

FEAR NO EVIL: A COMPLIANCE AND ETHICS PROFESSIONALS' RESPONSE TO DR. STEPHAN

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In his article “Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels,”¹ Dr. Andreas Stephan raises questions about the application of competition law compliance programs in dealing with cartel behavior. In response we have communicated with Dr. Stephan, and have been given the opportunity to address this topic at the Centre for Competition Policy at the University of East Anglia.

One message from this article is that the competition law field is overdue in opening up a dialog on important subjects related to enforcement policies and the role of compliance and ethics programs. As compliance and ethics practitioners, we have been active in the compliance and ethics field for over 30 years and 20 years, respectively, including work both in antitrust/competition law and in the area of anti-corruption. We have worked both in-house and as outside counsel. Our clients have included companies trying to prevent violations, companies trying to recover from serious violations, and government agencies assessing company programs. We have also participated in the OECD Working Group on Bribery's deliberations over the past two years relating to anti-bribery compliance programs. This experience forms the basis for our responses to Dr. Stephan. For your reference we have attached brief biographies as Annex 1 to this paper.

On-the-ground experiences. First we will share several experiences we have had in conducting antitrust training, which may help provide additional perspective on how programs operate. When we conduct training it is interactive; employees participate in group tests that lead to vigorous discussion. We also use videos and a brief presentation based on “war stories.” Much of the focus is not simply to convey facts about the law; it is heavily weighted on motivating employees both to avoid violations and to report them when they suspect they exist. In one case, as a result of the training, a marketing manager in one company called her company counsel and reported that she had been engaged in collusive conduct; she had not realized it was illegal until she had the training. In the second case after the training a junior manager called his company counsel and reported that his boss had been involved in collusive conduct. The boss was fired and the violation reported to the US Department of Justice under the voluntary disclosure program. In a third case, an HR manager did not realize that her team should not be reaching out to other companies to discuss salaries until sitting through a training; this was immediately addressed through a follow-on workshop with the HR department and an update to HR protocols. In a fourth

¹ ESRC Centre for Competition Policy & Norwich Law School, University of East Anglia, CCP Working Paper 09-09, https://www.uea.ac.uk/polopoly_fs/1.122147!ccp09-9wp.pdf

case, an employee who had just taken a training was riding in a taxi with a competitor and asked about pricing and other competitive market data. He immediately called compliance to report the incident and receive further advice. Many other cases involve employees who had witnessed or been involved in risky behavior but only became aware of the significance as part of interactive training and discussion. We offer these examples because they represent a level of conduct that does not show up in the kinds of data analyzed by Dr. Stephan. To say that compliance programs are not effective in preventing cartels really requires a much deeper level of empirical work than studying only major cases. Indeed, when a program actually prevents collusion or even detects it at an early stage the odds are fairly high that this will not show up in any set of public data. Therefore, Dr. Stephan is unaware of a voluminous number of cases where cartel behavior was avoided specifically as a result of training, monitoring, audit, and other elements of an effective antitrust compliance program. At least in our own examples, looking at compliance program activity when dealing with employees in the trenches, we have actually seen it work. We doubt that we are alone in this experience.

What are the enforcers' institutional interests? We would also like to suggest for Dr. Stephan and others interested in future analysis in this area a hypothesis that we have generally not seen considered, as a possible explanation of why the United States Department of Justice's Antitrust Division², and the European Union competition enforcers (at least since 2000) not only appear not to give credit for programs, but at times seem almost to go out of their way to discourage programs (although, in our experience, Mr. Kolasky, whose remarks on compliance programs are frequently cited but who has since left the Antitrust Division, was an exception in the helpfulness of his statements³). Consider this question: what is the actual institutional interest of both these bodies? If there are major, global conspiracies with headlines for the prosecutors, fines in the hundreds of millions, and glowing press releases announcing how the enforcers are "sending a message," why would they even want companies to take diligent steps to prevent misconduct? Using voluntary disclosure programs the enforcers have enough work to be fully employed and gain very positive press. Compliance programs, in contrast, appear boring, do not have the drama of dawn raids and press releases, and do not result in large fines and penalties. All they do is prevent violations. To enforcers determined to get press attention, compliance programs are nothing more than a nuisance; examining the bona fides of a company compliance program is a distracting annoyance that takes away from the main game.

