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The Price Fixer: Compliance Tales from the Other Side

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Keywords: Competition Law, Antitrust, Compliance, Cartels.

1. Introduction

Compliance with any area of law ultimately comes down to decisions made by individual human beings, either in isolation or as part of a larger group within an organisation. The antitrust compliance debate is dominated by those working to promote compliance within the firm and – to a lesser extent – those responsible for enforcing competition law. The perspective that is typically overlooked is that of the individual(s) responsible for

[1] Professor of Competition Law, Centre for Competition Policy and School of Law, University of East Anglia, Norwich NR4 6PN, UK. Email: a.stephan@uea.ac.uk. The usual disclaimer applies. I am grateful for the many wonderful discussions I have had over the years with competition law folk involved in cartel cases, and especially for their willingness to share frank accounts of their experiences and of the decisionmakers involved.

compliance failures. Yet how people behave and what motivates them is crucial to understanding what makes a robust compliance programme. For example, it is generally assumed that efforts to hide anti-competitive conduct from customers and from others within the firm is a strong indication of delinquency and a deliberate breach of duty, yet the act of hiding does not necessarily correspond with *how wrong* the individuals viewed the conduct, whether it was encouraged or facilitated by others in the organisation, or the extent to which the requirements of the law were properly understood. It is further assumed that individuals break competition law because they are directed or encouraged to do so by senior management. That was certainly true of many of the high-profile cases like *Lysine* and *Vitamins* investigated in the 1990s and early 2000s, however reasons for non-compliance are many, varied and complex. As individuals are *only human*, they may be driven by many desires and motives. Undoubtedly the need to make profits, maximise margins and increase personal bonuses are strong factors – but these are not the only drivers of non-compliance. Individuals may be strongly motivated by other reasons: crisis, arrogance, ego or hubris, a desire not to 'let peers down', or to be 'part of a club', among others.

There is a whole spectrum of potential behaviour that must be addressed by a compliance programme, between a deliberate breach of compliance, at the one end, and an inadvertent or well-intentioned lapse of judgement, at the other. The consequences in terms of corporate fines, potential damages actions and loss of reputation are typically the same regardless of the motivations that lie behind them. Nevertheless, the perspective of the price fixer (that is the individual who engages in price fixing, rather than the company) is crucial to understanding how even businesses who invest very significantly in their compliance efforts, occasionally get caught out by individuals who fall through the net. The particular danger that exists in relation to anti-competitive agreements (as compared to say, abuse of dominance), is the ease with which employees can expose the business to the risk of liability, by simply exchanging sensitive information with a competitor, and how any business (not just those with high market power) is exposed to this risk, regardless of whether an arrangement was implemented or had any actual effect on the market.

This paper aims to fill this important gap in the literature by exploring what we know about the perspective of the price fixer, through accounts of circumstances surrounding breaches of competition law, accompanied by a discussion of the extent to which an antitrust compliance programme can be designed to deal with these scenarios. For these purposes, the paper draws on three sources of research: (i) Cases that are in the public domain and have been the subject of enforcement decisions, media reports, speeches by competition authority officials and academic research and writing; (ii) Recorded statements made in interviews or in court hearings; and (iii) Anonymised accounts that the author has collected over a period of 15 years through conversations and interviews with competition lawyers, in-house counsel and some actual price fixers. The sensitive nature of these cases (some of which were still ongoing at the time of writing) and the understandable reluctance to share

them openly by those who were directly involved, make anonymity necessary if they are to further our knowledge and be shared with a wider audience. The anonymised accounts were not collected in a uniform way or as part of a single research project. Rather they are the by-product of various strands of research into cartels that were undertaken over the 15 year period. They should therefore be treated as anecdotal and may not be representative of the motivations and experiences of all price fixers. For example, they largely capture the uncorroborated accounts of those who were willing to talk about cartel infringements (many prefer not to) and are describing cartels that were caught and subject to enforcement action. The paper focuses on five common themes that emerge from these anonymised accounts, when taken together with the other sources of research outlined above. The quotes presented in this paper are a combination of verbatim and paraphrased remarks, selected to best illustrate each theme.

The paper first explains why a better understanding of the perspective of the price fixer is important, why our knowledge of it is comparatively limited and the difficulties in accurately capturing this aspect of the compliance story. It then structures the accounts around five key themes: (i) ignorance or a poor understanding of the law; (ii) where legitimate contact between competitors leads to an infringement; (iii) crisis and other pressure points that cause individuals to engage in behaviour that they understand is wrong and would otherwise make efforts to avoid; (iv) arrogance and greed that cause individuals to break the law even though they have a good understanding of the consequences of doing so; and (v) customer facing employees (regional sales staff). The final section of the paper analyses how leniency and settlement programmes can have a distortive effect on internal compliance efforts.

2. Why is the perspective of the individual price fixer important?

How employees make decisions depends primarily on their training and on the culture of corporate governance within a business. It also depends on the characteristics and culture within the wider industry or profession and on their personal attributes: past experiences, personalities, values, their sense of right and wrong, how they regard others, among many more factors. Workplace personality tests can be used to attempt to identify individuals who are more likely to take risks, ignore others, and have a poor sense of right and wrong. But such tests are of questionable accuracy and some level of risk taking can be important to growing and innovating parts of a business.[2] Interpreting the results of such tests can also be tricky, as while one might expect risk-loving individuals to be more likely to form cartels, an early study of cartel behaviour suggested that a key attraction is the reduction of the

[2] See L Weber and E Dwoskin, 'Are Workplace Personality Tests Fair?' *The Wall Street Journal,* 29 September 2014.

uncertainties and risks associated with competition.[3] Also, while testing may give one an indication of whether an employee's general sense of right and wrong is sound, it does not necessarily capture how well they engage with morally ambiguous decision making. In their empirical work on behavioural psychology, Hodges and Steinholtz identify the importance of ethics to effective regulation and compliance.[4] In order for people to obey rules, it is important that those rules correspond with their internal moral value systems and that they consider the rules have been fairly made and applied.[5]

As will be discussed later in this paper, ethical perceptions of practices such as price fixing can be quite fluid and depend very heavily on context. For example, where there is overcapacity and very heated competition within a market (sometimes described as a 'price war'), the prospect of one competitor being driven out of the market (a natural consequence of competition in a market with declining demand) can radically change employees' perception of anti-competitive conduct. Indeed, in situations of overcapacity, it may even seem rational to agree with competitors to close down production, or otherwise hold back supply so as not to 'flood' the market. Similarly, it is important to have a good understanding of performance related pressures that employees face within an organisation, as unrealistic target setting can have a very similar effect to what is described above. So the question of whether an employee is capable of infringing competition law is not something that can easily be determined by a personality test or necessarily prevented by compliance training. If antitrust compliance efforts are to continue to evolve and become more sophisticated, one needs to have a good understanding of the circumstances and motivations that caused employees to break the law. The more of these we are able to record and study the better, as no two infringements of competition law are quite the same. The perspective of the price fixer is also important to understanding the impact of factors specific to particular industries and types of businesses.

