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Perspectives on Antitrust Compliance

Anne Riley, Andreas Stephan, Anny Tubbs

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Chapter 8
Fighting Cartels: The Interaction Between Detection, Sanction and Compliance

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The idea that cartels are inefficient practices – since they freeze competition without any gains for consumers – is not a matter of debate in economics and public policy. However, the question of how best to deter firms from engaging in such anticompetitive practices remains in question.

In this respect, economic theory provides a useful starting point. In this chapter we therefore start from a counterfactual world, based on the theory of optimal sanctions that relies on restrictive assumptions but allows us to reach a powerful result on a theoretical level. We will apply this theory to cartel cases and highlight its limits, which will lead us to analyse the best tools to better dissuade these illegal practices.

It appears that the issue of the incentive to violate antitrust laws is complicated by the fact that, in practice, a firm and manager can have divergent interests regarding compliance with antitrust laws. We therefore analyse the diversity of concrete situations that may lead shareholders and/or managers to engage in

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cartel practices, and specify the appropriate mechanisms to prevent cartels in each case.

We will show that anti-cartel policy cannot be reduced to a binary arbitration between sanctions and detection: it must also include a policy of advocacy and compliance. Similarly, public policy cannot be limited to detecting and sanctioning firms. it should be extended to individuals.

I. A Counterfactual World with a "Triple Dividend"

This counterfactual world can be explained with the theory of optimal sanctions, inspired by the economic analysis of crime.[1] A firm infringes the law only if it estimates *ex ante* that the gain is greater than the cost. This principle refers to the notion of rationality, which leads firms to weigh up the gains and costs before making a decision. In the case of a cartel, the gain from the infringement is quantifiable: it corresponds to the difference between the cartel price and the competitive price, multiplied by the volume of transactions.

On the cost side, the participant in a cartel (usually the corporate participant, but in some jurisdictions also an individual) is exposed to a financial penalty if the practice is detected by antitrust authorities. The cost could potentially be divided into two distinct elements: the monetary penalty and the probability of being caught. Let us assume that the firm is risk-neutral when it decides whether or not to engage in a cartel: under this theory, its choice is solely based on the expectations of gains and costs. The firm does not violate antitrust laws if the expected cost exceeds the illegal gain.

To deter the formation of cartels under this theory, antitrust authorities should "threaten" firms *ex ante* with a penalty such that the expected cost is greater than the illicit gain. The optimal sanction here has a deterrent function. The objective is not primarily to punish *ex post* those who are caught, but to send a credible message of general deterrence *ex ante* to firms that might be tempted to engage in cartel practices. If firms are fully informed and convinced that the optimal (or maximum) sanctions will be applied *ex post*, they no longer have any *ex ante* incentive to break the law: no sanction is imposed as long as there is no violation of the law.

As a knock-on effect, since the violation is no longer profitable, shareholders have a strong incentive to "discipline" their managers. If the shareholders control the managers perfectly (no information asymmetry between them), the control costs are zero. Advocacy and public education about the benefits of competition and the importance of antitrust compliance by competition authorities may be ineffective unless it in the self-interest of firms to comply. One can even go further: as detection

1 Gary S Becker, "Crime and Punishment: An Economic Approach" (1968) 76(2) J Pol Econ 169.

is costly (in terms of public finance), antitrust authorities have an incentive to set low probabilities of detection, associated with very high sanctions. For public authorities the expense will be minimal, since detection will be limited and infringements rare. This counterfactual world would then lead to a "triple dividend": zero infractions, zero sanctions, zero public expenditure. This world does not exist, of course, because it is based on restrictive and debatable assumptions.

II. A Real World with Realistic Assumptions

First, the theory of optimal sanctions assumes that firms violate antitrust laws with full knowledge of the facts. While this assumption may be largely true in the case of large firms with internal or external legal departments (but even then, it is uncertain), it cannot be ruled out that in the case of SMEs (small and medium size enterprises), cartels can be formed despite the potential costs in the event of detection because of a lack of knowledge. Public authorities have an essential role to play here: if they want to prevent "infringements through negligence" or "lack of knowledge", costly to detect *ex post*, they must disseminate sufficient information *ex ante* on the illegal nature of cartels, the sanctions and the risks involved, especially to SMEs. As internal compliance may be lacking in SMEs, it is the role of public authorities, through advocacy, to take a leading role, specifically by addressing this target (like the SME guide published in 2020 by the French Competition Authority). *Competition Advocacy* should focus on the harmful dimension of cartels, beyond their immoral aspect: for example, the UK Competition and Markets Authority (CMA) expounded in 2017 on the idea that cartels are comparable to theft. Andrea Coscelli, Acting Chief Executive of the CMA, said: "Cartels are a form of stealing that cheat ordinary people as well as other businesses by undermining competition".[2]

Second, the assumption that antitrust authorities have an incentive to set a probability of detection close to zero (in order to minimise public expenditure) will create a behavioural bias: if the probability of detection is too low, firms will consider it to be (or to be close to) zero and … may be tempted to break the law. This is the so-called "availability bias" well known in psychology: when an event is rare, people tend to consider that it does not exist.