Consider, also, the EU enforcers approach to the role of in-house counsel. In the United States the Supreme Court has recognized the important role of legal counsel, including in-

² In the US Department of Justice, the Antitrust Division is at odds with the rest of the Department's recognition of the value of such programs, as illustrated in the Department's US Attorneys Manual. The Manual instructs prosecutors to take compliance programs into account, with antitrust the only exception. See United States Attorneys' Manual, 9-28.800 Corporate Compliance Programs, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm

³ Kolasky, "Antitrust Compliance: The Government's Perspective," 16 *ethikos* 6 (Sept/Oct 2002).

house counsel, in helping managers understand and comply with the law.⁴ The role of counsel is intrinsically tied in with the notion of confidentiality. Yet in the EU, the competition law enforcers seek only to exploit in-house counsel as a source of information to use in making cases against companies. As a result, whereas in the US employees know that they can go to counsel to report potential wrongdoing and get advice in confidence, in the EU these same employees are left to their own devices. Certainly the EU enforcers know that with the high price of outside counsel, companies will not rationally invite their employees to call outside counsel whenever they have a concern. But the EU enforcers have succeeded in getting EU courts to eviscerate the role of in-house counsel as a bulwark against anticompetitive behavior.

Also worthy of further study is the odd behavior of privacy authorities who have launched broad attacks against one of the core tools of voluntary compliance programs, the helpline. In some EU jurisdictions employees cannot even report illegal conduct internally on an anonymous basis, thus helping to preserve the perpetrators' ability to retaliate against whistleblowers. And particularly telling is that in jurisdictions like France, while they do permit reporting systems that "allow" employees to report corrupt conduct, only recently did they include reports of cartel behavior; originally employees could only report cartel behavior if the privacy authority specifically give its approval after the company went through the bureaucratic process of asking permission.

We do not mean to assert that this hypothesis is true and that these enforcement authorities have no interest in actually preventing violations, and we do believe individual enforcement people are sincere in their commitment to fighting corporate crime, but we only point out that we have not seen this idea explored. Moreover, we are struck by the difference we have seen between those determined to prevent foreign bribery, and those who enforce antitrust and competition law. Anti-corruption people appear to be more motivated by the image of poor citizens in corruption-ravished countries doing without because of the crime of bribery. They see the tangible, corrosive impact of corrupt behavior in the foreign nations and ultimately in their own home countries. But competition law enforcers seem to revel in the chase. Perhaps this form of economic crime does not have the emotional impact that bribery does. However, while anti-corruption enforcers hammer home to companies the need to have strong compliance programs and actively seek to recruit companies in the fight against corruption, competition law enforcers in the US Antitrust Division mostly have disparaged programs (referring to them as "failed programs" if even one violation occurs). And, although the former DG IV gave credit even for programs instituted after the offense had occurred⁵, it now seems to have followed lock step behind the "cowboys and Indians" approach from Washington. While the EU enforcers will reduce a conspirator's penalty because of its financial woes (i.e., rewarding an offending company that was so inefficient it could not even make money through a cartel), its penalty policy offers no recognition whatsoever for any compliance program no matter how diligent it might be. We have even heard from practitioners that the EU enforcers look for evidence of compliance programs

⁴See *Upjohn Co. v. United States*, 449 US 383 (1981).

⁵ 91/532/EEC: Commission Decision of 5 June 1991 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/32.879 - Viho/Toshiba).

only to use against companies – certainly an effective way to “send a message.”⁶ We should note, however, that the DC and EU approaches are not a global rule. The Canadian Competition Bureau has done much more to guide industry in what should be in an effective compliance program⁷ and other enforcement authorities have indicated a willingness to consider such programs. For example, the Competition Commission of Singapore considers programs as mitigating factors in its penalty policy.⁸

