

Chapter 1

Introduction

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Improved detection, rising fines, a greater relevance of private damages claims (especially in Europe), and longer prison sentences (for example in USA) have raised the necessity for firms to implement measures that prevent their managers and other employees from violating competition laws (e.g., by engaging in price fixing or the abuse of a dominant position).¹ Competition law compliance programmes have increasingly been implemented by European firms since about the year 2005 while having been in use by, e.g., US-American firms already for a somewhat longer period. Yet, research on this topic is often relatively new and sparse. Such work has mainly been done by legal scholars but increasingly also by researchers in business administration and economics. However, concepts relevant for competition law compliance have been examined by psychologists and political scientists, too. This poses two challenges. First, researchers sometimes work on this topic within the confines of their disciplines without necessarily knowing all the relevant concepts and results established in other fields. Second, practitioners had to implement and design competition law compliance programmes to the best of their knowledge without necessarily getting the scientific advice they may have wished for.

This volume addresses both challenges and may ideally be a step towards overcoming them. This is done by reviewing and presenting state of the art research from legal studies, economics, business administration, and psychology that addresses aspects relevant for competition law compliance programmes. Ideally, this will not only be interesting for researchers who learn how other disciplines approach the topic of antitrust law compliance. The chapters of this volume may

¹The terms *competition law* and *antitrust law* are used synonymously in this volume.

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also be insightful for practitioners who learn what scholars from different fields think how antitrust law compliance programmes can be designed and implemented best. Especially this interdisciplinary approach is new. The book aims at building a bridge not only from academia to practice but also between different sciences.

In this context, Stefan Frübing and Kai Hüschelrath provide an overview about competition law compliance programmes taking a law and economics perspective. They establish the key advantages of adherence to competition laws such as the avoidance of corporate fines, individual sanctions, repayments for damages, litigation costs, and counsel fees. They also suggest that compliant behaviour may affect stock prices positively and enhances firms' reputation before discussing the key challenges of competition law compliance programmes (e.g. setting the right incentives). Based on this discussion, they review relevant compliance measures such as appropriate remuneration schemes and effective organisational structures. Their chapter concludes with an analysis how competition law compliance programmes relate to competition authorities' law enforcement efforts, also touching upon the question whether the firms should be rewarded for the implementation of such programmes by granting them a reduction of the fine imposed on wrongdoing.

Georg Götz, Daniel Herold, and Johannes Paha provide an overview about the compliance efforts of European firms. They surveyed firms in Germany, Austria, and Switzerland and present what compliance measures these firms employed in early 2014. The participants were mainly compliance frontrunners (i.e. large firms and former cartel participants) who had a greater interest in ensuring compliance with competition laws than most firms. And still, the survey identifies some room for improvement when it comes to measures that go beyond training employees in matters of competition law. Such complementary measures are necessary because 71 % of the firms whose employees had violated competition laws in the past had already trained their employees before the misconduct occurred. Complementary measures to mitigate antitrust risks (e.g. codes of conduct and remuneration schemes) are, therefore, analysed in this book.

For example, Peter Kotzian, Thomas Stöber, and Barbara Weißenberger study the effectiveness of codes of conduct and challenge the assertion that these codes and compliance training cannot prevent illegal conduct if such behaviour generates net benefits for the firm and/or the misbehaving manager. They argue that besides pure economic reasoning one must not neglect the (informal) rules within a firm and its corporate culture, which also implies that antitrust compliance must not be treated in isolation but should be shaped in the context of a business ethics strategy. In doing so, they explore the boundaries between the rational choice theory of corporate crime and sociological as well as psychological explanations for misconduct. The firms should establish a culture that condemns all sorts of illegitimate behaviour where managers and other employees not only obey the laws but behave ethically. The authors infer conclusions about the effectiveness of codes of conduct from a factorial survey using a sample with 1800 managers who are employed by a large European corporation. Therefore, their chapter combines the results of original research with a review of the relevant literature. Kotzian et al. conclude

that codes of conduct and compliance training help to reduce unlawful conduct but should be complemented by additional measures.

