoring: The Behavioral Economics of Corporate Compliance with Law, 2002 Colum. Bus. L. Rev. 71, 106 (“[T]he objective indicators of a values-based program are also easy to mimic, making it
The nature of punishment of corporate crime explains the paradox of why compliance (including antitrust compliance) is not more effective. Jennifer Arlen provides powerful insight into the nature on the problem:

A firm that adopted an effective compliance program to detect wrongdoing thereby increased the risk that the evidence it created would be used to convict it if a crime occurred. A firm that reported wrongdoing could not do so without increasing its risk of being found criminally liable. By contrast, a company that turned a blind eye to the risk of crime, or even evidence of crime, might avoid sanction altogether. In addition, if the wrong was detected, the firm would not be subject to any formal increased sanction for not reporting or cooperating. Private sector response to internal audits also supports the position that firms will not do internal audits on their own to find wrong-doing as it will create additional liability. Thus, firms have incentives not to undertake serious compliance because by doing so (or in a moral calculus – making the morally correct decision), firms open themselves up to liability where inaction allows firms to probably reap the rewards of illegality (immorally behavior).

Antitrust enforcement misses a critical cause of the lack of effective anti-cartel compliance on the part of firms.

Under Delaware law, the board of directors (rather than shareholders) is the most significant unit of governance. Under current practice, there is not sufficient incentive for firms to invest in compliance programs overall. Corporate boards under Delaware law have very weak legal duties to monitor. The scope for violating such duties is narrow. Empirical work on board liability shows that in practice, there are limited financial penalties for weak monitoring by the board. The lack of strong compliance mechanisms overall shapes the nature of firm compliance.

difficult to separate out the sincere programs from the fakes.

70 OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance, February 18, 2010 at 30.
71 Even when there is detection, firms may behave strategically to shift the blame of non-compliance to lower level employees. Brandon L. Garrett, Structural Reform Prosecution, 93 VA. L. REV. 853, 876 (2007); William S. Laufer, Corporate Liability, Risk Shifting, and the Paradox of Compliance, 52 VAND. L. REV. 1343, 1343 (1999).
D. Culture of Corruption

1. Understanding Culture and Its Impact on Firms and Industries

Antitrust scholarship has overlooked the importance of firm culture on compliance. Beyond the legal regime, there are other incentives within the firm that influence compliance regarding cartel policy. For a cartel to avoid detection within a firm, there needs to be some level of management that actively participates in the cartel and other employees who either are unaware or who turn a blind eye to such behavior. Incentives within the firm shape firm behavior and the behavior of its agents. Thus, firm culture creates both direct incentives for criminality. A compliance program, if not made part of a broader part of the necessary part of the corporation’s culture will be viewed antagonistically by mid-level management. Such managers may view it as “a system to beat in pursuit of sales and commission.”

Firm culture has both economic and socio-legal explanations. Corporate crime is an agency cost. The foundational work on agency costs by Jensen and Meckling modeled how agents might do what is in their best interests rather than that of the firm without effective monitoring by the principal. Close monitoring can reduce this divergence but might deter agents from risk taking that might benefit the firm. Cartel participation by agents requires high monitoring but also does not lead to particularly high payoffs by the agents. Cartels are organized around their concealment of illegality rather than by their efficiency.

Culture impacts compliance both within an industry and individual firms. In her book *Controlling Unlawful Organizational Behavior*, sociologist Diane Vaughn posed a causal model for misconduct that includes the competitive environment (competition, scarce resources, and norms), organization characteristics (structure, processes, and transactions), and regulatory environment (defined as “the relation between regulatory and regulated organizations, and characterized by autonomy and interdependence”). These factors taken together explain misconduct.

If we treat non-compliance as a form of misconduct, then this model applies in the case of cartel compliance. In a later work of hers, *The Challenger Launch Decision*, Vaughn used this same model to explain the space shuttle Challenger explosion. The *Challenger Launch Decision*

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79 DIANE VAUGHAN, *CONTROLLING UNLAWFUL ORGANIZATIONAL BEHAVIOR: SOCIAL STRUCTURE AND CORPORATE MISCONDUCT* chaps. 4-6 (1985).
contained extensive data about organizational processes. The central concept that emerged was normalization of organizational deviance. This normalization process explained how non-compliance became part of the organizational routine.

Normalization of deviance also explains compliance in an antitrust context. Gilbert Geis wrote a classic article on the heavy electrical equipment antitrust price fixing conspiracy of the 1960s. In it, he captures industry leaders stating that they committed no wrong doing because the activity was viewed as legitimate in the industry. That is, executives in their view were conforming, not violating.

There are two sets of cultural factors that antitrust must consider in tweaking the current cartel leniency model - firm level and industry level factors. A more effective cartel policy requires shaping and responding to these organization characteristics.

2. Organizational characteristics

Violations of antitrust law may occur because of organizational failure rather than profit seeking on the part of management. From the standpoint of organizational failure, to the extent that compliance is cosmetic only, this will negatively impact the legitimacy of the program internally within the firm. Organizational design issues that may contribute to illegality are “processes and tasks, positional relationships, and hierarchical level and departmental boundaries.” As organizations increase in complexity, firms develop various organizational structures in response.

Most antitrust violations targeted by DOJ are international cartels. This focus on large firm international price fixing is important given that the size of the firm impacts its propensity for criminality. One study using event history analysis finds that larger firms are more prone to criminal behavior. Size may be a factor because as organizations get larger, agency costs

84 Jonathan Pinto et al., Corrupt Organizations or Organizations of Corrupt Individuals? Two Types of Organization-Level Corruption, 33 ACAD. MGMT REV. 685, 695 (2008).
86 [cite]
increase and monitoring becomes more difficult. Likewise, complexity of organizations may increase agency costs.\textsuperscript{88} The larger and more complex an organizational structure, the more difficult it is to coordinate various organizational subunits. Because of organizational size and complexity it is possible to hide wrongdoing from government officials, and inside and outside gatekeepers.

Organizational structure also may affect firm culture. A centralized organization will be more likely to have a strong organizational culture than a decentralized organization that has subcultures within departments or divisions.\textsuperscript{89} Depending on the particular organizational structure, especially in a decentralized structure, certain departments or divisions within an organization will have more importance than others.\textsuperscript{90} Decentralization may be the product of increased firm complexity. Likewise, complexity increases monitoring costs.

Organizational unwieldiness leads to increased formalization of policies. However, formalization of policies and the complexity and vagueness that come with such policies have been linked to organizational deviance.\textsuperscript{91} Organizations may be prone to inertia, particularly as they get more complex.\textsuperscript{92} Inertia affects firm outcomes because of the impact of organizations in norm creation for their employees. Social norms affect compliance with the law.\textsuperscript{93} The importance of norms becomes particularly pronounced as organizations grow, routines become established, and organizational structures become more rigid.\textsuperscript{94} Similarly, organizational change is not instant because organizations resist change.\textsuperscript{95}

The incentives to maximize profits may come into tension with institutionalization within the firm, which may lead to the “decoupling” of actual practice from various generalized compliance procedures because of the vagueness of the various legal terms used for compliance.\textsuperscript{96} Illegal activity may become embedded in an organization over time and become a

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\textsuperscript{89} LINDA KLEBE TREVIÑO & KATHERINE A. NELSON, \textit{MANAGING BUSINESS ETHICS}; chap. 8 (4th ed. 2007).
\textsuperscript{91} Diane Vaughan, \textit{The Dark Side of Organizations: Mistake, Misconduct, and Disaster}, 25 ANN. REV. SOC. 271 (1999).
\textsuperscript{92} Michael T. Hannan & John Freeman, \textit{The Population Ecology of Organizations}, 82 AM. J. SOC. 929 (1977); Andrew King, \textit{Organizational Response to Environmental Regulation: Punctuated Change or Autogenesis?}, 9 BUS. STRAT. ENV. 224, 238 (2000).
\end{footnotesize}
part of organization culture.97 Unethical changes within an organization may be subtle and gradual, such that individuals do not realize that they are engaging in illegal behavior.98 Over time, organizations reach a tipping point in their culture in which illegality becomes a defining element of the organization itself. By changing the corporate norm to abiding by the law and creating ethical standards, compliance programs increases the probability of detection of illegal activity.99

The more complex the organization is, the higher the proclivity within the firm for illegal activity.100 A unit within the firm (such as the division) might have incentive to improve a division’s profitability even though much of the risk for the cost of wrongdoing might be placed at the firm level. Therefore, a decentralized structure allows for the creation of unethical subcultures within an organization more than a centralized structure.101