It is therefore necessary for antitrust authorities to maintain a certain level of cartel enforcement action, even if this comes at a cost. "Zero public expenditure" is not a credible option.

Third, antitrust authorities cannot directly apply the theory of "optimal sanction". First because, in practice, the legal criteria for determining an antitrust penalty

2 CMA, "CMA launches campaign to crack down on cartels" Press release (*CMA*, 20 March 2017) <www.gov.uk/government/news/cma-launches-campaign-to-crack-down-on-cartels>.

rarely relates to the "illicit gain" or the "probability of detection". For example, in France, the penalty is determined on factors such as the seriousness of the infringement or the damage to the economy. Then, in order to account for the probability of detection, antitrust authorities would have to know its exact value, which is not possible to estimate. At the same time, since the maximum amount of sanction is usually established by law, antitrust authorities are limited in how far they may set a sanction that might be deemed "optimal" under the foregoing theory. Finally, if the antitrust authorities were to impose "optimal" sanctions, the amounts would potentially not be financially sustainable for firms, thus driving them into bankruptcy. It would be paradoxical if antitrust sanctions, imposed in the name of competition, resulted in less competition in the market.

It follows from the above that antitrust sanctions, even if they have increased significantly since the 2000s, arguably remain below their "optimal" level in terms of deterrence, as suggested by empirical studies *a posteriori*. For example, Combe and Monnier [2011, 2013],[3] on the basis of a sample of 64 cartels subject to infringement decisions during the period 1969–2009, conclude that the European Commission has become more severe but has not crossed the red line of "over-dissuasion". Thus, there may be a residual incentive, even with strong antitrust penalties, to engage in cartel practices: there is no such thing as "zero violations" and, by implication, "zero penalties" – nor (in compliance terms) is there any such thing as "zero risk".

III. Inside the Cartel: Shareholders and Managers

Every firm is composed of people with different objectives. In particular, shareholders have the primary objective of maximising profit, while managers (and more generally employees[4]) are focused on their career advancement or their own short- or medium-term remuneration. Depending on the situation, these interests may converge or diverge, particularly with regard to compliance and antitrust laws. Two polar cases are particularly interesting to study from a public policy perspective.

A first case is when shareholders, anticipating that sanctions will be suboptimal, allow (explicitly or tacitly) managers to form a cartel, without talking about the risks (Case 3 in Table 1). For example, they may refuse to implement a compliance programme, so that managers engage in cartels without being fully aware of the illicit nature of the practices. They may also try to minimise the seriousness of the violation by presenting it as a "necessary evil" to achieve a legal result, namely

3 Emmanuel Combe and Constance Monnier (2011), Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement (2011), Antitrust Bulletin, 56(2), 235–275; Emmanuel Combe, Marcel Boyer, François Brunet, Constance Monnier-Schlumberger, Esther Bitton, Sanctions antitrust: Quel est le juste montant? Concurrences N° 1-2013, Art. N° 50423, 16–37.

4 In this article we use the terms "manager" and "employee" interchangeably. Empirical studies show, however, that participants in cartel meetings are most often top managers. See, e.g., John M Connor and Robert H Lande, "Cartels as Rational Business Strategy: Crime Pays" (2012) 34 Cardozo L Rev 427.

a high profit.[5] A more radical solution is to develop a form of "toxic management", by setting profitability objectives for managers that cannot be achieved by legal practices: managers are in a way "forced" to break the rule in order to "keep their objectives".