Compliance program elements. Also of note are the statements in this paper about the elements of compliance programs. On page 6 there is a reference to three keys for programs: training, auditing, and support of senior management. In our experience this recognition represents real progress; often we have seen programs described as merely “policies and procedures,” or even worse, a great focus on codes of conduct and/or compliance manuals (particularly common in competition law). While these three identified in the article are important elements, there is much more that should be in any compliance program that warrants credit from a government. In this regard we commend to anyone interested in the topic the Canadian Competition Bureau’s Bulletin on compliance programs.⁹ Among the items that should be in a program are compliance controls, an executive level chief ethics and compliance officer directly responsible to the board of directors, active board oversight, background checks and disqualification of those who would undercut the compliance program, ongoing communications (not just training), a system that encourages reporting without fear of retaliation, audits, monitoring and other forms of checking, periodic evaluation of the program, discipline including discipline for failure to take steps to prevent violations, use of incentives to promote the program, a system to investigate and resolve allegations of misconduct, and benchmarking to keep up with industry practice. In essence, a good program will use the full range of management techniques to prevent and detect

⁶ The EU now says programs will not be considered an aggravating circumstance, but in its guidance on compliance programs has not said it has renounced its prior practice. See EU Commission, *Compliance matters: What companies can do better to respect EU competition rules*, Special first edition, Nov. 2011, http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf

⁷ Competition Bureau Canada, *Corporate Compliance Programs* (2010).
Competition Bureau Canada, *Corporate Compliance Programs* (2010).
[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf)

⁸http://www.ccs.gov.sg/NR/rdonlyres/A67B68FC-DB6F-415B-9DF1-5A97FC6855A9/19884/CCSGuideline_Penalty_20071033.pdf. In addition, in the US at least one court has accepted evidence of a compliance program to prove that a company effectively withdrew from a cartel. *United States v. Stolt-Nielsen S.A.*, No. 06-cr-466 (E.D. Pa. Nov. 29, 2007).

⁹ Competition Bureau Canada, *Corporate Compliance Programs* (2010).
[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf); see Murphy, “Good News from Canada for the Compliance & Ethics Profession”, 6 *Compliance and Ethics Magazine* 34 (SCCE; Feb. 2009).

misconduct¹⁰. If all a company has is training and auditing (which will usually be announced and have other characteristics that make the audits sub-optimal), then in our opinion the support of senior management does not really exist. A good example of how a compliance program can detect and prevent cartel behavior is the recently announced EU antitrust probe of some of the world's largest truckmakers, including MAN, Daimler, Volvo, Scania and Iveco. That case was initiated by a tip-off to MAN's newly established internal employee help desk, an integral part of the company's compliance program.¹¹

We have seen repeatedly, particularly among critics of compliance programs (especially those in academia), an attempt to summarize or reduce compliance programs to a very simple list of perhaps three elements. But there is a reason why more useful lists, like those of the Canadian Competition Bureau, the US Sentencing Commission, or the OECD Working Group on Bribery, cover from five to twelve elements. And those at the lower end of the tally really cover considerably more than the numbers five (Canada) or seven (Sentencing Commission) would suggest. There is actually no simple way to reduce the elements of an effective program to a miniature list. The process of developing an effective compliance and ethics program does, in fact, take a significant management effort. Because all of the necessary elements of an effective program need to work together to create a meaningful approach to preventing and detecting misconduct, a "check the box" mentality of one, two or three elements will most certainly result in failure. When the list is reduced to a simple checklist of three elements it no longer accurately represents what it takes to have an effective program.

Training. Dr. Stephan suggests training is not effective in the context of cartels because the participants already know they are doing something wrong. We agree that most (but in our experience not all) cartel participants know they are doing something wrong. But the assumption about training does not cover the full role of training (as well as other means of communication)¹². First, training is not simply the transfer of information; it must also be motivational. Many business people have a vague idea that price-fixing is illegal, but may not have been confronted with the reality of what this means. Effective motivational training will not convert the hard-boiled cartel participant, but it might reach the newest member of the cartel who is just continuing what his predecessor told him to do. It may reach the cartel participant who is angry about being passed over for a promotion, or who has a change of heart based on any number of possible personal reasons. Moreover, as the Canadian Competition Bureau recognized in its guidance, training is not just for the perpetrators; it is

¹⁰ Because effective compliance and ethics programs draw from the whole range of management techniques, the possibilities are quite extensive. In a book Joe Murphy wrote for SCCE, 501 Ideas for Your Compliance and Ethics Program (2008), 501 of them are listed just to remind practitioners how extensive the possibilities are.

¹¹ Schafer, Daniel and Reed, John. "Truckmakers in Brussels Antitrust Probe." Financial Times. 3 March 2011. <http://www.ft.com/cms/s/0/970ac24c-45c8-11e0-acd8-00144feab49a.html#axzz1Fw67eZqE>.