Given the link between organizational structure and wrongdoing, it seems to be the case that the internal governance structure within a corporation affects the likelihood of successfully monitoring illegal behavior and enforcing compliance. For example, independent board members seem to be more effective monitors against corporate fraud102 and opportunistic grants of stock options.103

The discussion of incentives and legitimacy suggest that social norms play an important role in corporations.104 Some firms have a strong compliance culture because incentives have been put into place to reward strong compliance. These incentives may take the form of pay incentives, organizational structures that allow for effective monitoring by legal and compliance staff and the overall creation of certain corporate cultures. For other firms, the social norms may work towards non-compliance for many of the same reasons. When individuals are rewarded for unlawful behavior, when monitoring by compliance staff is not strong, where country level

100 Marie A. McKendall & John A. Wagner III, Motive, Opportunity, Choice and Corporate Illegality, 8 ORG. SCI. 624 (1997).
102 Mark S. Beasley, An Empirical Analysis of the Relation Between the Board of Director Composition and Financial Statement Fraud, 71 ACCT. REV. 443 (1996); Mark S. Beasley et al., Fraudulent Financial Reporting: Consideration of Industry Traits and Corporate Governance Mechanisms, 14 ACCT. HORIZONS 441 (2000); Hatice Uzun et al., Board Composition and Corporate Fraud, 60 FIN. ANALYSTS J. 33 (2004).
103 Lucian Bebchuk et al., Lucky CEOs and Lucky Directors, 65 J. FIN. 2363 (2009).
social norms push toward cartel behavior, or where unawareness of the illegality of cartel behavior and its negative implications on the firm exist, these norms reinforce cartel behavior.105

Various processes within a firm also affect firm governance. Sometimes this can be solved privately through contract (such as incentive pay).106 A number of empirical findings show that CEOs’ whose pay is tied to incentive based pay are more likely to misreport material information.107

Firms may change the incentives for illegality for their employees via a focus on long term rather than short term gain in incentive pay.108 There is a principal agency problem in firms where the agent (employees) will veer from what is in the shareholders’ best interest to what is in the individual employee’s best interest. One way in which firms reduce the agency cost problem is through incentive based pay. It is more likely that firms that push short term gains for pay are likely to have individuals who may undertake criminal behavior to “meet the numbers”.109

Given the importance of top management, one issue connected to cartel activity is pay incentives of senior management. If officers and directors have an equity stake in the firm, they have incentives to monitor the firm against illegal activity when the illegal behavior threatens firm returns.110 However, if managers get bonuses passed on certain profitability metrics, this may encourage members to meet their performance based metric by any means necessary – including becoming involved in a cartel.111 In the cartel agency cost context, too much equity pay may create negative incentives that may actually encourage cartel behavior on the part of managers.112 Managers might be willing to risk joining a cartel if too much of pay is linked to performance as the short term incentive of a significant payout will increase, especially if the risk

105 D. Daniel Sokol, Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement, [___] ANTITRUST L.J. [___] (2012)[section on norms within companies]
109 [Connor and Lande]
111 Paolo Buccirossi & Giancarlo Spagnolo, Corporate Governance and Collusive Behavior, in 2 ISSUES IN COMPETITION LAW AND POLICY (W. Dale Collins ed. 2008) at 1224.
of detection is low both inside the firm from compliance officers and outside of the firm by antitrust enforcers.

Risk management and internal monitoring affect behavior and illegal outcomes. For example, poor internal controls affect the probability of corporate accounting fraud. From the antitrust perspective, improved internal controls include having an antitrust compliance function for someone within the firm and that person’s having the ability to effectively monitor the firm for cartel behavior. Business controls also can be implemented, such as limiting individuals with power to change prices. This limitation would reduce antitrust risk.

The perception by society that illegal acts are immoral also may create increased deterrence within the firm based on a pro-compliance culture. There are social costs for individuals for wrongdoing, such as stigma. These costs amount to shaming penalties. When there are no financial incentives for whistleblowing for cartels, there need to be other non-financial incentives to encourage people within an organization to blow the whistle on others whom they suspect of wrongdoing. The more that people within the company view cartel behavior on par with capital crimes, the greater the moral outrage that others will feel to the perpetrators of such crime and the more stigma that will attach to the individual. The mere threat of such stigma should be able to deter some individuals from participating in cartel activity.

Stigma also may be felt at the company level impact firms in terms of negative stock market returns due to a the loss “branding.” In the cartel context, in the Netherlands though information about the Dutch construction cartel was already available in the market, one study

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114 See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) (“Punishment is not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation.”).
115 Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J. L. & ECON. 519, 536 (“[stigma] shares with fines the advantage of deterring the criminal without real costs”). But see Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 J. LEGAL STUD. 355 (suggesting that stigma is most effective when it is used only rarely).
116 Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J. L. & ECON. 519, 519 (1996)(“A convicted criminal suffers not only from public penalties but from stigma, the reluctance of others to interact with him economically and socially.”).
118 Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010)(noting that only 19 percent of accounting fraud is detected internally by other employees).
119 There is some evidence this may be occurring. See e.g., Andrea Schoepfer et al., *Do perceptions of punishment vary between white-collar and street crimes?*, 35 J. CRIM. JUSTICE 151 (2007).
found that after a television show about the Dutch construction cartel appeared, the stock price of firms mentioned in the television show fell by 10 percent.¹²⁰

Yet, there seems to be very low level of social stigma associated with cartel crimes in the United States. Part of this is due to the very low level of media coverage of cartel activity within the United States relative to other types of corporate crime.¹²¹ Some of the lack of stigma is more directly tied to a poor compliance culture by cartel member firms. Connor and Lande reveal alarming statistics about the acceptance of illegal cartel behavior. They note:

We were able to determine the present whereabouts of 35 (34%) out of 103 managers known to have received a prison sentence in cartel cases between 1995 and 2010. Of those 35, nine (26%) are currently employed by the company for which they worked during the cartel, and another nine (26%) seem to be working at a different company within the same industry… We were also able to discover the current whereabouts of four people who received fines, but no prison sentence during the period between 1995 and 2009. Two of them are employed by the same company for which they worked during the cartel, one appears to be working in the same industry, and the other is working in another industry.

Where there are no explicit restrictions (such as through the terms of a company’s plea agreement) to rehire convicted felons who participated in cartel activities, social shaming could increase on some level the cost of participating in such activity.

By creating a pro-compliance culture that creates greater economic and moral cost to criminal behavior, firms can increase the cost of detection. The reason for this is that a pro-compliance culture increases awareness within the firm of potential wrongdoing. As a result, individuals involved in the cartel must work harder to avoid detection within the firm. This may make the cartel less profitable than it would otherwise be. As a result of higher detection costs, a cartel may be more likely to dissolve as the administrative costs of running a cartel may be significant relative to the payout and the likelihood of detection.

A crucial dimension of better incentives (and to the power of various policies) for compliance takes into account the distinction between managerial incentives and shareholder incentives and between the incentives of a middle manager and those of a senior manager. The next part examines the interrelationships between different individuals within the firm and across firms to better understand what might constitute effective compliance in the antitrust setting.

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¹²¹ D. Daniel Sokol, Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement, [ ] ANTITRUST L.J. [ ] (2012)
a. Senior Management Within an Organization

Senior management is an important component of firm governance and compliance. Different management styles affect corporate decision-making in a number of areas, such as investment and financial policy, tax compliance, and organizational strategy. The focus on senior management in antitrust is particularly important. The majority of individual defendants in cartel cases have been at the level of a company’s corporate officers.

The distinctiveness of top management within an organization may be due to the large amount of power that top management possesses. Therefore, the preferences of top management will affect strategic outcomes of a corporation. For example, CEOs with a long tenure tend to be less innovative. Some work suggests that a longer length of CEO tenure and top management team tenure negatively affect the strategic dynamics of a corporation. Thus, the allocation of power limits effective monitoring and creates an overall corporate culture.

As any stability usually favors cooperative outcomes, then more stable firm management in an industry should facilitate collusion. Moreover, younger managers may be “trained” by the older generation to participate in cartels. If there is significant turnover in management, though, it may be less likely to form a successful cartel.


123 Marianne Bertrand & Antoinette Schoar, Managing with Style: The Effect of Managers on Firm Policies, 118 Q.J. ECON. 1169 (2003); Scott D. Dyreng et al., The Effects of Managers on Corporate Tax Avoidance, 85 ACCT REV. 1163 (2010)(finding executive specific effects that firm characteristics cannot explain).