In this case, public authorities have an essential role to play (internal compliance will be lacking if shareholders want the company to violate antitrust laws): to disseminate information to the public at large on the illegal nature of cartels, in order to dissuade companies from participating. Public communication must focus as much on the illegal and harmful dimension of cartel behaviour as on the immoral aspect of these practices; according to an IFOP poll on the perception of cartels in France (the survey was conducted on behalf of the French Competition Authority), cartels receive a strong moral disapproval.[6] The majority of French people consider that it is a "dishonest" and "hidden" practice (the fact that customers pay more is not the first factor of disapproval). This result is in line with those obtained in similar studies in other countries.[7]

Table 1: Behaviour of managers and shareholders with respect to antitrust rules

Managers / **Shareholders**	*Comply with competition law*	*Engaging in a cartel*
Comply with competition law	**Case 1** Convergence of interests to comply with antitrust laws	**Case 2** Divergence of interest *("bad apple")*
Engaging in a cartel	**Case 3** Divergence of interest ("toxic corporate culture")	**Case 4** Convergence of interests to violate antitrust laws

A second case is that in which managers (or employees) intend to violate antitrust rules, against and without the knowledge of the shareholders (Case 2 in Table 1). This case is problematic for shareholders: in the event of an antitrust lawsuit, they cannot exonerate themselves from their responsibility by invoking the isolated behaviour of a manager. It is therefore in the shareholders' interest to dissuade the company (and its managers) from violating *antitrust* rules, by mobilising internal tools such as training, disciplinary sanctions (e.g. refund of bonuses or dismissal for misconduct), the implementation of a compliance programme, the adoption of an internal whistle-blowing procedure, etc.

However, it cannot be ruled out that, despite the best efforts of shareholders (or of "right-minded" company managers), particularly "risk-taking" employees

5 Maurice Stucke, "Am I a Price-Fixer? A Behavioral Economics Analysis of Cartels" (2010) University of Tennessee Legal Studies Research Paper No 97.

6 IFOP poll: <www.autoritedelaconcurrence.fr/fr/communiques-de-presse/22-janvier-2018-sondage-ifop-pour-lautorite-de-la-concurrence>.

7 Emmanuel Combe and Constance Monnier, "Public opinion on cartels and competition policy in France: analysis and implications" (2019) 42(3) World Competition 335–354.

may break the law, especially if they are overconfident. For example, some compliance programmes can only deter risk-averse employees and unethical behaviour when the programme is informative and not punitive. Similarly, the threat of a bonus withdrawal if the manager engages in an illegal practice is difficult to implement, as is the threat of a penalty in the employment contract.

Public authorities once again have an important role to play, because private sanctions are ineffective: public authorities should prosecute managers or individual employees personally, with sanctions such as fines, imprisonment or (in the case of directors) disqualification. Nevertheless, even such penalties may be insufficient. Indeed, the deterrent effect of high fines is limited for some people, so-called "hotheads", who are more influenced by the magnitude of the detection risk.[8] The existence of hotheads could explain why cartels continue to form and be detected, despite high fines. It is therefore necessary to develop other measures, such as increased detection or the use of incapacitation sentences (i.e. temporary disqualification from management positions). The latter have a stigmatising effect and are better accepted by public opinion than prison sentences.[9] Finally, a recruitment policy based on ethical criteria could also limit the formation of cartels. It would be advisable, when recruiting young managers, to assess their adherence to the rules of law, particularly with regard to compliance with antitrust rules.

Between these two "polar" cases, the situation that is the most likely in practice (Case 4 in Table 1) is where managers/employees and shareholders, although pursuing different objectives, may potentially have a convergence of interests in violating antitrust rules. On the part of the shareholders, if sanctions are not optimal, they may encourage (or allow) managers/employees to engage in cartels or do nothing to deter them. From the employee's perspective they may form a cartel to boost their performance, which may result in an acceleration of their career or in additional remuneration. This convergence of interests may be all the more likely since cartel practices, unlike other frauds, may mutually benefit shareholders and managers. In this respect, a PWC study has shown that competition is often the neglected topic of compliance policies, compared to the fight against corruption or embezzlement.

In this case, only a combination of sanctions against firms and individuals can limit these incentives to engage in collusion. Contrary to our initial theoretical framework, anti-cartel policy cannot be reduced to a simple choice between sanctions and detection, nor between shareholders and managers/employees.

Competition policy must also include an advocacy policy to prevent the formation of cartels when companies' internal compliance is lacking, and the latter must also be strengthened. Similarly, public policy cannot be limited to detecting and

8 Béatrice Boulu-Reshef and Constance Monnier-Schlumberger, "The fight against cartels: How to deter hotheads?" (2019) 70(6) Revue économique 1187.

9 Andreas Stephan, "An Empirical Evaluation of the Normative Justifications for Cartel Criminalization" (2017) 37(4) Legal Studies 621.

punishing legal entities: it can be extended to individual, according to modalities to be defined, through criminal sanctions.

IV. Which Kind of Public Sanctions Against Individuals?

The implementation of criminal sanctions against individuals remains quite rare, with the exception of the USA. The US DOJ Antitrust Division took criminal proceedings (including plea bargains) from 2009–2018 against no less than 524 individuals (both US and non-US citizens). Of these, 264 were sentenced to prison terms averaging 19 months. This approach is because cartel practices are subject to strong moral disapproval within American society, assimilated to a real "conspiracy against the market".