¹² In one case in the US a federal court actually found that "The Antitrust Compliance Policy was successful in transforming [the company's] corporate culture and reforming its business practices." United States v. Stolt-Nielsen S.A., No. 06-cr-466 Para 32 (E.D. Pa. Nov. 29, 2007).

also for the helpers and witnesses¹³. It is a tried and true axiom that misconduct is rarely accomplished in a vacuum – bad behavior has witnesses and accomplices. Time and time again, as compliance practitioners can attest, team members or other witnesses to misconduct ‘red flags’ report concerns they have seen after learning how to recognize and address misconduct through company training and engagement. Our experience with human nature teaches us that it is extraordinarily difficult for people to keep secrets; indeed, when most people say they will keep a secret they really mean that they will try to limit the number of people they talk to. Secretaries, travel staff, assistants, subordinates and others often suspect something is “funny,” but only through training do they learn how serious it really is, and that there is something they can do about it.¹⁴ It appears that most people will not willingly report on their friends and colleagues, but if given the opportunity and especially if asked they will talk. We have seen this over and over again. It may not seem logical to outsiders, but again it seems to be part of human nature.

Auditing. Regarding the article’s reference to auditing, there is great value in examining this aspect of compliance much more analytically. There is auditing, and then there is real auditing. We have seen reviews that consist of little more than asking people what they are doing. Even this, which we do not regard as the most effective auditing technique, will reveal surprising amounts of information. But internal review techniques can involve much more than this. Audits can be conducted on an unannounced basis. They should involve reviews of documents and computer records. There can be “deep dives,” that examine business units in a more intensive way.¹⁵ Particularly interesting are screening techniques for identifying patterns that indicate collusive conduct among competitors; this could be applied to internal compliance monitoring efforts.¹⁶ There is a range of measurement and detection devices such as surveys, focus groups, exit interviews and statistical analysis. However, that such intensive techniques are not currently widespread may reflect stagnation in the development of antitrust compliance techniques. We would also suggest that in the antitrust field at least, audits (and especially unannounced, vigorous audits) are more common in the literature than they are in practice. Is this so because of the approaches of Brussels and DC? We cannot know for sure, but it would be an interesting hypothesis to test out.

¹³ In the words of the Competition Bureau, “staff at all levels who are in a position to potentially engage in, or be exposed to, conduct in breach of the *Acts*.” (emphasis added).

¹⁴ In the paper, pp. 2-3, it is suggested that it is relatively easy to engage in cartel behavior. But cartels often require either a great deal of trust in competitors who are willing to engage in criminal collusion, or some form of policing. In one recent case competitors hired a cartel coordinator. In another they made visits to competitors’ plants to police production limits. Moreover, effective cartels can produce tell-tale patterns that are detectable through screening. And internally it can be difficult to control all the other players in the company whose cooperation is necessary to conform to the agreed-upon restrictions relating to sales and production.

¹⁵ See Murphy, “The Measurement Challenge (Part III): Results from the ‘Deep Dive,’” 18 *ethikos* 11 (Sept/Oct 2004); “The Measurement Challenge (Part II): Implementing the ‘Deep Dive,’” 18 *ethikos* 11 (July/Aug 2004); “The Measurement Challenge (Part I): Introducing the Deep Dive,” 17 *ethikos* 7 (May/June 2004).

¹⁶ Abrantes-Metz, Bajari & Murphy, “Enhancing Compliance Programs Through Antitrust Screening,” 4.5 *The Antitrust Counselor* 4 (September 2010).

Senior management. When we reviewed Dr. Stephan's chart on pages 8-9, we were somewhat surprised by the number of cases that did not involve CEOs in parent companies. We have some personal familiarity with one case in particular where a subsidiary violated a very strong parent company program barring collusive conduct. There were no outsized profits in the case, just protection of the "comfort" of the local competitors. Nor is the level of managers contained in the list particularly unusual in the area of white collar crime. The typical, headline-grabbing corporate cases that occur across a broad range of corporate misconduct areas involve either senior management actively participating, or senior management aware and failing to take action. This is not unique to competition law. Indeed, the findings of the US Corporate Fraud Task Force illustrate the prominent role played by senior executives through a broad range of corporate crime.¹⁷