If top management tolerates or is involved in illegality, this norm permeates within the organization and creates an ethical culture in which illegal activity can thrive. The ethical tone of top management affects organizational responses to wrongdoing. The more ethical top management seems to be, the more ethical others in the organization behave. Similarly, the more involved top management is involved in creating codes of conduct, the more effective such codes are in practice.

In an antitrust context, if the CEO mandates antitrust training, middle managers are more likely to take such compliance seriously. The CEO must project sincerity of a desire to comply. This will set the tone for the entire organization in terms of its antitrust compliance. The CEO must be fully committed to the antitrust compliance program and consistent in such commitment. The more powerful the messenger, the more likely that others within the organization will conform to the message because of the CEO’s ability to offer compliant managers greater resources, legitimacy and power.

Top management crimes different from others within an organization, because the board of directors more closely monitors senior management than other parts of the firm. There are various internal control devices to better align incentives between shareholders and management to improve the quality of oversight and reduce incentives for cartel activity. For example, companies might issue debt to constrain management from over-investment. Separation of the CEO and Chairman position improves the board’s monitoring ability of the CEO. Similarly, providing equity for directors might create improved monitoring of management by directors by

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131 Linda Klebe Treviño et al., *A Qualitative Investigation of Perceived Executive Ethical Leadership: Perceptions from Inside and Outside the Executive Suite*, 56 HUM. REL. 5, 28 (2003).
135 Cite Lufthansa. ABA, Antitrust Compliance: Perspectives and Resources for Corporate Counselors 20 (2d ed. 2010)(providing example of DuPont CEO who regularly raises antitrust compliance with senior leadership of the company and provides a signal of its importance).
better aligning director interests with shareholder interests. Moreover, board diversity serves to better monitor CEOs, based on CEO turnover.

Due to the availability of these various methods to reduce agency costs, the involvement by top management in criminal activities may merit tougher penalties since senior management involvement signals compliance weakness and a corrupt culture overall including at the level of board of directors. The United Kingdom has introduced the possibility of director debarment for firms that participate in cartels. A recent paper by Ginsburg and Wright suggests extending the British approach to the United States.

**b. Middle Management and Other Employees**

Within business entities, middle management may not have the same incentives for compliance as that of senior management. For example, in a divisional organizational model, each divisional unit may try to maximize the short term profitability of that particular division instead of the entity as a whole. This suggests that organizational structure may be a contributing cause for misalignment of incentives.

The financial rewards or possibilities for prestige or promotion for managers for divisional results may be different than for the firm as a whole. Middle management needs to be given tools to do the job in compliance with law, and to make sure that subordinate employees understand obligations. There is a general failure by compliance officers to drill down through the ranks of middle management, and up from the bottom.

Middle managers may be under significant pressure to meet various performance targets. A cartelist may rationally risk criminality because he/she wants to save jobs in their group or division. The cartel participant believes that as long as other firms do the same during a time of economic downturn, a cartel will naturally break up when the economy improves. People make similar calculations as to illegal behavior in other areas of corporate crimes such as pollution. For other potential cartelists, the fear of being caught and punished is a deterrent. However, this fear does not translate to others who are genuine sociopaths, or are desperate,

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141 Enterprise Act § 204.
angry, and/or scared of losing a job if they do not comply with a cartel. In yet other cases the cartelist may be convinced that they are smarter than everyone else.

Culture also implicates the behavior of middle managers. To become successful leaders in companies, middle management and lower level employees may mimic the behavior of senior management. Middle management may mimic behavior of more senior management. This may include behavior such as cartel involvement if such cartel participation allows these middle managers to move up the ranks within the firm.

3. Industry Level Factors

The industry environment in which a firm finds itself affects various outcomes for the organization. There are exogenous factors to a particular firm that also may affect its predisposition to criminal behavior. Industry structure and poor industry performance may indicate criminality. Similarly, firms in some industries are more prone to criminality than others based on industry culture.

Rapid growth and unrealistic company performance forecasts are factors in the accounting literature that indicate an increased likelihood of accounting fraud. Additionally, there is some evidence that firms exhibiting an illegal culture will manifest that culture in a number of different areas – tax, accounting, securities, etc. The discussion on the criminality of Bridgestone infra in the areas of both bribery and antitrust provide one such example.

Specific to antitrust compliance, Chicago School writing on structural factors may be the most important contribution that the Chicago School has made to the study of collusive behavior. Overall, antitrust empirical work provides a sense of the types of industry factors

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for which cartel stability seems to depend on for its operation. For example, industry or product cycle, competition within the sector and cultural factors as to the nature and stability of the cartel influence the effectiveness of leniency.\textsuperscript{153} Industry features such as high concentration, entry barriers, relatively inelastic demand, homogeneous products, and greater demand shocks impact the decision of firms within an industry to participate within a cartel. These industry factors are important for enforcement because cartel stability mitigates the effectiveness of leniency.\textsuperscript{154}

Where there is rapid growth in an industry, it may be that company controls and a company culture may not yet be strong enough.\textsuperscript{155} As such, these firms or industries may be more prone to cartel behavior when the opportunity to cartelize might present itself because formal and informal monitoring mechanisms are not in place.\textsuperscript{156} The monitoring mechanisms within the firm also impact the ability of a firm to create a distinct culture relative to that of other firms in the same industry.

\section*{II. Reducing Civil Liability}

To encourage cartel detection, DOJ introduced leniency for corporations and individuals who came forward with information regarding a cartel.\textsuperscript{157} The leniency program allows for firms to self report their cartel activity in reward for reduced penalties. In the US context leniency provides the first firm that is the leniency applicant amnesty from criminal prosecution and a reduction from treble to single damages from government action for firms that fully cooperate with DOJ. Other firms involved in the cartel may be provided lower civil penalties if they provide additional information to DOJ that results in detection of other cartels under a program known as Amnesty Plus. The possibility that firms might defect from a cartel and inform on its cartel members has had the effect to destabilize many existing cartels and deter other cartels from being formed. DOJ now detects most of its cartels as a result of the leniency program.\textsuperscript{158}

\begin{footnotesize}
\begin{itemize}
    \item[153] Harold E.D. Houba et al., Maximal Cartel Pricing and Leniency Programs (December 2008), Tinbergen Institute Discussion Paper No. 08-120/1.
    \item[154] Harold E.D. Houba et al., Maximal Cartel Pricing and Leniency Programs (December 2008), Tinbergen Institute Discussion Paper No. 08-120/1.
    \item[156] Some academics speculate that price fixing may be more likely where the industry is in decline. See e.g., Sally S. Simpson, \textit{The Decomposition of Antitrust: Testing a Multi-Level, Longitudinal Model of Profit-Squeeze}, 51 AM. SOC. REV. 859 (1986). There is not strong direct evidence in the academic literature indicating that financially weaker firms are more likely to cartelize. Andreas Stephan, \textit{Price Fixing During a Recession: Implications of an Economic Downturn for Cartels and Enforcement} (working paper 2010).
    \item[158] Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Div., U.S. Dep’t. of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Address before the 24th Annual National Institute on White Collar Crime (February 25, 2010) at 3. Of the two programs, the corporate leniency program is by far the most used.
\end{itemize}
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Yet, the leniency program has certain limits. In its operation, the leniency program does not reward compliance. Indeed, the leniency program utilizes a strict liability regime for wrongdoing. The very fact that a firm has applied for leniency means that any compliance program is a failure. This is a departure from other areas of corporate crime where compliance, as envisaged under the Sentencing Guidelines, allows for a penalty reduction. The motivation behind such an approach is to encourage companies to proactively set up compliance programs to minimize wrongdoing and build an infrastructure of good governance.

This vision is not merely a policy approach among the current DOJ Antitrust leadership. Instead, this approach has become institutionalized. The US Attorney’s Manual is explicit about a carve-out for criminal antitrust activity. Whereas for other crimes one might look to pre-indictment conduct by the firm (such as its compliance program), the manual makes explicit a carve-out for antitrust, noting, “However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation’s business. With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government.”

In fact, compliance can work with the existing leniency program rather than the current view that it works against the program. The better the compliance program, the greater the incentive for a firm to come forward and defect from the cartel. Early detection allows a firm to reap the benefits of a good corporate culture. Strategically, by coming in for the reward of a more generous leniency, a firm also punishes its competitors, who must pay a larger fine, still have criminal penalties and have the extra imposition of a corporate monitor. Thus, for every dollar saved by lack of criminal and civil penalties for a company, the company need only spend a fraction of that dollar on compliance. The rest can be reinvested in the company’s business to promote growth or returned to shareholders in the form of a dividend.