But in other countries the situation is quite different. In France for instance, although Article L. 420-6 of the Commercial Code has provided since 1986 for a prison sentence of four years and a fine of €75,000 "for any natural person to fraudulently take a personal and determining part in the conception, organisation or implementation" of a cartel, it remains little applied. Viros shows that the lack of resources devoted to investigations limits the effectiveness of criminal sanctions.[10] This collective reluctance to apply prison sentences reflects the low stigma of cartels in the civil society in France: cartels are not considered serious enough to require such penalties. In this regard, in France, the 2017 IFOP poll shows that the majority of respondents (75%) remain unfavourable to prison sentences, although they are not opposed to impose sanctions on individuals.[11]

Other than a prison sentence, what kind of criminal sanctions could be imposed? Following a purely economic reasoning, it is more profitable for the society to impose fines, in order to avoid incarceration costs. According to this approach, prison can be justified when individual offenders no longer have the financial capability to pay the fine: prison appears here as a residual measure. This reasoning is questionable:

- In practice, cartel fines are often capped at low levels, relative to the incomes of corporate executives. For example, in the United States, over the period 2008–2017, the average fine per person was USD 84,600. In addition, it is always possible for a firm to financially compensate the fine paid by its employee;
- It is difficult to determine the "optimal" amount of a fine in the case of an individual (what was the cartel's private gain for the individual?) and, if so, this fine may exceed his/her financial capacity;

10 Emmanuel Combe, Constance Monnier-Schlumberger, Philippe Coen, Marie-Pascale Heusse, Chloé Le Coq, Catarina Marvão, Andreas Stephan, David Viros, Comportement des managers et droit de la concurrence, novembre 2020, Concurrences N° 4-2020, Art. N° 96848.

11 Combe & Monnier (n 7).

– A fine is implicitly based on the idea that paying it is enough to "cleanse" the offending behaviour: its stigmatising effect is therefore weak.

Conversely, the imposition of an individual prison sentence has a strong deterrent effect:

– It obviously has a stigmatising effect on the individual (particularly with regard to their contacts and family) insofar as it induces a judgment of immorality of the offending behaviour;
– It sends a strong signal to its reference group (usually "white collar" in the case of cartels) as it is widely publicised;
– The threat of a prison sentence increases the effectiveness of leniency programmes when extended to criminal sanctions. Indeed, an individual will more readily agree to cooperate with antitrust authorities if a criminal immunity is anticipated.

Because prison for corporate crimes is rarely accepted in public opinion, it is useful to consider other, less stigmatising, forms of sanction, such as disqualification measures: a director or corporate officer who has directly contributed to violating competition rules or who has knowingly "allowed" managers/employees to do so can be banned from holding any position of responsibility within a firm for a certain period. This mechanism, adopted for example in the UK through the "Competition Disqualification Orders" system, provides for a maximum disqualification period of 15 years. Disqualification negatively affects the reputation of the executive and his career prospects, while minimising the cost to the society (no incarceration): it therefore has a strong dissuasive effect. It should be noted that the CMA has used this mechanism on several occasions, in particular in a cartel between real estate agencies: in 2018, two managers were disqualified for 3 years and 3.5 years for having participated directly in the organisation of a cartel.[12]

V. Compliance Programmes – Self-help for Companies

As criminal penalties for antitrust violations are currently limited in Europe, it is useful to turn to preventive policies, implemented by firms themselves through compliance programmes.

As explained earlier, compliance action within firms is not inconsistent with high antitrust penalties, rather it is a complement to them. The issue is not to reduce the responsibility of companies, on the grounds that they have set up a compliance programme, but to encourage greater compliance with competition rules by the company's employees and managers. Moreover, in Europe, the European

12 CMA, "Residential estate agency services in the Burnham-on-Sea area: Director Disqualification, Press release (*CMA*, 10 April 2018) <www.gov.uk/cma-cases/residential-estate-agency-services-in-the-burnham-on-sea-area-director-disqualification>.

Commission has no need to establish top management implication or to demonstrate that the employee's actions were known or authorised by management. The imputation of an employee's actions to its employer is akin, therefore, to an irrebuttable presumption.[13]

Arguably the implementation of a compliance programme may be more effective if the risk of sanctions is perceived as high. The rise of antitrust compliance within large companies has sometimes been explained by the fear of huge fines (although an increased focus on corporate governance has also had a significant impact). The risks of antitrust violations include both antitrust penalties and possible damage to a firm's reputation (through, e.g., a publication order). Moreover, the rise of claims for damages is increasing the level of these financial risks, and therefore the need for a real preventive policy.