3. Why little is known about the individual price fixer

In the era of secretive cartels prohibited by law, detailed accounts of the role of the individual are surprisingly limited. Our characterisation of the price fixer tends to be shaped by the Lysine cartel of the 1990s and covert FBI footage that provides a fascinating window into the workings of a cartel meeting. The hazy black and white FBI recording is true to the notion of a smoke-filled room in which conspiracies are hatched and executed. The

[3] G Geis, 'White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961' in M.D Ermann and R J Lundmann (eds.) *Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society* (New York, OUP 1987), pp. 111-130.
[4] See generally: C Hodges and R Steinholtz, *Ethical Business Practice and Regulation* (Hart 2018).
[5] N Gunningham and D Thornton, 'Fear, duty, and regulatory compliance: lessons from three research projects' in C Parker and VL Nielsen (eds), Explaining Compliance: Business Responses to Regulation (Edward Elgar, 2012); see also studies discussed in J D Jaspers, 'Managing Cartels: how Cartel Participants Create Stability in the Absence of Law' (2017) European Journal of Criminology Research, 23, pp. 319-335, at 320

protagonists – senior executives from the world's biggest Lysine manufacturers – deride antitrust enforcers and even their customers, with the now infamous line: "our customers are our enemies".[6] The workings of the cartel and the way Mark Whitacre first disclosed the price fixing conspiracy to distract from his own misconduct within Archer Daniels Midland, is set out in great detail in the books, *The Informant*[7] and *Rats In The Grain*[8]. Detailed accounts also exist of a handful of other price fixing conspiracies, such as that between the auction houses Sotheby's and Christie's.[9] These cases have etched into our minds an archetype of antitrust wrongdoing: a group of unscrupulous rogues no better than 'well-dressed thieves'.[10] Yet this characterisation is misleading, as it suggests that cartels are always deliberate breaches of the law driven by greed. From a compliance training perspective, this is unhelpful, as it creates the risk that employees will not fully engage in the nuances of competition law because they do not identify with the Lysine archetype of a price fixer and therefore discount their own risk of breaking the law. The absence, in most jurisdictions, of sanctions aimed at the individuals responsible for the cartel, also create a false sense that cartels are generally coordinated at an institutional level and not the consequence of individual decision-making.

Beyond the small number of well documented cases, there are good reasons why we know relatively little about the individuals responsible for cartels.

3.1 Little information is disclosed about price fixers in public enforcement

In most jurisdictions, competition law does not engage in the punishment of individuals, and so the focus tends to be solely on the businesses that are vicariously liable for the behaviour of their employees. Details of who within the business was responsible, their motivations and individual conduct, are either redacted from infringement decisions or are not relevant to the main purpose of the investigation: to prove the existence of the anti-competitive arrangement itself. As will be discussed later in this paper, businesses may be tempted to protect the identity of their employees and prefer not to have details of their internal compliance failures detailed publicly. The increased use of settlement procedures has resulted in less detailed cartel decisions, fewer appeals and the greater redaction of information that is not essential to the finding of an infringement. By contrast, older European Commission decisions, for example, contained far greater information about how

[6] Michael Andreas, Archer Daniels Midland. FBI covert recording of a Lysine Cartel meeting in Hawaii, March 1994.
[7] K Eichenwald, *The Informant* (Broadway Books 2000).
[8] J B Lieber, *Rats In The Grain: The Dirty Tricks and Trials of Archer Daniels Midland, The Supermarket to the World* (Basic Books, 2002).
[9] C Mason, *The Art of The Steal: Inside the Sotheby's-Christie's Auction House Scandal* (Berkley Publishing Corporation 2005).
[10] J I Klein, (Asst. Attorney General, US Department of Justice Antitrust Division), 'The War against International Cartels: Lessons from the Battlefront' Speech at the 26th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, New York, 14 October 1999.

the cartel was administered and who was involved. Even in the US where a significant number of individuals have been imprisoned for antitrust offences, not much is known because so many cases are settled at plea bargain in lieu of a full criminal trial.[11] The same is true, to a lesser extent, whenever the individuals do not contest the case. Important records of cartels, including transcripts and covert recording, do not generally enter the public domain unless they are heard in open court. It is only where a full criminal trial occurs, as in the UK prosecutions relating to *Libor* manipulation, that we are able to hear and record accounts centred on the role of the individual.

3.2 Businesses and their compliance officers do not want to talk about price fixers

Even where businesses have taken internal disciplinary action against the individuals responsible or dismissed them, there are good reasons for not publicly disclosing information about their role in an infringement. This information could further heighten any reputational damage caused by the enforcement action, could undermine trust in capital markets (especially where the failure in compliance was particularly stark or embarrassing), and could assist the cases of prospective claimants seeking damages. In any case, it is rare for an organisation's internal disciplinary proceedings to be made public – especially where they involve dismissal. It may also be that the individual and the firm decide to go separate ways at an early stage of any antirust investigation, when the precise nature of their role is still unknown. As will be discussed later in this paper, the need to secure the cooperation of the individuals responsible to cooperate effectively with competition authorities in return for leniency, can be an additional reason for protecting their identities and individual conduct.

3.3 Price fixers do not want to talk about their own past conduct

With few exceptions individual price fixers are generally very reluctant to talk about the infringements they were involved in. In some cases, they are subject to non-disclosure agreements as a condition of any severance settlement with their former employers, or are still in the employment of the firm. Those who have served gaol time in the US or are dismissed appear to find employment at a comparable level and often within the same industry, making them understandably embarrassed and unwilling to discuss their past wrongdoing.[12] These individuals may also be conscious of the possibility of incriminating

[11] See A Stephan, 'The Direct Settlement of EC Cartel Cases' (2009) International Comparative Law Quarterly, 58(3), pp. 627-654.
[12] See A Stephan, 'The UK Cartel Offence: Lame Duck or Black Mamba?' (2008) Centre for Competition Policy Working Paper No. 09-19.

themselves given the growth in individual sanctions internationally, including criminal offences.[13]

3.4 It is hard independently to verify the accounts we do have

Where there is only one source of information (whether that is the price fixer, the competition lawyer or in-house counsel), it can be difficult to engage in an objective analysis of why the breach of competition law came about. Price fixers who were motivated predominantly by greed or hubris at the time may deflect responsibility by claiming a partial understanding of the law, or by focusing on the role of others and the pressures of crisis or unrealistic target-setting by management. In doing this, they blunt the sting of any moral opprobrium associated with their conduct and this is an important caveat to the accounts presented in this paper. Similarly, where businesses and compliance officers are able to share accounts of what went wrong, they may – in some cases – omit or minimise key failures, such as wider knowledge and tacit condoning of the behaviour within the organisation at the time.