Full leniency alone may not be sufficient to deter all cartels. Those cartels that are able to adapt to leniency may be strengthened in their ability to avoid detection. Leniency programs have resulted in less inclusive cartels because too many members lead to the possibility of detection. While a more inclusive cartel means higher cartel profits, each additional member is one more firm who could apply for leniency. Yet, the costs involved in cartel concealment both within the firm and across firms involved in the cartel have increased. As a result of this higher cost of cartel participation, cartels have become more effective in their concealment of their

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activity. Recent academic work suggests that cartels have evolved over time so that detection of cartels has in some circumstances become harder, rather than easier, as a result of leniency.\footnote{Joe Chen & Joseph E. Harrington, Jr., The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path, in THE POLITICAL ECONOMY OF ANTITRUST (Vivek Ghosal & John Stennek, eds., 2007).}

What the current policy approach lacks are positive incentives to create robust and effective compliance programs. This article proposes that the leniency applicant gets no criminal penalty and no civil penalty for full cooperation if the applicant could show that it had an effective compliance program in place that detected the cartel conduct. Thus, the only penalty for the leniency applicant would be private plaintiff class action follow on suits. This approach would destabilize cartels since the threat of defection is increased. Moreover, it would create incentives for firms to spend additional resources \textit{ex ante} on antitrust compliance because the amount spent on additional effective compliance would be less than the cost of detection.

Motivating the reduced penalties is that one firm within the cartel has better compliance than the others. The idea is to create incentives for the weakest link to defect from a cartel. A better set of proactive incentives (assuming that a company meets the Sentencing Guidelines steps for effective compliance) creates enough incentives for at least one firm to spend on proactive compliance against potential wrongdoing.

The problem with the current sentencing guidelines is that by following them, a company increases its likelihood of sanctioning by the government while by ignoring them and providing cosmetic compliance, a company increase the potential payoff from illegal activity (low level of cost of compliance program and low level of detection) while increasing the benefit of illegality (overcharge above the competitive price). This critique is not limited merely to US anti-cartel efforts. In a survey of 999 of the largest 2,500 Australian businesses, Parker and Nielsin found that compliance with competition laws to be high variable with implementation half-hearted and incomplete in many cases.\footnote{Christine Parker & Vibeke Nielsen, Do Businesses Take Compliance Systems Seriously? An Empirical Study of Implementation of Trade Practices Compliance Systems in Australia, 30 MELB. U. L. REV. 441, 482-83 (2006).}

This article’s policy proposal can be contrasted with other recent suggestions. Some academic work has pushed for a lottery for the leniency award winner in which the antitrust cartel system would be set up to reward cartel leniency applicants with all of the fines of the other cartel members. This work is limited to viewing the firm/decision-maker as a profit-maximizer so there are no criminal penalties. This literature does not disaggregate the firm from the individual decision-makers within the firm. A bounty would provide incentives for firms to defect from a cartel. Both theoretical\footnote{Giancarlo Spagnolo, Divide et Impera: Optimal Deterrence Mechanisms Against Cartels and Organized Crime, working paper (2006).} and experimental work\footnote{Mariana Bigoni et al., Fines, Leniency and Rewards in Antitrust, working paper (2011).} by Spagnolo and his co-authors suggests that it is optimal to award full leniency plus a positive reward capped/financed by the fines paid by the others to the first spontaneously reporting firm (before an investigation is
open). Spagnolo’s corporate bounty proposal has the weight of economic logic and market-experiment outcomes that support greater cartel detection and destabilization than the current leniency/amnesty programs.

In a real world setting, there are dangers to effective cartel policy to too much leniency, such as the cartel lottery bounty. One limit to leniency is that it is difficult to sell it to the public at large – a member of a criminal conspiracy that hurts consumers goes without significant punishment. This can create moral backlash against the penalty reduction program and the entire antitrust cartel enforcement system. Indeed, a press that has promoted a competition culture might get pushback from a populace that wants punishment for wrongdoing rather than a windfall. Press coverage in the UK for mere traditional leniency against Virgin Airways in its fuel surcharge cartel with British Airways was significant against the UK’s cartel enforcer the Office of Fair Trading because one company seemed to escape without sufficient penalties. This pushback would be even stronger with significant financial rewards to a company that financial benefits from its illegality and who will be strengthened at the expense of its rivals, thereby creating other potential antitrust problems as firms exit a market.

E. Need to Create Monitors

In addition to ex ante rewards to create more effective compliance, harsher penalties can work to create better compliance. This article suggest that harsher penalties should take the form of a corporate monitor imposed upon a company found to be involved in criminal wrongdoing. What is increasingly common in other areas of white collar crime does not seem to have made an impact in criminal antitrust. A recent plea agreement provides an illustration of the sharp contrast in approaches between DOJ Antitrust’s approach to compliance with that of DOJ’s Criminal Division.

On September 9, 2011, both the Department of Justice Antitrust Division and Criminal Division entered into a plea agreement with Bridgestone Corporation regarding white collar criminal activity. Bridgestone is a Japanese company, which plead guilty to violating the Sherman Act for price fixing from January 1999 to May 2007 as part of the international marine hose cartel.

Bridgestone also plead guilty for bribery in violation of the Foreign Corrupt Practices Act (FCPA) for activities that occurred within this same time period. Its corrupt activities occurred through Bridgestone’s various subsidiaries in which Bridgestone’s local sales agents had illegal relationships with government officials who worked for state owned enterprises (SOEs) in Latin America. The Bridgestone sales agents paid the officials who worked in the

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164 Andreas Stephan, How Dishonesty Killed the Cartel Offence, 6 CRIM. L. REV. 446, 453 (2011).
SOEs a percentage of the total deal. Bridgestone managers in Japan were not only aware of these payments but authorized and worked to conceal them.

In both the case of the cartel and the bribes, there was criminal behavior to which Bridgestone had to admit to on the part of executives. One might imagine that the remedies for both sets of circumstances would include some sort of rooting out of criminal activity within what one might properly call a corrupt corporate culture that permitted and indeed encouraged criminal behavior across different international business units.

Attachment B to the plea agreement included a detailed corporate compliance program that Bridgestone entered into to review its internal controls to prevent future wrongdoing. This includes the implementation of a “clearly articulated and visible corporate policy against violations… including strong, explicit, and visible support and commitment from senior management to the program.”167 It also required that “Bridgestone will develop and promulgate compliance standards and procedures designed to reduce the prospect of violations… and will take appropriate measures to encourage and support the observance of ethics and compliance standards… at all levels of the company.”168 Additional provisions detail the type of implementation that would be undertaken as part of the monitoring to ensure that there are no future violations. These steps included particular issues in how to address the behavior of senior and midlevel executives within the firm in a way to overcome the criminal behavior that at best was tolerated and at worst actively encouraged.

What is striking about this detailed corporate compliance program is that the compliance was exclusively set up for the FCPA violations. There was no mention of the cartel activity nor any mechanisms set up for compliance to prevent future cartel activity. This is particularly interesting since the same firm was involved in both sorts of criminal activities. It is this strange disparity in policies – one that takes compliance seriously (FCPA) and another that does not (antitrust) that is the focus on this part of the article. This section will explain what a corporate monitor does, the agency cost problem that it attempts to solve and the limits of the effectiveness of corporate monitors to date. After providing this analysis of corporate monitors outside of antitrust, the article then explains the dynamics of monitoring within antitrust and the curious case of criminal antitrust which seems unaffected by developments in enforcement in other areas of white collar crime.

Congress enacted the FCPA to combat bribery by US companies of foreign officials in 1977. However, FCPA enforcement became vigorous only in the past decade.169 The FCPA prohibits payments to foreign officials (bribes) and requires that publicly traded firms maintain accurate accounting controls as part of financial transparency to better detect potentially illegal

167 Bridgestone Please Agreement Attachment B.
168 Bridgestone Please Agreement Attachment B.
payments.\textsuperscript{170} FCPA enforcement remained little used until 2002.\textsuperscript{171} Since that time its enforcement has been more significant. In 2004, federal enforcers brought only five actions (two DOJ actions and three SEC actions). However from 2007-2009, FCPA actions averaged 37 a year and in 2010 alone the SEC and DOJ Criminal brought a combined 74 FCPA actions.\textsuperscript{172}

If criminal and civil penalties are leading to under-deterrence, then the potential imposition of a monitor for wrongdoing is a potential stick that may lead companies to invest more in compliance to ensure that it does not collude with its competitors. Such deterrence is useful only when the costs of deterrence for the use of monitors are fewer than other forms of punishment and where the benefits of the use of monitors exceed that of other forms of deterrence.