One such measure is studied by Daniel Herold who reviews principal-agent theory showing what needs to be considered when designing employment contracts in a way intended to reduce anticompetitive conduct. He argues that sometimes cartel conduct may be beneficial for the misbehaving employees even if—in the light of fines, repayments for damages, litigation costs, reputational damage etc.—it lowers the profit of the firm. Therefore, the owners of the firm may have an incentive to design managers' remuneration in a way that deters collusive conduct best. Well-designed employment contracts may even prevent cartel conduct that would, otherwise, raise the profit of the firm. On the contrary, badly designed remuneration schemes may not only fail in preventing collusive conduct, they may even be the cause of managers' misconduct if, for example, a bonus can only be attained by illegal means. However, one must also bear in mind a trade-off insofar as remuneration schemes that prevent collusive conduct effectively may come at a cost, i.e., they may lower managers' incentives to exert work effort. Even more badly, if managers are not appropriately incentivised to work hard they may even become more likely to collude as this allows them to generate higher profits without exerting much effort.

The chapter provided by Ulrich Schwalbe broadens the scope of antitrust compliance beyond the prevention or early detection of cartel conduct. Compliance officers may put an additional focus on the prevention of abuses of a dominant position. Ulrich Schwalbe reviews conduct that may classify as an abuse of a dominant position and makes suggestions how to screen for such behaviour. Basic versions of such screens are already available today. Yet, future research may help to refine them. This is particularly important when it comes to abuses of a dominant position in online markets. They are not only special by often being characterised as platform markets offering services to (and charging prices from) both the sellers and the buyers of a good. Online markets also allow for the collection of data from the customers and forms of price discrimination that are not present in the offline world.

While these chapters analyse what the firms themselves can do to promote compliance with competition laws, later chapters study the role of competition authorities. Andreas Ransiek answers the question whether criminal sanctions (as opposed to administrative sanctions) should and can be imposed on firms whose employees violated competition laws. This discussion is not only relevant when comparing European competition laws to US antitrust laws. The discussion must also be seen in the context of recent advances in Germany calling for a criminalisation of corporate lawbreaking. The chapter asks whether a corporation can be personally culpable for conduct of its employees and studies whether it makes truly a difference if a sanction is called administrative or criminal. Andreas Ransiek argues that, say, a 10m EUR criminal sanction has no stronger effect than a 10m EUR administrative sanction. Administrative sanctions may even comprise elements similar to criminal sanctions such as imprisonment. This is because imprisonment deprives individuals of their liberty to go where they would like.

Depriving firms of their liberty to, e.g., submit bids in public tenders has a very similar effect. Therefore, the author does not see an advantage in holding corporations *criminally* liable for infringements of competition laws over the current situation in Europe and many European member states that impose administrative sanctions.

Andreas Ransiek continues by arguing that one should, however, also “think twice before introducing criminal sanctions against board members or employees of a corporation in antitrust cases”. Such an in-depth discussion of individual sanctions is provided by Florian Wagner-von Papp who advocates sanctions, and in particular criminal sanctions, being imposed on the managers of a firm. He fears that, otherwise, sanctioning the firm only may not create sufficient deterrence. First, if the expected fines imposed on the firms are lower than the expected benefits the firms may not have an incentive to prevent their managers from colluding. Second, even if the fines imposed on the firms would in principle be deterrent collusion might still generate private benefits to the managers (e.g. greater job security, bonuses, or better chances to get promoted). In the absence of individual sanctions these managers would not be deterred by the corporate sanctions especially if they expect to work in another department or even for a different firm once the cartel will be revealed.

By reviewing the current state of law, Florian Wagner-von Papp shows that criminal sanctions are already applied by European member states such as the United Kingdom. Other countries such as Germany, Austria, Hungary, and Poland impose criminal sanctions on individuals only for specific offences such as bid rigging. Based on a detailed analysis, the author does not consider it justified to treat bid rigging substantially different from other cartel offences. Florian Wagner-von Papp is well aware of and presents arguments in favour of and against criminal sanctions being imposed on individuals. He suggests that a criminal fine is truly a *sanction* while an administrative fine is rather a *price*, and that a criminal sanction exerts a stronger deterrence effect. For example, being considered a criminal may cause a manager to lose social prestige and/or the esteem of his/her peers. The author provides both empirical and anecdotal evidence that supports his claim. Weighing these arguments against their counterarguments the author concludes that criminal sanctions against individuals would be a desirable feature of competition enforcement.