The concept of the "support of senior management" as a compliance program element does not mean that every manager will always follow the rules and company policy. But it does mean that all such managers will be held to account. "Senior management commitment" includes things like fully empowering and providing resources for the chief ethics and compliance officer, officers being models for the code of conduct, and active oversight by the board. Is it possible that some manager with substantial authority will commit a violation? It is not only possible, but highly probable, no matter how good the program. The number of such managers at a global company may be in the thousands; simple statistics tell us some will go wrong. But what the rest of management has done to prevent this and what happens when a violation is detected represent crucial tests. After all, even government agencies have compliance problems; in the US, for example, the SEC in 2009 announced it would hire a compliance officer and institute a state of the art compliance program because lawyers in the agency had violated the agency's own trading rules¹⁸. Certainly there should be deep skepticism about a program when a senior corporate officer engages in collusive conduct, but if a company can prove that it took rigorous steps to prevent such conduct, and that it acted decisively when it discovered the violation, then there is no reason to discourage companies from making such compliance efforts.

One area of growing awareness is that compliance and ethics programs need to be designed and empowered to address criminal conduct at this higher level. The typical serious corporate violation is not the act of a remote employee off on a frolic of his own. However, taking this important step of developing compliance program tools to reach senior managers will likely not happen in competition law as long as governments actively undermine the basis for such programs.

¹⁷ Report to the President, Corporate Fraud Task Force 2008, <http://www.justice.gov/archive/dag/cftf/corporate-fraud2008.pdf>

¹⁸ "SEC Takes Steps to Strengthen Existing Rules Governing Securities Trading by Personnel," Release 2009-121 (May 22, 2009); Rutgers University even has a center on government compliance programs, see The Rutgers Center for Government Compliance and Ethics, <http://rcgce.camlaw.rutgers.edu/>

Reporting by employees. On page 10 Dr. Stephan mentioned the UK's experience that offering paid bounties of 100,000 pounds to those who reported on their bosses had not resulted in such reports, and he therefore concluded that employees with knowledge of cartels would not come forth in a compliance program. But in the 50 plus aggregate years we have been doing this work, which has included working with internal whistleblowers, and all the discussions we have had with other compliance professionals, we cannot recall a single experience where an employee raised an issue because they wanted or expected money. In fact, all that most employees ask is that something be done and that they not be retaliated against. There is much data on such employee reporting, and it is a rich source of information on corporate misconduct, but it is necessary to examine the broader field of compliance and ethics, not limited to competition law. The fact that in the UK employees will not "rat out" their fellow workers to the government may indicate nothing more than a general distrust of government, as well as loyalty to the company. In companies that really do encourage employees to raise questions, act firmly and quickly on such reports, publicize cases where those engaged in misconduct are held to account, and deal harshly with actual or threatened retaliation, employees do in fact report all types of misconduct. They do not do it to make money; they do it because they see it as the right thing to do. We have seen this face to face, and we greatly admire those employees who stand up for what is right. We generally advise companies not to offer cash rewards; if they want to increase employee reporting then just treat employees fairly and act promptly and effectively on what is reported.

The need for empirical work. On page 13 it is suggested that there is a need for empirical work on the "proliferation of competition law compliance programmes." Interestingly there is quite a bit of empirical work on compliance and ethics programs in general, albeit not focused on this one area of competition law. But this could reflect the successful result of Washington and Brussels' apparent efforts to diminish the importance of such programs.

But the idea of empirical work does suggest another area for exploration. It is often said, usually jokingly, that the definition of insanity is to keep repeating the same act over and over but each time expecting a different result. But when we look at the legal system's approach to competition law, there does seem to be a repetitive pattern. If the misconduct does not stop, then we will impose more fines and jail time. When that does not seem to be working, then we do more. And if that does not seem to work, we do even more. Fines in the US now reach the hundreds of millions; antitrust miscreants can now go to jail for 10 years. What is the next step? Do we put fines in the billions or simply put all cartelists (save the one who voluntarily discloses) out of business (thereby replacing cartels with monopolies, for those with a sense of humor?) And why not make collusion a capital offense? At least then we will eliminate rehiring of this class of criminal. The area where we seriously need empirical work is why all these enormous fines and prison terms do not work. How could the vitamin cartel be successful for a decade? How could the lysine cartel be so brazen (we have both used the DOJ videos of the lysine conspiracy in antitrust training)? How could these cartels be operating around the world, right in front of enforcers everywhere? To an uninformed observer it would be difficult to explain the logic that says

all we need is to make it even more criminal. Why not require at least some modest empirical inquiry before relying solely on this one step?