B. Corporate Monitors

Linked to the increase of the use of the FCPA has been the increased use of corporate monitors as a remedy in FCPA cases. Corporate monitors have been used for a number of different corporate crimes, not merely the FCPA, although this part discusses the FCPA as an example.\textsuperscript{173} In doing so, it undertakes due diligence to craft a work plan as to what it will do and how much authority it will have to implement changes that it sees fit.\textsuperscript{174} In this sense, monitors have wide latitude of discretion in the use of their power.\textsuperscript{175} The duration of corporate monitors is a range of typically one to three years, although there have been cases of monitors having longer tenures.\textsuperscript{176} In the corporate cases, the compliance officer typically reports to the audit committee of the company and to the relevant government enforcer.\textsuperscript{177}

To provide additional guidance,\textsuperscript{178} the Department of Justice released the Morford memo in 2008, which provided some vague limits of when a corporate monitor should be introduced.

\begin{footnote}
\textsuperscript{170} Joseph W. Yockey, Solicitation, Extortion, and the FCPA, working paper at 5.
\textsuperscript{178} Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Dep’t Components, U.S. Attorneys 1 (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/business_organizations.pdf; Memorandum from Paul J.
\end{footnote}
According to the memorandum, a monitor should only be used where appropriate given the facts and circumstances of a particular matter. For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.179

These types of situations of ineffective compliance arise in antitrust as regularly as in other areas of law. Indeed, this is the very reasoning behind the antitrust carve out regarding compliance programs – price fixing somehow goes to the “heart” of a company’s business. Yet, if antitrust goes to the heart of a company’s business because there is a senior executive with pricing power that is involved in the price fixing, one wonders why monitors are used in areas such as bribery, oftentimes with lower level employees, and not in antitrust which by being at the heart of a company’s business is much more in need of more effective monitoring.

There is a significant legal literature on use of monitors generally, in the context of civil structural reform litigation (such as with the FCPA), and what independent monitors can and cannot accomplish.180 The costs of monitors include the cost of supervision of the company. It also includes the cost of the monitor substituting its judgment for that of management and the board in business decision-making. The threat of the imposition of monitors increases the commitment within the firm to spend resources on increased detection.

The use of monitors shifts the cost from government enforcers to the firms being monitored. The fear of the implementation of monitors means more investment by firms ex ante to protect themselves against the intrusion of a monitor. If there is wrongdoing that results in the imposition of a corporate monitor, the monitor has the discretion to utilize significant firm resources to restructure the firm in a way to create credible compliance commitments.

The discretion of corporate monitors is broad. There are two forces that pull in different directions. On the one hand there is the need for specific guidance for companies and monitors to understand how to comply and the limits of what a monitor can and cannot do. However, there is also a need for flexibility to tailor a monitorship to the specifics of a company and its

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particular organizational environment. As such, the structure of monitors is highly adapted to the context of the violation, the company involved and the prosecutor. Corporate monitors can easily add up to hundreds of millions of dollars. A corporate monitor’s work may include a comprehensive review of documents and various practices of an organization to take stock of the micro and macro of an organization to determine how it operates. Such a review may include reviewing various business records and correspondence of employees with those outside of the firm.

Dollar amounts for corporate monitors can be significant. This seems to have been the case with Siemens, which since its FCPA violation (resulting in a $800 million US fine and a similar $800 million fine in Germany) has spent over $100 million on improving its global compliance in 2009 with over 600 compliance personnel around the world and $150 million spent on outside consultants to help with compliance remediation.

The current controversy regarding corporate monitors is that that they have broad powers and little accountability. This has allowed corporate monitors to become far more active in the internal governance of a firm than perhaps they should be, as they substitute their judgment for management. This is perhaps the ultimate deterrence for cartel members. Firms will be more likely to invest in greater compliance because of the very intrusive nature of corporate monitors. A monitor places an outsider in a decision-making process within the firm. Senior management and directors of companies do not want to have a monitor to second guess it’s every decision. Compounding this fear by managers is that in some cases, it seems as if there has not sufficient oversight of corporate monitors. The lack of clear guidelines for how it should be implemented also impact the potential abuse of discretion by corporate monitors.

Brandon L. Garrett, Globalized Corporate Prosecutions, 97 Va. L. Rev. 1775, 1777 (2011)
Siemens 2011 Annual Report at Section II p. 74.
Jennifer Arlen, Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony Barkow & Rachel Barkow eds., 2011).
Another issue regarding monitors is the person who serves in such a capacity. It is difficult for prosecutors to understand the complex organizational practices of a firm and of the crimes committed therein. For this reason, we might assume that prosecutors would impose monitors who have a strong business background who understand how compliance works and how to reduce or eliminate corporate criminality. Yet, many of the corporate monitors lack an understanding of how a corporation and its internal environment. Many monitors are former prosecutors, government regulators or retired judges rather than people with in-house experience. Monitors without business experience may not know what programs are effective to implement and may undertake compliance work that does not improve actual compliance but increases costs in a way that does not maximize shareholder value of the firm.

III. Use of Structural Corporate Monitors in Antitrust

A. Why monitors are not used in antitrust more broadly

If overall monitors can curb recidivism and reform corporate cultures in firms, this may assist in criminal antitrust and the leniency program. If all companies except for the leniency applicant understand that they will have corporate monitors imposed upon them, this will increase cartel instability as it will increase the payoff for a cartel member to defect via leniency.

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191 Lisa Kern Griffin, Inside-Out Enforcement, in Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct 120 (Anthony Barkow & Rachel Barkow eds., 2011). For example, The AIG Monitor examined internal controls regarding financial reporting and oversaw compliance programs for a total cost of $20 million. The monitor, longtime Washington lawyer James Cole, performed oversight at exactly the time that AIG engaged in risk credit default swaps but seemed not to understand its significance to the company’s long term financial health. Sue Reisinger, “AIG’s Federal Monitor Failed To Curtail Bad Behavior. Is It Time To Reexamine The Program?” Law.com Corporate Counsel, 07/01/09, at http://www.gop.com/index.php/research/comments/the_aig_dag#ixzz1TzYVC1CPg. In Cole’s defense, he was limited in the settlement agreement as to the monitoring the particular terms of the settlement agreement and not beyond. F. Joseph Warin et al., Somebody's Watching Me: FCPA Monitorships and How They Can Work Better, 13 U. PA. J. BUS. L. 321, 359 (2011).

192 Nor have monitors been able to fully eliminate recidivism. There have been a number of repeat offenders for FCPA enforcement, including ABB Ltd. (2004 and 2010 violations)(Press Release, U.S. Dep't of Justice, ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties, Press Release No. 10-1096 (Sept. 29, 2010), available at http://www.justice.gov/opa/pr/2010/September/10-crm-1096.html; SEC v. ABB Ltd., SEC Litigation Release No. 18775 (July 6, 2004)( and Baker Hughes (2001 and 2007 violations)( SEC v. Baker Hughes Incorporated and Roy Fearnley, Litigation Release No. 20094 (April 26, 2007); In re Baker Hughes Inc., Exchange Act Release No. 44,784 (Sept. 12, 2001). This does not necessarily suggest that the FCPA is ineffective. Indeed, multinationals have thousands of employees who operate across countries (with different levels of country corruption and expectations of how business is done). In such circumstances, despite even the best compliance procedures, a multinational can be subject to liability even if one or small group of employees acts contrary to the company's pre-existing procedures.
The Bridgestone plea bargain proves that DOJ Antitrust is aware of the possibility of corporate monitors as a remedy for criminal activity. For some reason, DOJ is reluctant to include monitors as part of its usual remedy scheme in a criminal cartel setting even though leniency on its own, while effective at detecting a number of cartels, is less effective at creating an effective compliance culture that would deter cartel formation in the first instance.

DOJ Antitrust has focused only on leniency and avoidance of violation. It has not spent time on building a competition culture within companies, which puts DOJ Antitrust at odds with other leading antitrust agencies. Yet, it may not be surprising that DOJ Antitrust would be unwilling to experiment with tweaks to the leniency program. Organizational theory notes that, “Organizational members who have been socialized or trained into a specific institutional logic are likely to be committed to defending it should it be challenged.”