4. Perspectives of the Price Fixer

What follows is a critical discussion of the accounts of individual price fixers that raise very different challenges for antitrust compliance. They are separated into the following themes: (i) ignorance of the law; (ii) legitimate contact between competitors, (iii) pressure – crisis and 'ruinous' competition; and (iv) delinquency and arrogance.

4.1 Ignorance of the law

Despite the very emotive language that is sometimes employed by authorities to describe anti-competitive behaviour, the level of awareness among the average employee or member of the public is rather limited. Significant survey work has been carried out across jurisdictions and the results are pretty uniform: people recognise price fixing as something that is harmful, but not a practice that attracts significant moral opprobrium or is considered equivalent to serious crimes like theft and fraud.[14] In one survey where respondents in the UK were given a range of behaviours to compare price fixing too, most

[13] A Stephan, 'Four Key Challenges to the Successful Criminalisation of Cartel Laws' (2014) Journal of Antitrust Enforcement 2(2), pp. 333-362.

[14] A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement In Britain' [2008] 5(1) Competition Law Review, pp. 123-145; C Beaton-Wells and C Platania-Phung, 'Anti-Cartel Advocacy – How Has the ACCC Fared?' (2011) 33 Sydney Law Review, 735; A Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (2017) Legal Studies 34(4), pp. 621-646; E Combe and C Monnier-Schlumberger, 'Public Opinion on Cartels and Competition Policy in France: Analysis and Implications' (2019) World Competition 42(3), pp. 335-353.

felt it was only a little more serious than copyright infringement.[15] One explanation for this is that the victims of price fixing and the extent of the harm are not generally obvious. Most anticompetitive behaviour is between firms who sell to other businesses and so any overcharge is typically passed on and shared among a large number of final consumers. It is for this reason that competition law cases do not tend to be newsworthy outside of the business press.[16]

The key implication of this is that individuals' moral compass may not be equipped to recognise the wrongfulness of anti-competitive conduct, especially when that conduct involves more subtle forms of collusion than say, the bid-rigging of a procurement process. What is needed is education in the form of the advocacy and engagement activities of regulators, but also the crucial compliance training that is provided within an organisation. The businesses that tend to be at greater risk are those who either choose to not take compliance seriously, or who do not have the means to adopt a comprehensive compliance programme. While robust compliance measures can be taken at a fairly low cost[17], survey work undertaken by the UK's Competition and Market Authority (CMA) suggests there is a worrying gap in competition law awareness. In 2014 only 23% of UK businesses felt they knew competition law well, while 45% had never heard of it or did not know it at all well.[18] The study suggested very significant divergences according to the size of the business, with small and medium sized firms still in very significant danger of committing competition law infringements out of ignorance or partial understanding of the rules. Indeed, one in ten who had been in contact with competitors, reported having some discussion of price.[19]

In 2009, the UK's Office of Fair Trading (the CMA's predecessor) fined 103 construction companies for involvement in bid-rigging and in a far more common practice called *cover pricing*.[20] This is where a business does not wish to win a contract that has been put out to tender, but wants to participate so as to ensure they are involved in future tendering processes. In order to do this, they contact a competitor who is bidding for the same contract to request a *credible losing bid*. As Hviid and Stephan show, this practice has limited impact on competition unless the number of bidders is very low.[21] Nevertheless, it amounted to a serious breach of the competition law, as it was a direct communication between competitors exchanging sensitive information about pricing intentions. The UK Competition Authority at the time (The Office of Fair Trading or OFT) treated it as equivalent

[15] Ibid, Stephan 2007

[16] A Stephan, 'Cartel Criminalisation: the role of the media in the "battle for hearts and minds"' in C Beaton-Wells and A Ezrachi (eds.) *Criminalising Cartels: Unexplored Dimensions and Unforeseeable Consequences* (Hart Oxford, 2011)

[17] See for example: J E Murphy, *A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs*, (Society of Corporate Compliance and Ethics, 2010).

[18] IFF Research, *Report: UK business' understanding of competition law prepared for CMA* (26 March 2015).

[19] Ibid.

[20] OFT Decision CA98/02/2009, 'Bid rigging in the construction industry in England' 21 September 2009 (Case CE/4327-04).

[21] A Stephan and M Hviid, 'Cover Pricing and the Overreach of 'Object' Liability Under Article 101 TFEU' World Competition 38(4), pp. 507-526. 2015.

to bid-rigging in setting the fines, but these were subsequently reduced by 90% at appeal to reflect the less serious nature of the practice.[22]

At the time this author had the opportunity to interview some of the individuals involved in the practice and their lawyers. One construction company director commented,

> *"We just couldn't understand what was illegal about it. We'd been getting [cover bids] from each other for years. It was standard practice in the industry and nobody ever got harmed by it"*

There was a good understanding among these individuals about the harmful and dishonest nature of naked bid-rigging, but little comprehension of why cover pricing was also considered a serious breach of the law. Indeed, one might argue that openly withdrawing from the process instead of acquiring a cover price is more harmful to competition, because it results in all competitors knowing you do not want to win the contract, not just the one firm who is approached for the credible losing bid.[23] What was interesting about this case was the level of consternation, not just among those in the industry, but also among their legal representatives (who were not generally specialist competition lawyers). One said,

> *"The treatment of these honest businesses by the OFT is a disgrace. The fact this behaviour can amount to crime is just ridiculous".*[24]

In another UK case, competitors engaged in bid-rigging through the use of a preferred customer list that essentially divided up the market. The customers (who were all other businesses) would always get the best price from the seller whose list they were on. If they approached any of the other competitors who were party to the agreement, they would be quoted a price that was in excess of the preferred sellers cartel price. Interestingly in this case the individuals did have some awareness of competition rules. Yet despite having attended an industry body event on compliance, someone directly involved in the cartel meetings said,

> *"We knew what we were doing was wrong, but not something really bad. The customers were getting a fair price and once they knew who to get the best price from, it saved them the hassle of searching around each time they wanted to place an order. The fact we were not so squeezed on price also meant we could look after them better."*

Such justifications and perspectives are indicative of a partial understanding of competition law and also a failure to fully appreciate the scope of cartel laws. Ennis points out how a classic business school education may compound this problem. The writings of business academics like Michael Porter in the 1980s and 1990s taught managers strategies for suppressing competition and raising prices, typically without the clear caveat of antitrust

[22] See *Kier Group Plc and others v Office of Fair Trading* [2-11] CAT 3/
[23] Stephan and Hviid (n 21)
[24] This was a reference to the UK's Cartel Offence under Enterprise Act 2002, s.188.

rules.[25] Another example of this is the writings of Judith and Marcel Corstjens, who in their book *Store Wars*, describe how,

> Achieving an orderly market where competitors can make more than survival returns, is a primary business aim. Industries need to find the road from free-for-all, gloves-off war to sustainable competition. Market orientation is one such road – an uphill road with segmentation as its destination.[26]

Many of these publications are now quite old and there has been a marked improvement in the way Business Schools flag competition rules in their teachings of business and marketing strategies. Yet those managers likely to be acquiring price setting powers today will have gone through university education in the 1980s and 1990s. Also, however much one caveats business strategies with knowledge of antitrust rules, the two will remain diametrically opposed to some extent. The role of competition law is to ensure low prices and competitive pressures, while the role of marketing strategies is to find ways to reduce competition so that bigger mark-ups can be made. The two are reconciled where the higher profits reward innovation or improved service, but not where they amount to a manipulation of market conditions to suppress competitive pressures. So the challenge of compliance is not just one of education, but also of 'unlearning' dangerous strategies and balancing performance measures.