What we see is that development in compliance and ethics in general has involved rigorous discussion and debate, and efforts to raise the bar in such programs¹⁹. There has been and continues to be empirical work, although more would be welcome. And more serious work needs to be done in all areas to increase the effectiveness of compliance and ethics programs. But in the competition law area there is a sense of ennui. Why bother if we cannot detect violations, and the government does not want us even to talk to them about compliance programs? There is a need for an open reexamination of the policy approaches in Brussels and Washington. We personally believe cartel behavior should be criminalized²⁰. But to think that this alone will change the patterns we have been seeing is, we submit, not realistic. We also need to put energy into developing techniques for organizations to effectively join the fight against business crime and misconduct, including competition law (along with bribery, securities fraud, consumer fraud, environmental crimes, theft of competitors' proprietary information, privacy violations, unsafe products, government contract fraud, etc)²¹

Employee certification. On pages 14-15 Dr. Stephan suggests companies should have employees confirm in writing that they know that cartel behavior is illegal or triggers the applicable legal standard. Of course, the act of doing this would have to be part of a compliance program. Why would a company do this, however, when the government has already said it does not care that the company did this? But there is also the compliance and ethics practitioners' concern that such steps reflect what can be a counter-productive legalistic approach to compliance. There are also a substantial number of other legal areas where similar certifications could play a similar role. Employees are not stupid. They immediately see such certifications as management attempts to cover their own derrieres at the employees' expense (and they are fairly accurate in this perception). This helps breed distrust by employees and can tend to undercut efforts to create a culture of compliance and ethics. Such mistrust also can undercut efforts to have employees voluntarily report on other employees. Certifications can serve a useful purpose, but need to be handled carefully within

¹⁹ We invite anyone to visit the SCCE web site, and particularly the Social Network where practitioners discuss various aspects of compliance and ethics programs. See <http://community.corporatecompliance.org/CORPORATECOMPLIANCE/CORPORATECOMPLIANCE/eGroups/Default.aspx> .

²⁰ An additional or alternative form of punishment more attuned to the nature of organizations, is the appointment of a monitor to ensure changes in the organization's behavior. These can be quite intrusive and repugnant to management, and thus possibly more of a deterrent than one time fines paid with shareholders' money and prison terms served by ex-employees.

²¹ The suggestion on page 11 of the paper that competition law offenses differ from other corporate offenses because they advance at least the short-term interests of the business should be further considered. In the areas where the employer faces criminal or serious civil liability, e.g., bribery, government contract fraud, consumer fraud, environmental crimes, etc., the employer obtains benefits in terms of increased revenues or reduced costs. It is rather unusual for a company to face criminal liability when it is the victim of individual employee misconduct.

the context of an overall compliance and ethics program addressing the full range of corporate compliance and ethics risks.

Control of organizational conduct. We will also offer another hypothesis for possible consideration. In the article Dr. Stephan appears to assume that people in organizations act exactly like individuals not associated with organizations. Introduce the risk of criminal punishment and people will no longer engage in cartels. Putting aside the reality that cartel behavior has been a crime in the US for decades²² and we still seem to have a constant parade of cases, it is necessary to consider the reality that people in organizations act differently from individuals acting alone. Group loyalty tends to be an extremely strong force. Groups go bad not simply because incentive plans offer strong rewards to a few individuals, but because of loyalty to the group. Moreover, people in organizations tend to focus on the threats and rewards within the organization. The risk of prosecution is just one of those outside risks that can seem remote when compared to the immediate, close-knit environment where they work. This phenomenon has been seen in dealing with defective and even deadly products: “yes, short-cutting quality controls may kill people somewhere, but I do not stand face to face with those people. But if the quality control slows production my boss will be in my cubicle ripping me apart before the day is done.” The threat of prosecution for collusion, even for those who know that threat exists, will generally seem remote. Moreover, the criminal penalty model does not deal with another strong force – arrogance. People at senior levels simply think they are smarter than anyone in government. As the book title on one of the books about Enron suggests, they see themselves as “The Smartest Guys in the Room.”²³ As a simple guide we advise compliance and ethics people that good people do not think they are doing anything bad, and bad people do not think they are going to get caught, so between the two it is a mistake to rely solely on fear as a motivator. Government, acting outside the organization and remote from the daily reality of employees’ workplaces, generally cannot reach this environment well. As Professor Christopher Stone observed in the title of his groundbreaking book, the corporate, organizational world is “Where the Law Ends.”²⁴