DOJ Antitrust has not provided specific guidelines but has followed the Sentencing Guidelines and the actions of DOJ suggest a pattern of what compliance should look like as well as case selection. Unlike the rest of DOJ, the Antitrust Division routinely ignores the corporate guidelines and cartel enforcement does not provide much guidance at all about what compliance should look like. Indeed, DOJ cares little about compliance because it informally states that any cartel involvement is failed compliance. As such, it is irrelevant if there is a compliance program. There is also no sense of what compliance should look like after the fact. DOJ does not impose any affirmative requirements, leaving it to the companies. This part explains this reluctance on the part of DOJ but also shows that monitors have been used in non-criminal antitrust contexts and indeed in the area of mergers the trend within DOJ antitrust is growing.

In antitrust, structural reform has been longstanding, starting with the break-up of Standard Oil in 1911. Over time, antitrust has shifted from structural remedy of breakup to more behavioral remedies. In some cases the behavioral response has meant a quasi-regulatory function for antitrust. The most important recent antitrust case that involved

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193 Competition Bureau Canada, Corporate Compliance Programs (2008); Office of Fair Trading, How your business can achieve compliance with competition law (OFT1341)(2011); [Conseil de la Concurrence compliance guide].
dominant firm conduct, Microsoft is well known and has been detailed elsewhere.\(^{199}\) This article discusses a bit the issues that emerged in the consent decree governing the remedies of this landmark case.

In the Microsoft saga, the remedy was to create a monitor to ensure that Microsoft’s competitors in the application and browser markets could have equal access to Microsoft’s operating system. The consent decree by Judge Kollar-Kotelly set up a monitor to work through technical issues regarding interoperability and the creation of a protocol licensing requirement. The protocol licensing required Microsoft to make available communications protocols that Windows client operating systems used to interoperate with the server operating system of Microsoft.\(^{200}\)

The consent decree imposed a three person technical committee of software designers and programmers to oversee this process through behavioral monitoring.\(^{201}\) The technical committee process led to a monitoring system that was costly to Microsoft (40 experts were employed by the Technical Committee) and took on a quasi-regulatory function in its ability to suggest additional obligations that it suggested should be imposed for interoperability.\(^{202}\) The monitor’s work proved to be less than fully effective. However, there are reasons to explain the more limited success of the monitoring at Microsoft:

\[T\]his provision [of the monitor and protocol licensing requirement] was problematic from the outset because it did not respond directly to any proven antitrust violation by Microsoft. Monopolization remedies should usually aim to remove impediments that proven violations place in the way of entry, innovation, and expansion. The protocol licensing remedy, by contrast, imposed an affirmative obligation, essentially unrelated to any proven violations, to facilitate possible future entry by unknown firms and technologies. Many of the problems the court and the parties have encountered in enforcing the provision can be traced to this high ambition.\(^{203}\)


\(^{202}\) Nicholas Economides & Ioannis Lianos, A Critical Appraisal of Remedies in the EU Microsoft Cases, 2010 COLUM. BUS. L. REV. 346, 380.

The Microsoft decree lasted for more than 10 years. While there is more competition today than at the time of the Microsoft settlement, DOJ did not anticipate correctly any of the eventual firms that would prove to be serious competitors for Microsoft.

In other circumstances involving dominant firm conduct, monitors have been more effective, such as in the area of antitrust implications of the licensing of intellectual property. In the area of the licensing on intellectual property, antitrust has been active (through the courts rather than through a monitor within companies) of licensing of intellectual property such as through the ASCAP decree (which has been in existence since 1941, although there are a number of other examples such as BMI. The mere threat of judicial rate setting is enough for parties to often bargain with each other in the shadow of the law.

It may very well be that a reason that DOJ hesitates to use corporate monitors in the cartel setting is because of the very mixed results with its monitoring in cases of single firm civil conduct. Yet, this reluctance to use monitors on the part of DOJ, as this part will demonstrate, seems to be limited to Section 2 claims involving single firm conduct. In fact the imposition of antitrust compliance officers as part of behavioral remedies is common in both merger and civil Section 1 contexts and in the merger context, in fact may be a growing preference at DOJ.

Given the use of monitors to change behavior in other antitrust settings to protect competition and promote compliance, this article claims that the most likely reason that criminal antitrust has not embraced the use of monitors is the fear that somehow tinkering with the leniency program will weaken the leniency program. In fact, this article argues that with exactly this sort of tinkering and the use of monitors, there is even more incentive than ever for a company to avail itself of leniency for illegal cartel behavior.

Monitors and conduct remedies seem to be increasingly preferred in the merger context, in particular for vertical mergers. Indeed, there seems to have been a shift within DOJ between the 2004 and 2011 Remedies Guide on this issue. The 2011 Remedies Guide discusses behavioral remedies as a “valuable tool” whereas the 2004 Remedies Guidelines showed more concern that behavioral remedies are “more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.” These remedies have been

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207 2011 Remedies Guide at 6-7.
208 2004 Remedies Guide at 7-8.
used with increased frequency in the merger context in cases such as Comcast/NBC Universal\textsuperscript{209} and Google/ITA.\textsuperscript{210}

Conduct remedies within the merger context require intervention into the management of firms. However, conduct remedies reduce information asymmetries that otherwise would exist between the antitrust agency and the merging parties. A conduct remedy with a monitor embeds the monitor in the merged firm to have better access to information to ensure competition. The monitor must ensure that competition that existed before the merger is preserved. This requires training programs and policing against conduct that reduces competition through coordination between parts of the firm that must be kept separate through a firewall. In this sense, the use of antitrust monitors in the merger context is more similar to what a cartel monitor would do that the quasi-regulatory function that a monitor would undertake in the single firm context. However, there is significant discretion to these monitors. The issues in merger orders tend not to be within the text of the antitrust laws, so the monitor must ensure that the merged firm is living up to the terms of the order.

B. Curious case of criminal antitrust

In civil Section 1 cases, since the introduction of the leniency program, the Antitrust Division has imposed corporate monitors in a number of different types of situations. Since the introduction of the leniency program there have been 40 separate matters for the Antitrust Division civil Section 1 cases that involved remedial compliance programs. Of these cases, 29 of the cases involved the imposition of an “antitrust compliance officer” whose role is similar to that of a corporate monitor. The entire list of cases that involved the creation of an antitrust compliance program (including those with corporate monitors) is included in Appendix I.

Two cases provide a representative sample of the structure of civil final judgments in a Section 1 context and the role that the monitor plays in these settings. One case involved what is known within antitrust merger parlance as “gun jumping”. In a gun jumping situation, merging parties integrate before the merger has been finalized. As a result of the gun jumping by Gemstar and TV Guide, the two companies unlawfully fixed prices and allocated markets before the companies were formally granted clearance to merge.\textsuperscript{211} The Final Judgment provided for the designation of a compliance officer to ensure that the gun jumping would not reoccur.

Another case suggests more significant responsibilities for the antitrust compliance officer. In a Final Judgment entered into with the National Association of Realtors (NAR), DOJ sought to limit NAR’s policies that restrained competition involving virtual office websites in


violation of Section 1 of the Sherman Act. The Judgment prohibited NAR from prohibiting or restricting brokers from using a virtual office for listing information. To police against NAR, the judgment creates an antitrust compliance officer to monitor NAR and to educate its board members in antitrust compliance.

On the criminal side, with the exception of one set of companies involved in the same cartel, the Antitrust Division has never imposed something akin to a corporate monitor (called an “Antitrust Compliance Officer” in the plea agreements). One plea agreement involved a criminal conspiracy in telecommunications and internet equipment. As part of the plea, the company needed to establish an antitrust compliance officer to oversee antitrust compliance. This included educating the board, officers and employees about the antitrust laws and its compliance. The monitor also would oversee any work that the company did with government agencies as purchasers to ensure that there would not be bid rigging of government funded or sponsored programs. This included the creation of an internal auditing program, setting up an internal antitrust hotline and various other compliance related functions. Another two plea agreements involved other companies who were members of the same cartel.

The lack of significant use of corporate monitors in antitrust criminal plea agreements is particularly surprising given that the size and scope of cartel corporate illegality in multinational companies. One would expect to see increased use of corporate monitors as the fines per firm have seemed to have reached a natural limit. The same is true as to the length of individual criminal convictions.