Firms sometimes ask whether competition authorities could reward their compliance efforts by reducing the fines that are imposed on anticompetitive conduct. Florence Thépot summarises the advantages created by compliance programmes and studies how competition authorities can encourage compliance efforts in order to improve the prevention and detection of collusive practices. In particular, the author discusses the effects of fine reductions that many competition authorities are reluctant to give as they fear this might undermine the deterrence effects of the fines. This is although such reductions are not infrequently granted in the fight against bribery and corruption. Florence Thépot reviews some literature analysing why fine reductions may actually improve compliance efforts. In line with Kotzian et al., the author suggests that (non-)compliance should not only be researched in a

mere rational choice framework that takes the firm as the object of analysis. Taking into account organisational and cultural aspects, while focusing on employees as the unit of analysis, can instead help to understand (non-)compliance better and to set the right incentives for the introduction of compliance programmes. This may include fine reductions that according to Florence Thépot should, however, only be granted if the firms are able to demonstrate the effectiveness of these measures along with a strong commitment to compliance.

Per Rummel is more sceptical about such fine reductions and presents the negative side effects and legal obstacles that may prevent fine reductions from being the best way of promoting compliance programmes. To arrive at this conclusion, he studies different designs of this *compliance defence* asking, e.g., whether a fine reduction should only be granted for the implementation of a new compliance programme or also for the existence of a programme that was implemented even before the infringement occurred. He also questions whether a reduction of the fine of only 10%, which is typically presumed in this context, provides a sufficiently strong incentive for the firms to intensify their compliance efforts. Per Rummel also presents what legal norms may require German firms to implement compliance measures. These norms may serve as an alternative to fine reductions when it comes to making firms invest in compliance programmes.

Competition law compliance programmes are often discussed from the viewpoint of legal studies, business administration, and economics. Agnieszka Paruzel, Barbara Steinmann, Annika Nübold, Sonja Ötting, and Günter Maier add a new perspective to this discussion. They show what psychology may contribute to this topic because violations of antitrust laws share common elements with counterproductive work behaviour, workplace deviance, and especially unethical pro-organisational behaviour. Based on these established concepts Paruzel et al. develop the *onion model of competition law compliance* arguing that in order to understand (non-)compliance better one must take into account certain intra-organisational factors (i.e. the individual, the group, and the organisation) that interact with influences in the (market) environment. On the individual level it may be important to take into account the personality traits of the employees (i.e. emotional stability, extraversion, openness to experience, agreeableness and conscientiousness) along with their needs for achievement, affiliation, and power. However, individual behaviour can on the group-level also be shaped by, e.g., social norms and perceptions of justice. These can potentially be affected by elements like ethical leadership that in the compliance-context is related to the *tone at the top*. The concepts described by Paruzel et al. relate to aspects studied by Kotzian et al. who both emphasise the importance of organisational elements like firms' corporate social responsibility activities and the creation of an ethical work climate to foster compliance.

To summarise, the book shows that antitrust compliance is an inherently interdisciplinary topic and can only be understood fully when crossing disciplinary boundaries. The law sets the stage for compliance issues, with legal studies defining what specific types of conduct are legal or illegal especially when this is far from clear. Firms' compliance efforts themselves may have a legal dimension such as

data protection when using, for example, e-discovery methods. Economists then analyse the risks in the market environment that facilitate or even trigger collusive conduct. Such knowledge is necessary to concentrate compliance resources at the departments and during times where they are needed most. It is however not sufficient to study the effect of the market environment on the profit of the firms only. Misconduct is being carried out by the employees of the firms. This requires both to understand their individual incentives and to implement organisational measures that make anticompetitive conduct undesirable at an individual level. Here, knowledge generated by economists on, e.g., incentive-compatible employment contracts and remuneration schemes goes hand in hand with the results obtained by business scholars. Business administration and behavioural economics also build a bridge to psychology. Researchers in the latter field help to understand the individual motivations of firms' employees better, which is necessary to design the organisational environment as well as the employment contracts optimally.

In this context, it may be important for future research to understand these individual incentives better. For example, learning in what ways employees behave rationally while pursuing objectives other than a maximization of lifetime income is relevant when setting the *right* incentives. Even an ideal incentive scheme may not prevent misconduct that is emotionally driven, individual-specific, unsystematic and, thus, unpredictable. Improved knowledge about these limits of organisational measures also has implications for antitrust compliance. For example, knowing about unsystematic causes of illegal conduct (be they rational or irrational from the viewpoint of the decision maker) is necessary when measuring the effectiveness of the implemented compliance measures and demonstrating it to, e.g., a competition authority.

These considerations underline how this book may be source of reference both for researchers and practitioners in the compliance-field. It presents the current state of antitrust compliance efforts (mainly but not exclusively) in Europe and summarises key concepts from multiple disciplines. Ideally, researchers will take up some of these ideas in their future studies, and practitioners will find the concepts helpful in further refining their compliance programmes.

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