Collusion and values. Where does this lead us? We do agree that Brussels needs to step up and make hard core collusion criminal²⁵. Price fixing, bid rigging and market allocation are stealing from customers. Moreover, our sense is that in Europe it is still not viewed as being morally reprehensible. If Transparency International rated geographic areas for their propensity for collusive conduct in the same way it rates corruption, the most industrialized parts of Europe would be the equivalent of Myanmar. Criminalization would help in making this needed cultural shift.

²² Multinational cartel participants have faced this risk of incarceration in the US but have apparently remained undeterred.

²³ McLean & Elkind, The Smartest Guys In the Room: The Amazing Rise and Scandalous Fall of Enron (Penguin; 2003).

²⁴ Stone, Where the Law Ends: The Social Control of Corporate Behavior (Harper; 1975).

²⁵ Note, however, that while corporate penalties may not effectively deter individual actors, criminal sanctions aimed at individuals may lead to “scapegoating” by the organization to buy more lenient treatment for the corporate employer.

But this leaves open the role of effective compliance programs. And here, if Brussels and Washington continue the same level of gamesmanship, they will only perpetuate the same pattern. They will have continued “success” in prosecuting cartels, because there will continue to be so many to prosecute. But is this a good measure of success?

How do we prevent cartels? If we want to change the conduct of organizations then the mechanisms of those organizations need to be recruited into the battle. If bluster and fines were enough we would be writing today about what it was like years ago before massive global cartels were wiped out. But that has not happened. Something is still not working. Government, industry, academia, and others should be working cooperatively to promote effective compliance and ethics programs. Experience teaches us that programs do not simply spring up based on the good will of businesses. Only government promotion has triggered development of good programs. We need realistic approaches to programs, recognizing that programs are not some mystical formula; they are the application of effective management techniques within organizations toward the end of preventing and detecting misconduct. To question whether they work is a misunderstanding of what they are. It is a bit like questioning whether “management” works in operating companies. If there is no management there is no company. Everything that is done in an organization is done only through the use of management tools. If these tools are not used then nothing happens. Government can fulminate all it wants; if the means of managing organizations do not participate in the effort, then what goes on outside the organization will not have the intended impact. But if these tools – the very things that make large organizations operate effectively – are applied to this socially beneficial task, and are joined by an intelligent approach by law enforcement authorities, then there will be real progress in prevention and early detection of business misconduct, including cartel behavior.

Do compliance programs work to prevent cartels? Only to the extent we as a society want them to.

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Annex 1 **BIOGRAPHIES**

Joe Murphy, CCEP

Joe Murphy, of counsel to Compliance Systems Legal Group, and co-founder of Integrity Interactive Corporation (now part of SAI Global), has worked in the organizational compliance and ethics area for over thirty years. Before working with Compliance Systems Legal Group, Joe was Senior Attorney, Corporate Compliance, at Bell Atlantic Corporation, where he was architect and lawyer for Bell Atlantic's worldwide corporate compliance program. Joe is the editor in chief of Compliance and Ethics Professional, published by the Society of Corporate Compliance and Ethics (“SCCE”). He was previously vice-chairman of the board of Integrity Interactive Corporation. He has worked on compliance and ethics matters on six continents, and assisted government agencies, NGOs and companies across a broad range of industries.

Joe has lectured and written extensively on corporate compliance and ethics issues, is on the board of the SCCE, and is the SCCE’s Director of Public Policy (pro bono). He has represented SCCE as a consultative partner to the OECD’s Working Group on Bribery in Paris, and testified before the US Sentencing Commission on the proposed revisions to the Sentencing Guidelines. He currently serves as chair of the advisory board of the Rutgers Center for Government Compliance and Ethics.