IV. Antitrust Monitors?

A. The Use of Monitors as a Response to Criminal Antitrust Violations

Given that DOJ Antitrust views all cartels compliance as failed compliance, by DOJ Antitrust’s own position, corporate monitors should be utilized in cartel cases to respond to such “failed” compliance. By increasing the penalties and creating the possibility of monitors, this raises the stakes for enforcement. This in turn may make it less profitable for some firms to participate in price fixing because of the increased probability of detection internally and lead to greater deterrence for some cartels to be formed and for others to be dissolved.

214 Discussions with the case handler at DOJ Antitrust (in the Cleveland Field Office) explained that the motivation for the imposition of the corporate monitor came from the US Attorney who worked with him on the case. The US Attorney mentioned that the imposition of monitors was typical in other areas of white collar crime and suggest that it be imposed in this antitrust case. The author suspects that had the case been tried with DOJ Antitrust staff based in Washington, DC that a monitor would not have been contemplated.
The reason for the imposition of monitors in criminal antitrust cases is that based on the current structure of antitrust enforcement, there do not seem to be sufficient incentives for firms to implement compliance programs. Without detection of wrongdoing at the individual level, firms benefit from the illegal activity associated with collusion. To counter this, firms and individuals within firms need incentives to monitor internally and rewards for doing so. As other articles argue, providing rewards for information may improve cartel detection.\textsuperscript{215}

Monitors can assist to change the corporate culture of a firm to make the culture one of compliance and lawfulness. Creating an ethical compliance environment suggests that individuals have internalized the pro-compliance social norm.\textsuperscript{216} This means that an individual will factor the social cost of non-compliance into their risk-reward calculation of cartel participation because non-compliance will be internalized as deviant behavior. This cultural shift toward ethical compliance aids in whistle blowing on others within the organization who commit wrongdoing.

Blowing the whistle on cartel crimes requires employees to feel empowered within the organization. Employee incentives are not aligned with the firm in terms of compliance because an employee or mid-level manager risks losing his/her job if he/she comes forward with information of illegal activity.\textsuperscript{217} The cost of informing outweighs the benefit of remaining silent. The misalignment of incentives between employees and firm replicate themselves in the cartel context. Where the cartel compliance culture at a firm is weak, there is little incentive for employees to come forward to report on others within the organization.

Through more effective use of moral shaming, norms can be changed within companies and society at large. This can be done through changing the incentives, highlighting the ethical value which decreases the cost of detection because others will be on the lookout and because those who might try to engage in illegal activity will see that it will hurt them because such behavior will not be tolerated in the company. It raises the potential cost to participation in illegal activity.


\textsuperscript{216} Charles O’Reilly III & Jennifer Chatman, \textit{Organizational Commitment and Psychological Attachment: The Effects of Compliance, Identification, and Internalization on Prosocial Behavior}, 71 \textsc{J. Applied Psychol.} 492 (1986); Donald Lange, \textit{A Multidimensional Conceptualization of Organizational Corruption Control}, 33 \textsc{Acad. Mgmt Rev.} 710, 720-21 (2008).

\textsuperscript{217} Alexander Dyck, Adair Morse, & Luigi Zingales, \textit{Who Blows the Whistle on Corporate Fraud?}, 65 \textsc{J. Fin.} 2213 (2010).
Another element of whistle blowing is that it occurs more often in organizations where employees feel empowered by their work environment. Social context matters when employees decide to whistle blow or to participate in illegal behavior. Some people violate laws because they do not understand them rather than because they actively seek to do so. The creation of symbols for what constitutes bad behavior and giving such symbols normative cultural values affect law compliance. Institutional and organizational forces thereby constrain individual decision-making.

A corporate monitor may have the support from top management to get information and to get buy-in from various parts of the company that a pre-existing compliance officer or general counsel of the company did not have. The monitor would work to ensure that the compliance officer would be better integrated to reduce information asymmetries to reduce the costs of compliance (reduction of agency costs). The monitor would assist the firm to create an understanding of the legal regime and creating a culture and set of rituals that support legal compliance. A compliance culture also lowers monitoring costs as it allows for early detection of wrong-doing. At the back end it minimizes the penalties because firms (and their agents) are more likely to detect internal wrongdoing and therefore more likely to be able to successfully win the race for leniency.

B. Who Monitors Should Be

As noted in the discussion regarding FCPA monitors, one problem with compliance officers is in selection. In an antitrust criminal setting, the monitor needs to be someone who has real skills. Someone without an antitrust background will not be well suited to integrate antitrust knowledge into to the general culture of the company. Yet being an antitrust expert is not enough. To minimize costs monitors should be chosen who are not merely antitrust “experts” but people who have worked intimately with companies. A monitor who has only worked in law firm or in government without much interaction with the business unit of the firm may not understand corporate culture and various methods of communication. Such monitors may not know how to ask for information or how to understand a firm’s organizational structures.

This is not to suggest that the only people qualified to serve as antitrust corporate monitors must be in-house practitioners. Some practitioners in law firms or government know an industry particularly well because of deal flow or litigation within a certain industry. The

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more experience the monitor has, the lower the slope of the learning curve will be and the more effective their ability to positively shape compliance within a company.220

C. What Monitors should do

The compliance program that a monitor should implement needs to be tailored to the specific organization and its dynamics. This requires a certain amount of discretion. However, some sort of guidelines for what effective monitoring might look like (and more broadly what makes for effective compliance programs) would go a long way to reducing the abuses that seem to have been not infrequent for corporate monitors in the FCPA context. This part explains broadly the types of policies that monitors should undertake.

Tirole describes active monitoring as prospective monitoring, as opposed to passive monitoring, which is retrospective.221 A compliance officer should require antitrust interviews with senior and middle level management to learn the business and understand the realities of both the formal and informal organizational structures of the firm and the key players therein. Training should focus on senior managers and employees who deal with contracts, competitor benchmarking, trade associations, joint-ventures, and pricing and marketing strategies.222

To better conform compliance under the Sentencing Guidelines to the particularities of antitrust, DOJ should create guidelines for effective compliance, as other agencies do and as DOJ does for other areas of antitrust conduct such as Horizontal Merger Guidelines,223 Antitrust Guidelines for the Licensing of Intellectual Property224 and Antitrust Guidelines for Collaborations Among Competitors.225 Multinational firms have the benefit of guidance on other types of compliance issues from the OECD Antitrust Bribery Guidance226 and from the Department of Justice.227 There is nothing equivalent from DOJ Antitrust. Yet, a number of non-US antitrust agencies offer specific guidance on compliance programs. This includes the

220 An example of a successful monitor is the monitor used in the Coca-Cola 2010 vertical merger with its distributors. The monitor was the former antitrust and compliance counsel for another consumer food product multinational familiar with merger integration issues and compliance.
221 Jean Tirole, Corporate Governance, 69 ECONOMETRICA 1, 9-10 (2001).
222 ABA, ANTITRUST COMPLIANCE: PERSPECTIVES AND RESOURCES FOR CORPORATE COUNSELORS 80 (2d ed. 2010).
226 OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance (2010)(noting that each firm should have “a clearly articulated and visible corporate policy prohibiting foreign bribery.”).
227 Department of Justice Opinion Procedure Release 04-02 (July 12, 2004)(suggesting that firms need a “clearly articulated corporate policy against violations of the FCPA and foreign anti-bribery laws and the establishment of compliance standards and procedures to be followed by all directors, officers, employees, and all business partners, …that are reasonably capable of reducing the prospect that the FCPA or any applicable foreign Anti-Corruption law or [the firm’s] Compliance Code will be violated.”).
Office of Fair Trading (United Kingdom),228 Canadian Competition Bureau,229 and Australian Competition and Consumer Commission.230

Recent empirical studies suggest that antitrust compliance is not always effective.231 A compliance program will only be effective if it changes the culture and relationships within a firm which suggests both a desire to change and a sense of what a company must do to affect such change. Without guidance of what a good compliance program should be on the part of DOJ Antitrust, compliance programs have the risk of being both too expensive and ineffective.

A compliance program should require the creation and effective use of an antitrust manual and a clear statement of the company’s compliance commitment. This is in line with the Sentencing Guidelines, which discuss “reasonable steps to communicate … effective training programs and otherwise disseminating information…”232 By creating a narrow tailored set of compliance guideline and following them, this not only helps corporate monitors in achieving very specific and circumscribed goals. This also would allow companies to benefit from taking on the cost of serious compliance.