The discussion above underscores the considerable challenges faced by compliance officers in ensuring that training content is both effective and engaging for those employees involved. One compliance officer was kind enough to share some rather disheartening anonymous feedback they received on their work from target employees within their organisation,

> *EMPLOYEE 1: "The competition law training was about as memorable as all the other short courses they pile on us, on top of our regular work. You resent doing it because you're busy and it feels like a waste of your time".*
>
> *EMPLOYEE 2: "The regulatory stuff [referring to competition law] is boring, complicated and doesn't always make sense, but you don't want to ask too many questions because you know everybody in the room just wants it to end as soon as possible".*

These statements also speak of the pressures employees are typically under and of the need to create sufficient and credible space in their workloads to properly engage in compliance training activities. It also hints at the growing burden of compliance training (in many areas, not just in antitrust) more generally and the need for businesses to identify synergies and

[25] S Ennis, 'Business Strategy and Antitrust Compliance' forthcoming in Anne Riley, Andreas Stephan and Anny Tubbs (eds), *Perspectives in Antitrust Compliance* (Concurrences 2021); See for example M Porter, 'How Competitive Forces Shape Strategy' in D Asch and C Bowman (eds), *Readings in Strategic Management* (Palgrave, London 1989)

[26] J Corstjens and M Corstjens, *Store Wars: The Battle for Mindspace and Shelfspace* (Wiley 1995), p17.

holistic approaches that help prevent compliance from feeling like a burden and to avoid "compliance fatigue".

4.2 Where the cartel began with legitimate contact between competitors

Compliance risk is always heightened in industries where competitors have legitimate opportunities to meet up and exchange information lawfully. Trade associations in particular, are overwhelmingly high-risk venues for facilitating and administering anti-competitive arrangements. Examples include, the *Electrical and Mechanical Carbon and Graphite* cartel which held its meetings in the margins of the European Carbon and Graphite Association, and the *Citric Acid* cartel who used the European Citric Acid Manufacturers Association to mask many of their activates.[27] Compliance officers have to carefully manage legitimate contact between competitors, as it can take little more than a series of misjudgements for communication to fall on the wrong side of prohibitions like Article 101 TFEU and Sherman Act, s.1. The danger is less heightened when it comes to research and development, as these sorts of joint ventures and arrangements do not tend to directly involve staff with price setting powers or those who work in marketing or sales. The problem lies more where a public or industry body asks competitors to discuss topics relating to cost and price. The challenge of managing these interactions was heightened by the apparent relaxing of enforcement priorities at the beginning of the Covid-19 crisis[28] and the pressure on competition policy to take a more permissive approach towards agreements that facilitate sustainability and other environmental goals.[29] The likely permanent move to 'remote working' for many employees creates new obstacles, as it means employees have less interaction with their managers and compliance officers.

Even where discussions between competitors are deemed legitimate and lawful, any exchange of information may improve their knowledge of each other and may make both tacit and explicit collusion easier to achieve.[30] It is also difficult to draw clear 'lines in the sand' when engaging in topics that have to involve some discussion of costs. Of the creation of a manufacturing cartel that began with meetings about safety standards called for by the relevant industry body, a sales executive closely involved in the meetings said,

> *"We didn't just suddenly decide to form a cartel and probably never would have done had it not been for the [industry body]. They introduced us, encouraged us to discuss safety issues and left us to organise our own meetings. The meetings just kept going*

[27] COMP/E-23/38.359 Electrical and mechanical carbon and graphite products [2004] OJ L125/45 at 82; Citric Acid[2002] OJ L239/18 at 87.
[28] See the special Covid edition of Journal of Antitrust Enforcement (June 2020) and in particular: P Ormosi and A Stephan, 'The dangers of allowing greater coordination between competitors during the COVID-19 crisis' (2020) Journal of Antitrust Enforcement 8(2), pp. 299-301.
[29] See for example: Autoriteit Consument & Markt, *Guidelines: Sustainability agreements: opportunities within competition law* (9 July 2020); and European Commission, 'Statement on ACM public consultation on sustainability guidelines' (9 July 2020).
[30] See C Argenton, D Geradin and A Stephan, *EU Cartel Law and Economics* (OUP 2020), at I.A.1.2

and the conversations gradually wandered onto prices and sales. Before we knew it, we were discussing who we sold to and for how much. Even before it got to that stage, we got a very good sense of how to compete less aggressively. It is what you don't know about your competitors that keeps you awake at night."

The danger of slipping into a breach of competition law is also greater in relation to some forms of vertical and hub and spoke arrangements.[31] One corporate executive commented how products are often 'tweaked' by marketing teams to keep them fresh and interesting for buyers. These tweaks might include new 'seasonal editions' or variants, and small changes to certain features of the product. When these are presented to retailers with resale price recommendations, retailers will sometimes seek assurances that upon following such recommendations they will remain competitive. The correct approach here is to persuade the retailer that the changes will genuinely enhance how consumers value the product and increase their willingness to pay. But those dealing with retailers may be pressured to provide assurances, including information about the practices of other retailers they sell to, that amounts to either minimum resale price maintenance and/or a 'hub and spoke' type cartel arrangement.

The notion that infringements are not always deliberate from the outset is an important one. It is imperative for businesses to create clear 'escape routes' for employees who suddenly find themselves on the wrong side of the law. This is where clear and regular reporting procedures, oversight of activities, whistleblowing hotlines and a no-blame culture relating to inadvertent breaches of competition law are important. The challenge is how to reconcile this with the need to discipline those responsible for serious breaches of the law. One possible solution is to create a no-blame culture only in relation to those individuals who report early on and who have not gone to great lengths to hide the conduct from their employer.

Without a no-blame mechanism to report inadvertent breaches, employees are far less likely to report the breach and could find themselves in a spiral of delinquency, in that the more they do to hide their involvement, the more culpable and exposed to punishment they feel, which can just spur on further efforts to conceal what is going on.[32] Meanwhile, the infringements themselves go on for longer, thereby expanding the business' liabilities. A leading competition lawyer with experience of international cartel cases described how,

"Once they become aware they have broken the law, it is hard for them to just say, 'that's it – let's go home'. They worry about going to their boss to say they messed up. The danger they imagine they are in is already overwhelming. They also get a

[31] Hub and spoke arrangements are essentially a horizontal cartel that is facilitated by common vertical links.
[32] The term 'spiral of delinquency' is used to describe the relationship between secrecy and dishonesty by J Joshua and C Harding, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2nd Ed OUP, 2011), p51

strange sense of camaraderie in that they feel they are in this together with the other cartel members, who they often view as good friends".