The first issue with compliance is its dissemination within a firm. A 2018 survey of 1,200 companies conducted by the UK CMA revealed that only 25% of the respondents (all senior people within the business who had a responsibility for sales) had a good knowledge of competition rules and 16% claimed to have never heard of them.[14] In this respect, the relaxation, even temporarily, of antitrust enforcement can potentially weaken the effectiveness of a compliance policy:[15] it gives managers the feeling that antitrust rules are not intangible and depend on circumstances. Any relaxation may thus erode the sense of moral wrongdoing associated with cartels – as Professor Stephan points out, some "arrogant" individuals (hotheads[16]) remain impervious to any culture of compliance with the rules of law.

The spread of a compliance culture can be supported in that increasingly employees, particularly younger generations, are particularly sensitive to ethical considerations and environmental issues. They are more interested in the impact of their professional commitment on society. For example, business schools have now a strong incentive to develop more ethics training in their curriculums.

Many companies have recognised that it is useful to develop compliance within trade associations, especially as trade associations have (historically) been used to "support" collusive behaviour in a particular industry. LeCoq and Marvao studying a sample of 2,261 "legal" cartels registered in Sweden during the period 1947–1993, show that in 48% the cartel includes a trade association.[17] This presence may

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13 See Emmanuel Combe and others, "Comportement des managers et droit de la concurrence" (2020) Concurrences N° 4–2020, Art. N° 96848.

14 See ICM on behalf of the CMA, "Competition Law Research 2018" (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750149/icm_unlimited_cma_competition_law_research_2018.pdf>.

15 See Stephan (n 9).

16 Boulu-Reshef & Monnier-Schlumberger (n 8).

17 Emmanuel Combe, Constance Monnier-Schlumberger, Philippe Coen, Marie-Pascale Heusse, Chloé Le Coq, Catarina Marvão, Andreas Stephan, David Viros, Comportement des managers et droit de la concurrence, novembre 2020, Concurrences N° 4-2020, Art. N° 96848.

contribute to the legitimacy of this type of practice in the eyes of individual employees within a company.

The second challenge of compliance is to integrate the increasing complexity of competition rules. In particular, the effects-based approach to certain anticompetitive practices (if we move away from the classic cartel, which is prohibited by object), the treatment of information exchanges and pricing algorithms, and the importance of economics in competition law imply adopting a more global approach to compliance, which goes beyond mere knowledge of legal rules. Training should not be limited to teaching a set of pre-established rules but should also aim to develop a true understanding of competition. In this respect, responsibility for implementing compliance programmes should not be limited to lawyers or legal departments alone, but should also involve economists, business executives and compliance experts, particularly in changing sectors where rules are evolving rapidly (digital, technological etc.).

The third challenge of compliance is to create positive incentives for compliance. Coen rightly points out that managers have not been rewarded for their compliance skills and that, as a result, the legal culture has difficulty in permeating the management bodies.[18] Unlike in the United States, it is not yet common in Europe for employment contracts and compensation packages to take into account the issue of compliance. One solution may be to set up an antitrust rating system that would appear in company rankings, following the example of what is being developed in the environmental sector (rating system with a compliance barometer).

Between a purely punitive approach and the attempted prevention of anticompetitive behaviour, the right answer is probably a combination of both types of policy, both at the level of companies and public authorities.

18 Emmanuel Combe, Constance Monnier-Schlumberger, Philippe Coen, Marie-Pascale Heusse, Chloé Le Coq, Catarina Marvão, Andreas Stephan, David Viros, Comportement des managers et droit de la concurrence, novembre 2020, Concurrences N° 4-2020, Art. N° 96848.

Perspectives on Antitrust Compliance

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Companies around the world are arguably at a crossroads where global compliance challenges need attention as never before. Increasingly, antitrust compliance is seen by companies not as a standalone topic, but as part of a suite of compliance efforts needed by companies to ensure that they comply with societal and shareholder expectations.

This book makes an original and timely contribution to the important debate surrounding the function and design of antitrust compliance programmes. Crowding in the immense knowledge of a selection of renowned international antitrust compliance experts including academics, in-house counsel, private practitioners, economists, consulting firms and regulators, it seeks to embrace varied perspectives rather than championing one particular vision of what good antitrust compliance should look like. The publication is designed to assist all stakeholders, while appreciating that every industry and corporate entity faces unique compliance risks and that an approach that works well for one business may be less appropriate and effective for another.

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