Joe’s work with governments on compliance and ethics programs has included presentations to the Australian Competition and Consumer Commission staff and the Australian Tax Office, assistance to a US Attorney’s office in assessing a corporate defendant’s program, training for federal prosecutors at the National Advocacy Center, and training at the SEC’s FCPA boot camp for SEC, FBI and DOJ enforcement officials. He also works on an ongoing basis with the OECD Working Group on Bribery to promote anticorruption compliance programs. Through SCCE and individually he has provided written comments and input on compliance program standards to the SEC, the US Sentencing Commission, the UK Office of Fair Trading, the UK Serious Fraud Office, Standards Australia, the drafters of the King III report in South Africa, and the Canadian Competition Bureau. He also served as a witness for the US Department of Justice during the OECD Working Group on Bribery’s Phase II

review of US implementation of the OECD Convention on Bribery of Foreign Public Officials.

With his mentor, Jay Sigler, Joe wrote the first book on compliance programs, Interactive Corporate Compliance in 1988, 3 years before the Organizational Sentencing Guidelines were issued. Together with Jeff Kaplan and Win Swenson he wrote the leading legal text on compliance programs, Compliance Programs and the Corporate Sentencing Guidelines (Thomson/West; 1993 & Ann. Supp.). He is also the author of 501 Ideas for Your Compliance & Ethics Program (SCCE; 2008) and co-author of Building a Career in Compliance and Ethics (SCCE; 2007).

Joe has his BA from Rutgers University and his law degree from the University of Pennsylvania where he was a member of the Order of the Coif and Managing Editor of the Law Review. He is admitted to practice law in Pennsylvania and New Jersey.

Joe is also an avid ballroom dancer, chief cha-cha officer of Dance Haddonfield in his home town of Haddonfield, NJ, and founder of the Society of Dancing Compliance and Ethics Professionals.

Donna Boehme

Donna C. Boehme is an internationally recognized authority in the field of organizational compliance and ethics with 20+ years experience designing and managing compliance and ethics solutions, both within the U.S. and worldwide. As Principal of Compliance Strategists LLC, and Special Advisor to Compliance Systems Legal Group, Donna has advised a wide spectrum of private, public, governmental, academic and non-profit entities. She serves on the respective boards of the RAND Center of Corporate Ethics and Governance, and South Texas College of Law - Corporate Compliance Center, and is Program Director for the Conference Board Council on Corporate Compliance and Ethics. Donna is an Emeritus Member and past Board member of the Ethics and Compliance Officer Association, a member of the Society of Corporate Compliance and Ethics (and a member of SCCE's Public Policy Task Force), and past Board member of the Association of Corporate Counsel – Europe. She was a charter member of the Compliance and Ethics Leadership Council of the Corporate Executive Board and a past member of the Ethics Resource Center (Fellows Program). Donna's extensive on-the-ground experience includes serving as the first global compliance and ethics officer for two leading multinationals, BP plc and BOC Group. At BP, she was the founder of the company's global compliance and ethics infrastructure and strategy, including the company's first global code of conduct, covering 100,000+ employees in over 100 countries (34 languages), a dedicated worldwide compliance and ethics team, and a groundbreaking network of 135 senior-level business ethics leaders, regional

ombudspersons and other specialists as part of a world-class program. Many of the features of programs developed by Donna are viewed as best-in-class in the field and have been widely adopted by leading companies.

Donna is a Contributing Editor of *Ethikos*, the leading business ethics publication, and Editor of *CS Newsflash*, a weekly newsletter covering top ethics and compliance issues of the day. She has been published and quoted widely on issues in the field, including in *The Wall Street Journal*, *Boston Globe*, *The Economist*, *Financial Times*, *Reuters*, *New York Law Journal* and *Compliance Week*. She is a frequent speaker to business and professional groups, including as keynote speaker to Ethics Practitioners Association of Canada (Ottawa), International Financial Executives Leadership Forum (Montreal) and Network for Good Business Ethics and Non-financial Reporting (Copenhagen). She has spoken at the House of Lords on the design and implementation of global compliance programs, and served as a member of the U.S. delegation to the 9th annual RAND-China Reform Forum (Beijing). Donna is a featured expert in the PBS documentary, “*In Search of the Good Corporate Citizen*”.

Prior to specializing in organizational compliance and ethics, Donna was in private practice at Fried, Frank, Harris Shriver & Jacobson in NYC. She holds a J.D. from New York University School of Law and is a member of the American Bar Association and the New York Bar.