In an interview of Bryan Allison, who was imprisoned for involvement in the *Marine Hoses* cartel, he described the spirit of the cartel meetings as "almost a social occasion".[33] The role of close personal ties in anti-competitive agreements is hardly surprising. In order to ensure everyone adheres to an agreement that is not legally binding, what is required is trust through monitoring and effective personal communications. Personal relationships (that in some cases predate any cartel agreement or legitimate contact) and trustworthiness are key to the success of such arrangements.[34] Those who have had an opportunity to listen to cartel meeting recordings or read transcripts of them, might be confused for thinking they are listening to a meeting of close friends. From this author's experience of such records (most of which are not in the public domain), they are nearly exclusively a male dominated world that revolves around humour, sport, food and drink. This acts to reinforce trust between the protagonists but also creates peer pressure to stick with the agreement and not cheat or pull out. In Jaspers' study of Dutch cartel cases he quotes a director who attempted to break up his cartel,

"Again, I declare that we decided internally, with the introduction of the new Dutch competition law, to cease our activities. We did not succeed. We should have distanced ourselves from these activities. I urged this several times and was sometimes pressured by other firms to continue with the agreements".[35]

Even where individuals understand that it is in their best interest to report the behaviour, there can be serious barriers to doing so. For example, where the cartel is effective at raising profits, the individual may be receiving praise within the firm and become accustomed to being shielded from the pressures and unpredictability of competition. They may fear the personal consequences of getting caught and that could distort their judgement and perception of risk – especially where they feel confident that the arrangement is unlikely to otherwise be detected.[36] Of the prospect of putting an end to the infringement, Bryan Allison of the *Marine Hoses* cartel said,

"Would I have then gone to a law firm and said, 'This is what we have done, and I think we need some help'? I suspect I would have buried it under the carpet and hoped that nothing would ever come of it. But there again once you are in one of these things, it is virtually impossible to get out of. How do you leave something like a cartel?"[37]

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[33] M O'Kane, 'Does prison work for cartelists? – The view from behind bars: An interview of Bryan Allison by Michael O'Kane' (2011) The Antitrust Bulletin, 56(2), pp. 483-500, p487.
[34] See C Parker, 'Economic rationalities of governance and ambiguity in the criminalization of cartels' (2012) British Journal of Criminology 52(5), pp. 549-583.
[35] Jaspers (n 5) p330.
[36] RA Johnson, *Whistleblowing: When It Works – And* Why (Lynne Rienner Publishers 2002) p93; see also O'Kane (n 33), p489.
[37] O'Kane (n 33), p489.

Finally, if the business does not create effective 'escape routes' for its employees it is extremely unlikely that those individuals will seek to expose the behaviour in any other way. There is a considerable amount of stigma attached to the act of whistleblowing and the experience of the whistle blower is generally far less happy than that of the price fixer who is caught, even where they are not themselves responsible for the infringement.[38] On this question Bryan Allison said,

> *"I rather think that 'grassing people up' isn't really the done thing. Isn't that a little unethical? There is nothing could be more crazy than a convicted criminal talking about ethics, so I understand the conundrum I am in. However I really didn't feel that we could go around 'grassing people up.' I just didn't think that was on."* (sic.)

The story of Stanley Adams of Hoffman La Roche, lives long in the memory of many in the compliance world. Adams sent the European Commission a well-intentioned communication about an infringement of competition law, which was later inadvertently disclosed by them. As a consequence, Adams became bankrupt, suffered a terrible personal tragedy and was prosecuted under Swiss law for passing confidential business information to a foreigner.[39] There is considerable evidence to suggest that, in contrast to price fixers who have served time in prison, whistleblowers find it extremely difficult to find work again in their industries, as was the case for Ad Bos, an engineer who blew the whistle on a Dutch construction cartel and whose experience was portrayed in a documentary film.[40]

4.3 Crisis and the effects of 'ruinous' competition

Crisis is a very common theme in the creation of cartels. The key motivation is often to avert bankruptcy, or to prevent the deterioration of prices that are dropping rapidly in response to a contraction in demand or the decline of the industry.[41] Indeed, this can lead to some rather irrational cartel outcomes, such as that between Christie's and Sotheby's in the *Auction Houses* cartel. The Chief Executive Officer of Christie's is said to have reacted to the price fixing arrangement by saying,

> *"This seems unnecessary… [we] always follow each other's commission increases anyway. We can raise commissions without having to put our reputation at risk"*.[42]

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[38] See A Stephan, 'Is the Korean Innovation of Individual Informant Rewards a Viable Cartel Detection Tool?' in T Cheng, B Ong and S Marco Colino, *Cartels in Asia* (Kluwer 2015).

[39] Eric Newbigging, 'Hoffman-La Roche v Stanley Adams – Corporate and Individual Ethics' (1986) Cranfield University Working Paper. Available: https://dspace.lib.cranfield.ac.uk/handle/1826/471

[40] *Fiddling With Millions* (VARA 2001); On the impact of whistleblowing see: C F Alford, *Whistleblowers: Broken Lives and Organizational Power* 54 (Columbia University Press 2002). P54; WE Kovacic, 'Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels' (2001) 69 George Washington Law Review 766, p774.

[41] A Stephan, 'Price fixing during a recession: implications of an economic downturn for cartels and enforcement' (2012) World Competition 35(3), pp. 511-528.

[42] C Mason, *The Art of The Steal*, (Penguin 2004), p123.

When asked why they entered into an anti-competitive arrangement, many price fixers suggest that it was not for personal gain, but rather a matter of survival.[43] Fear of bankruptcy can have a significant distortive effect on both rational choice and on an employee's moral compass. The fact is human beings do desperate things when they fear losing their jobs and may show a willingness to engage in practices that, absent that pressure, they would not normally consider. This can impact both the way the behaviour is viewed by the price fixer and by others in the organisation.