A monitor can change a corporation’s culture. Changing culture includes better reporting mechanisms are in place, reduced information asymmetries, reduced agency cost problems from certain types of managerial pay incentives, and improvements to both the frequency and the total amount of antitrust compliance programs. Improved compliance programs also better allow for communication with enforcers about potential wrongdoing and therefore lead to better detection should there be a bad apple that veers from the good corporate culture in spite of his incentives that should push for compliance.233

The role of the monitor would be to create a long term mechanism to better integrate the general counsel’s office within the broader compliance function of the company, which may be elsewhere (such as a compliance officer who directly reports to a CEO or CFO). One issue that might affect the lack of compliance with cartel prohibitions is that the compliance process may not effectively utilize lawyers. If antitrust compliance is left to the corporate compliance officer

228 Office of Fair Trading, How Your Business Can Achieve Compliance, OFT424 (2005); [insert 2011].
229 Canadian Competition Bureau, Bulletin: Corporate Compliance Programs (2010).
231 A survey of Belgian companies found that 64 percent had an antitrust compliance program. However, the same study found that only 35 percent of such compliance programs met the standards of the competition authorities. In that survey, those companies that are the most likely to have a compliance program have a number of aspects are large companies (1,000 or more employees), are subsidiaries of US and Asian companies, publicly traded and have confronted an antitrust violation in the past. Gerben Pauwels & Ysewyn, The Impact of Competition Law and Compliance on Belgian Businesses: Results of a Survey of Company Lawyers in Belgium, 2 (Linklaters 2010). Survey work in the UK reveals that in the United Kingdom, the larger the organization, the more aware its employees are of competition law. OFT, Competition Law Compliance Survey (2011) at para 4.6.
of a corporation, this might be problematic as only 29 percent of compliance officers have law degrees.\textsuperscript{234} A corporation’s compliance department may be separate from that of the general counsel’s office. Bifurcating compliance might mean that some compliance programs are more likely to be rewarded than others. Additionally, the lack of coordination between compliance and legal teams may mean that while there is emphasis on accounting fraud, it may come at the expense of financial support for cartel related compliance monitoring and training.

To properly effectuate antitrust compliance, monitors should implement measures such as the creation and integration of a code of conduct, providing training sessions for employees, creating an antitrust compliance officer and requiring online training programs. Creating an effective compliance structure requires a way to properly collect and analyze information. The monitor should also conduct an antitrust audit to provide a diagnostic of antitrust risk.\textsuperscript{235}

Monitors might want to adjust the pay incentive structure of a company. The nature of managerial contracts may impact the likelihood of a manager undertaking collusive activities. Incentives can be structured in such a way that decreases the likelihood of a manager engaging in collusion.\textsuperscript{236}

It is important that as part of the compliance program that the compliance function be given continuing budgetary support. As such, the compliance program must be regularly reviewed. Changes in marketing or sales should trigger an antitrust review of the proposed strategy for the likelihood of coordinated behavior. One job of the monitor would be to identify staff for additional and monitoring training via their risk profile. A member of the company who interfaces with competitors such as trade association meetings may be riskier than others in an organization to participate in cartel activity.\textsuperscript{237}

Antitrust monitors should run econometric screens. Screens examine improbable occurrences. For example, a screen can employ regression analysis to determine the probability of collusion for industries based on industry variables.\textsuperscript{238} Screens also can use anomalous patterns in data based upon a control group.\textsuperscript{239} These screens might generate irregularities that

\textsuperscript{234} Cristie Ford & David Hess, \textit{Can Corporate Monitorships Improve Corporate Compliance}, 34 J. CORP. L. 679, 693 (2009). Whether or not this is an issue in antitrust remains unknown. In tax, whether the compliance officer has a JD is irrelevant to whether or not a corporation will engage in tax evasion. See Scott D. Dyreng et al., \textit{The Effects of Managers on Corporate Tax Avoidance}, 85 ACCT REV. 1163 (2010).
\textsuperscript{235} Donald I. Baker & Mary J. Houle, \textit{Using the Results of an Antitrust Audit to Educate the Corporate Team}, 59 ANTITRUST L.J. (1990); but see Joseph E. Murphy, \textit{Surviving the Antitrust Compliance Audit}, 59 ANTITRUST L.J. 953 (1991)(suggesting some downside to the antitrust audit).
\textsuperscript{236} Giancarlo Spagnolo, \textit{Managerial Incentives and Collusive Behavior}, 49 EURO. ECON. REV. 1501 (2005).
\textsuperscript{237} Anne Riley & Margaret Bloom, \textit{Antitrust Compliance Programmes–Can Companies and Antitrust Agencies do More?}, 1 COMPETITION L.J. (2011).
\textsuperscript{238} For a practical application, see Paul A. Grout & Silvia Sonderegger, Predicting Cartels (Office of Fair Trading, Economic Discussion Paper No. 773, 2005).
could inform antitrust agencies where to look for collusion. A screen, for example, might focus on irregular price movements within an industry. A firm may want to preemptive run a screen.

Employees sometimes hide facts out of fear of detection. Sometimes it is difficult to gain employee trust. A company may have multiple business lines and tens of thousands of employees. Screening can help identify red flags in business activities and lines of business for the company to use in determining where to focus its efforts. Screens may increase compliance by executives who know company is watching them. The use of screens allows for internal detection and allows, which enables firms to apply for leniency based on the information that they uncover. At the industry level, the use of such screens would make cartels less stable as members of an industry would be more reluctant to participate in cartels knowing that their industries would be under closer scrutiny.

**Conclusion**

The criminal antitrust system is not broken. Leniency overall has been the most impressive innovation in antitrust enforcement in the last quarter century. However, the traditional penalty formulation of fines and criminal sanctions seem to be reaching their limit. This article proposes modifications to both the benefits and punishments associated with leniency. On the benefits side, leniency should be more generous – but only for the amnesty applicant and only if the applicant has an effective compliance system as contemplated under the US sentencing guidelines. On the punishment side, cartels need stronger punishments. Corporate monitors create fear among boards of directors and senior executives because of the discretion that they have to oversee a company and push changes that may have a significant impact on a company’s operations and structure. One reason to promote corporate monitors and better internal governance in a cartel setting may be that such policies can substitute for higher criminal sanctions as part of the optimal deterrence trade-off that firms make. Without some other mechanism to increase the cost of illegality (because of limits to fines and incarceration for cartel crimes), it will be rational for firms and individuals therein to participate in cartel activity.

These additional carrots and sticks will not eliminate cartel formation and participation. At whatever penalty level the legal regime sets fines and jail, there will always be some group of people for whom no amount of penalties will matter because such people convince themselves that they will never get caught. However, reduced penalties for the leniency applicant and the automatic imposition of corporate monitors upon other members of a cartel will bring cartel

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policy closer to optimal deterrence than the current regime without significant additional administrative costs.
## Appendix I – Cases in Which An Antitrust Compliance Officer/Corporate Monitor Has Been Imposed

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Date</th>
<th>Judgment</th>
<th>Compliance Officer</th>
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<tbody>
<tr>
<td>Nat'l Ass'n of Realtors</td>
<td>11/18/2008</td>
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<td>9/12/2007</td>
<td>Final Judgment</td>
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<td>11/20/2002</td>
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<td>11/5/1998</td>
<td>Final Judgment</td>
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<td>Seminole Fertilizer Corp.</td>
<td>9/19/1997</td>
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<td>Yes, Section VII.</td>
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<td>Norsk Hydro USA, Inc.</td>
<td>5/18/1998</td>
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<td>Tom Paige Catering Co.</td>
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<td>AIG Trading Corp.</td>
<td>10/10/1997</td>
<td>(Dismissed)</td>
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<td>Brush Fibers, Inc.</td>
<td>11/12/1996</td>
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<td>Universal Shippers Ass'n, Inc.</td>
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<td>Anchorshade, Inc.</td>
<td>10/8/1996</td>
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<td>Ixtlera de Santa Catarina, S.A. DE C.V.</td>
<td>12/10/1996</td>
<td>Final Judgment</td>
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<td>A&amp;L Mayer Assocs., Inc.</td>
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<td>IV, part C</td>
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<td>6/25/1996</td>
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<td>Ass'n of Retail Travel Agents</td>
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<td>Steinhardt Mgmt. Co.</td>
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<td>Utah Soc'y for Healthcare Human Res. Admin.</td>
<td>9/14/1994</td>
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<td>Alliant Techsystems Inc.</td>
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<td>Airline Tariff Publ'g</td>
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