In the *Galvanised Steel Tanks* cartel case three executives were charged with the UK's criminal cartel offence and two faced trial and were acquitted by a jury.[44] The case concerned tanks used as part of fire safety sprinkler systems in large stores, factories and warehouses. The cartel followed a very heated period of competition that, it was alleged, caused the three manufacturers to cut corners in the production of the tanks, in response to increasing pressure on their profitability. There was a fear among staff that one of the companies would eventually go bankrupt. Evidence presented in the trial suggested that those involved, entered into the cartel arrangement to stabilise what one barrister in the case described as "ruinous competition" and that safety standards of the tank were able to improve as a result. One of the witnesses working in the industry even suggested the cartel may have ultimately saved lives.[45] Another described the defendants as "heroes" because their actions in forming the cartel had helped to safeguard jobs and the future of the company.[46]

This case concerned a relatively small industry, with companies that were not of a size that would justify in-house counsel, specialist compliance officers or policies typical of larger businesses. Nevertheless, the case demonstrates how perceptions can be shaped by a period of crisis immediately preceding the cartel. In another manufacturing case, a director involved in the infringement commented,

> *"we thought we were doing some good, in stopping a price war that was causing us to make so little profit, that we were beginning to lower the quality of the product and cut after-sales service"*

In a case involving a similar industry, the price war that preceded the agreement distorted not only the individuals' perception of the conduct they were engaged in, but also their perception of the customers, in echoes of the infamous "our customers are our enemies" *Lysine* quote,

> *"Our margins were low anyway, but it felt like the customers were driving us to the ground by playing us against our competitors in a Dutch auction. We sold [a*

[43] See for example Bryan Allison's comments in O'Kane (n 33), p498
[44] *R v Stringer and Dean,* Southwark Crown Court, June 2015 (unreported)
[45] These observations are based on this author's own notes from observing every day of the trial. Stephan was involved in assisting Mr Dean's defence team.
[46] Ibid.

homogenous product] so all we could really compete on was price. How is that fair? Why didn't the buyers get fined for putting us out of business?"

It is hard to draw firm conclusions based on the crisis cartels we know about, as they may not be representative of all cartel agreements and in particular those that are less likely to be detected by competition authorities. However, they tend to be in markets where there is little or no product differentiation, which is why cartel agreements are so common around the world for products like cement and milk. Product differentiation is the process of distinguishing a product or service from others, through its characteristics, features, quality or the level of support that it comes with. It provides businesses with the scope to get an edge over their competitors and escape the ill effects of a crisis, by working to provide a better product that customers are more willing to buy. However, in some industries price competition is particularly sensitive because there is little scope for innovation or differences in quality and there is virtually no brand loyalty. So these are factors that need to feature in any risk assessment exercise undertaken for the purposes of compliance.

There is also a broader observation that can be made, however, in relation to the performance management of individual employees, divisions and subsidiaries. It is essential that target setting is done in a constructive and realistic way, as failure to do so can put the employee or group of employees in the same distortive moral space that is created by crisis in the industry. It is also crucial that greater importance be placed on complying with the law and with the organisation's compliance policy, than on meeting targets and outcomes.

4.4 Delinquency and arrogance

This is perhaps the hardest form of compliance risk to eliminate within an organisation. There are instances where despite the business investing heavily in compliance, a small number of determined employees go ahead and break the law anyway. Indeed, in some cartels the employees put as much effort into hiding their activities from others in the business, as they do hiding them from the authorities. Kolasky recalls an instance where an executive was accompanied by a compliance officer to a meeting with a foreign competitor to discuss the exchange of technical information. The executive in question staged the meeting with his counterparts as if it was the first time they had met, with the customary exchange of business cards and pleasantries—all to the satisfaction of the person overseeing his meeting. It later transpired the executive in question had been socialising, playing golf and fixing prices with this individual for years.[47]

While an infringement committed by a rogue trader is actually quite rare, it can happen within some very large and complex international businesses. What follows is an account

[47] Kolasky, "Antitrust Compliance Programs: The Government Perspective", Speech given to Corporate Compliance 2002 Conference, Practicing Law Institute, July 12, 2002, San Francisco.

from an in-house counsel who found themselves having to deal with a deliberate breach of competition law driven by arrogance and hubris:

> *"One of Company A's many businesses was involved in the sale of products to the construction industry. A cartel came to light within a very small unit in the business (as a result of a leniency application by another company). The individual in Company A's small business unit (whom I will call Mr. X) who had been personally involved in the cartel had left the company before the cartel came to light. It became apparent during the investigation that Mr.X was in fact the only person in Company A who was involved in or had knowledge of the cartel. Mr. X's job title was "[product] Sales Manager", but in fact, despite his title of "Manager", he was a relatively junior employee within Company A, being responsible for sales of [the product] within a very small territory.*
>
> *Although Mr.X had left Company A by the time of the dawn raid, he agreed to come into the company for an interview. It was clear from Company A's internal records that Mr.X had received antitrust training on many occasions, and so he was asked why – despite attending many training sessions and clearly understanding that what he did was unacceptable, he did it anyway.*
>
> *Whilst very defensive (and self-justifying) in his replies, it became apparent that Mr.X felt a personal grudge against Company A and his own boss: he felt a lack of recognition for (what he wrongly considered were) his many talents. He thought that the company "owed him something" as he felt he had been passed over for promotion.*
>
> *In his own words (and without any trace of remorse or recognition of wrong-doing) he decided to "enjoy himself" by organising dinners and golf outings with direct competitors – in which they could fix the price of [the product in the territory]. His motivation was not to increase profits for Company A – indeed rather the reverse – he maliciously hoped that his actions would harm Company A, and he felt he could do so without any personal consequences, as he was shortly to retire."*

The author of this account identified two key learnings from their experience of this case: (i) Senior and middle management need to maintain better oversight of the activities of employees who report to them. This may be particularly important in small business units in a large organisation, where the problems may occur far from HQ locations; and (ii) A better review (and audit) of business expenses would have allowed earlier challenge – especially where expenses are incurred relating to social events where competitors are present.

So the risk of the rogue trader is probably best managed through rigorous and effective systems of oversight and monitoring which make it very difficult for such behaviour to go undetected for very long. This can be hugely challenging and costly for businesses, but there are a variety of reasons why individuals who have completed regular compliance training,

go on to participate deliberately in anticompetitive behaviour anyway. Crisis, greed, hubris, arrogance are just some of the possible drivers.

Two factors undermine compliance efforts and risk emboldening this category of behaviour. The first is the design of the law. There appears to be a consensus among compliance officers that there should be a threat of sanctions against the individual as well as the company, if compliance training is to be taken seriously by such individuals. Also, as is evident in various studies, the frequency of cases and probability of getting caught are important drivers for desistance.[48] So in a jurisdiction where there are no individual sanctions, or in the UK where there is a criminal offence that has been all but abandoned, it is hard to ensure employees take the consequences of breaching competition law seriously. On this issue, Bryan Allison said,

> *"I knew from the legislation coming in, in 2003, that it was a criminal offense in the United Kingdom and that an individual could go to jail. But again I hadn't thought anything would really happen. We had gone four years from 2003 to 2007 without any prosecution of anybody. Why would anybody, and the OFT seemed to be primarily concerned with consumer rather than trade or industry type issues, prosecute us? …it was that aura of invincibility—why would anyone want any involvement in what we were doing?"*[49]

The second important factor is that the company is consistent in its compliance policy and in particular in its condemnation of anti-competitive behaviour. There are fairly recent instances of firms taking a mixed approach. A good example of this was the *Passenger Fuel Surcharge* case in the UK involving British Airways. While the airline did not dispute the existence of an infringement of competition law and was keen to settle the administrative public enforcement case against them, they retained the employment of an individual charged under the UK's cartel offence and even promoted him while he was awaiting trial.[50] Another charged with the offence was appointed to a top-level job in UK private care provider, Bupa, at a round the same time.[51] The criminal trial itself collapsed and while BA may have felt the criminal indictments were disproportionate, the act of promoting one of the individuals allegedly involved, risked sending a rather mixed compliance message within the organisation. Openly rewarding individuals responsible for an infringement or who failed to stop it – albeit ostensibly for their non-cartel related achievements – does not appear to be that uncommon and is not compatible with effective compliance.[52]

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[48] See for example A Chalfin and J McCrary, 'Criminal Deterrence: A Review of the Literature' (2017) Journal of Economic Literature, 55(1), pp.5-48.
[49] O'Kane (n 33), p488.
[50] M Peel, 'BA sales chief on price fixing charge to join the board' *Financial Times*, 28 November 2008. The trial subsequently collapsed and the individual was never convicted of the offence.
[51] R Lea, 'Bupa job for BA chief in price-fix scandal' *Evening Standard*, 2 December 2008.
[52] See for example: Robert Wiseman Dairies, *2008 Annual Report*, in which bosses were awarded major bonuses despite the firm incurring a £6.1 million fine in the pervious year for price fixing.

4.5 Regional Sales Staff

Cartels are typically set up and administered by those with price setting powers.[53] This means that the individuals involved are typically either the heads of divisions or subsidiaries within an organisation, or responsible for sales at the other end of the process.[54] While sales employees do not necessarily have price setting powers, they enjoy considerable discretion to grant discounts, quantity rebates and other tools to secure sales. Indeed, it is sometimes necessary for the cartel to instruct them to not act, because their tendency to reduce the price and sell more, defeats the efforts of the cartel to exert a monopoly price.[55] The majority of cartels that involve sales staff are coordinated by senior management, but a particular risk of sales staff breaking competition law arises where their job involves travel and regular meetings with customers in a regional setting. In one such cartel, a competition lawyer recounts a statement made by one of the sales staff in an internal interview,

> *"In this job you see more of your competitors than you do people from your own company. You stay in the same hotels, get the same trains, and sometimes even see each other in the customer's reception lobby. It's hard not to get to know these people, have a drink with them, join their table for breakfast. When that happens what do you talk about? Your customers of course. You make proper friendships and that means a lot when your work is lonely. It's hard to control what you talk about – even if it is just to talk trash about dealing with the customers".*

Given the movement to sales that are based more on digital interactions, it is hard to say how prevalent this scenario still is. It does, however, illustrate a broader point about employees who do not feel closely connected to others in their organisation because of the nature of their work. The increase in remote working brought on by the Covid-19 crisis may signal an increased risk of such outcomes. One might also think of other jobs where interactions with competitors are hard to avoid.

5. Leniency and Settlement Programmes

Modern cartel enforcement owes much of its success to the use of leniency programmes. These provide immunity to the first firm to come forward and report an infringement. In jurisdictions where there is a criminal offence, that immunity extends to the company's employees. Subsequent firms to come forward also get some reward, usually in the form of reduced fines and sentences administered through a formal leniency policy, or through plea bargains in the case of the US. Around two thirds of cartels investigated in the EU now

[53] They can also be administered by those who control production quantities rather than price.
[54] A Stephan, 'See no evil: cartels and the limits of antitrust compliance programmes' (2010) The Company Lawyer 31(8), pp. 3-11, at 7-8.
[55] *R v Stringer and Dean* (n 44)

involve at least one leniency application.[56] In more recent years, jurisdictions have sought to replicate the benefits of the US plea bargaining system (which does not exist in most legal traditions), by also adopting settlement programmes. These provide parties with an additional discount in fines in return for them not contesting the case and agreeing to a streamlined procedure.

While systems of leniency and settlement have undoubted success at uncovering infringements that would otherwise go undetected, they create some unhelpful distortions for corporate compliance. It is important to note that the decision to apply for leniency is not taken lightly and those with experience of uncovering potential liability will know that the 'race to the competition authority'[57] is not always a fair or accurate characterisation. Indeed, in a survey conducted by Sokol of 234 US antitrust lawyers, more than half said that in the previous two years at least one client had come to them with hard-core cartel issues that did not go on to be investigated by the US government.[58]

The particular distortion that these programmes create relates to the treatment of individuals responsible for the breach in competition law. Often the individuals responsible for the cartel have retired or left the company by the time the infringement is discovered. However, where they are still within the firm and assuming it can genuinely be said that these individuals went against compliance training and company policy, the instinct to reprimand or dismiss them can quickly run counter to the businesses' immediate concern, which will be to maximise any benefit available under leniency and plea bargaining or settlement. Acting swiftly could make the difference between getting immunity, or a 50% discount in fine, or only a much smaller reduction if other members of the cartel are already cooperating with the competition authority. Limiting liability and exposure on capital markets will also likely be shareholders' primary concern at this stage.

In order to ensure a leniency application is successful (especially if you are a multinational dealing with multiple leniency fillings in many jurisdictions), businesses require as much information about the infringement as possible. Given the secretive nature of cartel arrangements and the great care they take to cover their footprints, it is often the case that the most effective and expedient way of getting this information is by enlisting the cooperation of the manager(s) responsible. Those individuals may only be willing to cooperate where they get certain assurances about their employment, pension and related benefits.[59] They may also ask that the firm covers all their related legal costs (where that is permitted in the relevant jurisdiction), including those connected with any individual

[56] A Stephan and A Nikpay, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities' in C Beaton-Wells and C Tran (eds.), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion* (Hart Publishing 2015).
[57] J Vickers, 'Competition Economics', Speech delivered to Royal Economic Society annual public lecture. Royal Institute, London. 4 December 2003.
[58] D. Daniel Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement' (2012) 78(1) Antitrust Law Jounal, 201.
[59] P. Whelan, The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges (Oxford University Press, 2014), p.133.

sanctions. Indeed, this may explain why companies sometimes appear to retain the employment of those responsible and even reward them.

Leniency programmes also typically create an obligation on the business to do what they can to ensure the cooperation of current and former employees. This is true of the European Competition Network's Model Leniency Programme[60] and also of the US Department of Justice, which has in the past stated that, 'the number and significance of the individuals who fail to cooperate, and the steps taken by the company to secure their cooperation, are relevant in the Division's determination as to whether the corporation's cooperation is truly "full, continuing and complete"'.[61]

A further incentive to keep those responsible within the firm, is created by the Antitrust Criminal Penalty Enhancement Reform Act of 2004 (ACPERA). This addresses the possible disincentive for self-reporting under the Department of Justice's Leniency Policy, where there is fear of being exposed to significant follow-on actions for treble damages. The legislation reduces the exposure for the revealing firm to single damages, among other protections. One of the requirements created by the act is the corporate amnesty applicant uses its 'best efforts' to secure the testimony of individuals 'covered by the [leniency] agreement', which might include facilitating their cooperation by covering their legal expenses.[62] This provides those responsible for the infringement further leverage to push back against efforts to discipline or dismiss them. In principle, these firms could attempt to show best efforts despite the fallout of any internal disciplinary action, but the main priority will be to avoid or minimise the exposure to financial penalties and follow-on damages.

These sorts of obligations manifest themselves in leniency and settlement procedures around the world but are particularly stark in the US because of the nature of how plea bargains are negotiated. A common theme is the pressure on firms to encourage their current and former employees to enter a plea bargain with the US Department of Justice, in order to assist them in negotiating a reduced corporate fine in the same criminal investigation. The lengths that some businesses will go to is illustrated by an anonymised interview published in *Automotive News* in 2014 with a Japanese executive who had agreed to serve gaol time in the US for a price fixing conspiracy, under a plea bargain arrangement.[63] The individual claimed his employer had promised 'to support me for the rest of my life' if he agreed to go to gaol, in order to assist the firm in negotiating a lower corporate fine. They also indemnified the $20,000 criminal fine that came with the prison sentence and promised to ensure his family were looked after financially for its duration.

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[60] See for example the European Competition Network's Model Leniency Programme. Available: https://ec.europa.eu/competition/ecn/model_leniency_en.pdf (accessed 19 March 2021)

[61] G R Spratling (Deputy Assistant Attorney General, Antitrust Division), 'The Corporate Leniency Policy: Answers to Recurring Questions' speech to the ABA Antitrust Section Spring Meeting, Washington, D.C., 1 April 1998.

[62] See M D Hausfeld *et al,* 'Observations from the Field: ACPERA's Firsts Five Years' (2009) The Sedona Conference Journal, 10, pp.95-114, p109-10, citing ACPERA Sections 213(b)(3)(B)

[63] H Greimel, 'Confessions of a price fixer' *Automotive News* (16 November 2014).

As Stucke points out, leniency and settlement programmes pose a broader problem in that they 'undercut the moral outrage from price-fixing'.[64] Many see an inherent injustice in the employees of the immune firm being entirely unaffected by an investigation that potentially results in others involved in the same infringement serving time in gaol. On this point, Bryan Allison said,

> *"it doesn't seem right that by dumping everybody else in the mud you can get away with it. Especially when, clearly in some of these incidents, the people that have gone to the authorities in the first place were by far the most culpable participants in this illegal activity. If you take it to pure criminal law, if the leader of a gang of armed robbers reports all his colleagues and gets away with it, is that right? When he set about instigating the crime, working out what they were going to do? I suspect the public wouldn't think much of that. And yet in cartel activity it's accepted because it's the only way the authorities can break it."* [65]

The relationship between leniency, enforcement and compliance is therefore a complicated one. The availability and regular imposition of individual sanctions of some form can be of great benefit to compliance officers, in helping them ensure employees engage with the training and feel there are some personal consequences to breaking competition law. Yet once an infringement has occurred, the availability of leniency can make it difficult to discipline those individuals internally if their cooperation is needed to ensure a good outcome for the firm.

In many ways, the active enforcement of sanctions against individuals offers a possible solution to this quagmire, in that punishment and deterrence is served even if the business' desire to discipline those responsible is frustrated. These sanctions may take the form of a criminal offence, individual civil fines, or other tools such as director disqualification.[66] However, in the absence of a US style system of plea bargains, criminal cartel convictions have proven both difficult to secure and may pose a chilling effect on employee's willingness to cooperate.[67]

6. Conclusion

This paper has provided a critical analysis of the challenges to antitrust compliance, from the perspective of the price fixer. It suggests that the motivation for entering into a cartel

[64] M E Stucke, 'Am I a Price-Fixer? A Behavioural Economics Analysis of Cartels' in C Beaton Wells and A Ezrachi (eds.) *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement* (Hart 2011).
[65] O'Kane (n 33), p491.
[66] See P Whelan, 'The Emerging Contribution of Director Disqualification in UK Competition Law' in A MacCulloch, B Rodger and P Whelan (eds), *The UK Competition Regime: A Twenty-Year Retrospective,* (OUP forthcoming, 2021).
[67] See Stephan (n 13)

arrangement is often more complicated than a rational choice driven by greed. In particular, ignorance still appears to be a major obstacle to compliance, especially among smaller and medium sized firms who do not have the resources to undertake significant compliance efforts and who may have little if any understanding of competition law. Even where the price fixers have undertaken some compliance training, the quality and extent of their understanding of the law may vary widely. Cartel infringements may also come about as a consequence of legitimate contact between competitors, serious crisis within the industry or a period of very heated competition. These create an ambiguous moral space in which it is harder to recognise wrongdoing. It can also create clear justifications in the minds of the price fixer, of why the conduct is acceptable. These might include the fact an industry body or public authority encouraged the competitors to initially talk to each other (albeit for legitimate reasons), other job roles that involve close proximity or frequent interaction with competitors, or where there is a serious fear of bankruptcy or job loss. Despite even the most far-reaching compliance programme, there will always be a clear danger that the price fixer makes a very deliberate decision to engage in wrongdoing out of arrogance, greed or hubris, in complete disregard for the law and their employer's compliance programme.

These perspectives and in particular the quotes presented in this paper, should be interpreted with some caution. Some are unverified accounts that could be skewed to deflect or manage responsibility. They are also from what is far from a representative sample of all cartels and give an insight into only a small number of the cartels that were detected. We still know very little about those cartels that are not. Despite these limitations, the study provides an important insight that furthers our knowledge of why cartels occur and how corporate compliance efforts can prevent them. The findings suggest that ongoing education and training is fundamental, both within the business and more widely in society through the advocacy efforts of competition authorities. This is especially important given how some managers may need to 'unlearn' business strategies that raise serious antitrust risk, and the low level of awareness and moral opprobrium that smaller businesses and members of the public still attach to cartel conduct. Clear mechanisms for reporting inadvertent breaches of competition law can be effective if they are on a no-blame basis, where the employee reports it at an early opportunity and has not made efforts to hide their involvement. This is especially important in detecting infringements that have come about because the employee is not sufficiently alert to the dangers of the situation and preventing a descent into a spiral of cartel behaviour. Businesses also need to be consistent in their compliance message, closely monitor all interactions with competitors, and avoid pushing employees into that morally ambiguous space – for example by creating unrealistic performance expectations.

The biggest challenge businesses face is reconciling the need to discipline employees who ignore the compliance programme, with the need to ensure any infringement is detected quickly and reduce liability through the successful engagement with leniency and settlement procedures. The well-designed use of individual sanctions by competition

authorities can help businesses in this respect, by ensuring those responsible are punished even if compromises need to be made by the business in relation to their internal disciplinary procedures, in the interests of cooperating with the cartel investigation. Sanctions that are regularly imposed on individuals in cartel cases, may also be the only way of deterring those employees who engage in deliberate breaches of the law, in clear disregard their employer's compliance programme. This group is unlikely to be deterred at present in jurisdictions that rely overwhelmingly on corporate fines alone to deter cartels.