South Carolina Journal of International Law and Business

Volume 15
Issue 1 *Fall*

Article 5

2018

# Corporate Culture and Competition Compliance in East Asia

Jingyuan Ma
*Central University of Finance and Economics, Bejing*

Mel Marquis
*European University Institute*

# CORPORATE CULTURE AND COMPETITION COMPLIANCE IN EAST ASIA

*Jingyuan Ma*[*]
*Mel Marquis*[**]

*Abstract*

*Efforts to secure competition law compliance among commercial operators can usefully be tailored in a way that takes account of cultural characteristics. Since culture forms part of the conditions in which the development of a robust and credible compliance system occurs, it makes sense to approach compliance issues in a manner sensitive to that cultural background. In the context of East Asian enterprises, this implies a need to take account of the legacy of Confucian ethics, which has had a profound influence on the psychology and behavior of commercial organizations in the region. The importance of that legacy suggests that compliance will not be achieved within East Asian firms solely on the basis of the external legal environment, an environment in which deterrence-oriented factors such as sanctions and the threat of detection play a central role. More*

---

[*] *Jingyuan Ma, Ph.D, is Assistant Professor at Central University of Finance and Economics in Beijing.*

[**] *Mel Marquis, Ph.D, is Part-time Professor of Law at the European University Institute in Florence and Professore a contratto at LUMSA University in Rome.* *The authors thank the editors for their helpful assistance with the manuscript of this article.*

*attention should be given to the internal moral and social environment, and to shaping the logic of appropriateness within a given firm. A compliance culture can thus be constructed on the basis of elements such as moral commitment, Eastern-style education, the cultivation of virtue, and the convergence of the interests of the enterprise and those of its employees.*

## I. INTRODUCTION

Since the early 1990s, antitrust authorities have taken actions to encourage companies to implement compliance programs, thereby raising the likelihood that they conform to the requirements of antitrust law. Such actions include offering reductions in fines,[1] issuing compliance guides,[2] and producing YouTube videos, or

---

[1] *See, e.g.*, *Guidance as to the Appropriate Amount of Penalty*, OFF. OF FAIR TRADING (2012), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf.

[2] *See, e.g.*, *Drivers of Compliance and Non-Compliance with Competition Law: An Oft Report,* OFF. OF FAIR TRADING (2010), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf; *How your Business can Achieve Compliance with Competition Law,* OFF. OF FAIR TRADING (2011), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf; *Promoting Compliance with Competition,* ORG. FOR ECON. CO-OPERATION AND DEV. (2012) [hereinafter OECD], http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf. *See also United States Sentencing Commission,* 2015 US

even cartoons, to aid compliance training.[3] In the United States, if an offending firm has implemented a compliance program, it may be taken into account when the authorities decide whether the enterprise will be prosecuted, whether it should be rewarded with a fine reduction, and during any settlement negotiations.[4] In Australia, Canada, France, India, Israel, Italy, Singapore, South Africa, and the United Kingdom, the effectiveness of existing compliance programs will be considered by the competition authority when calculating fines or in the context of settlements.[5] Among those authorities, some

---

SENTENCING COMMISSION GUIDELINES MANUAL (2015), http://www.ussc.gov/guidelines/2015-guidelines-manual.

[3] *See Benefits of Competition Policy for Consumers,* Eur. Comm'n on Competition http://ec.europa.eu/competition/consumers/why_en.html (April 16, 2012); Ted Banks & Joe Murphy, *The International Law of Antitrust Compliance*, 40 DENVER J. INT'L LAW & POL'Y 368, 373-4 (2012); *see* NMaMovie, *Leniency in Cartel Cases*, YOUTUBE (June 9, 2008), http://www.youtube.com/watch?v=5diFAaJdweI*;* *see also* Konkurrensverket, *Be the First to Tell - A Film about Leniency*, YOUTUBE (Mar. 3, 2010), https://www.youtube.com/watch?v=_r99qzC8aHA.

[4] *See* Banks & Murphy, *supra* note 3, at 376 (citing *United States Att'ys' Manual,* STATES DEP'T OF JUSTICE 9-28.000, (2018) http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.800).

[5] *See* Banks & Murphy, *supra* note 3, at 379-80. Subject to variations and nuances, certain jurisdictions including Australia, Brazil, Canada, the UK and the US provide for the possibility of fine reductions for companies with effective compliance programs. Other authorities, including notably the European Commission and most European competition agencies (with some exceptions) maintain the opposite policy and refrain from granting fine reductions. *See, e.g.*, Eva Lachnit, *Compliance Programmes in*

(such as those in the United States,[6] Canada,[7] The Netherlands,[8] and France[9]) provide guidelines on the key elements and tools that should be incorporated in a compliance program, whereas others, such as the competition authority in Singapore,[10] provide standards that will be used to evaluate whether, in the authority's view, the compliance program is effective.[11]

The latter point concerning Singapore illustrates the fundamental point that *adopting* a compliance program is not sufficient; the crucial issue is whether a well-

---

*Competition Law: Improving the Approach of Competition Authorities*, 10 UTRECHT L. REV. 31, 46 (2014).

[6] *See US Sentencing Comm'n*, *supra* note 2.

[7] *See* Corporate Compliance Programs, CAN. COMPETITION BUREAU (Jan. 3, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html.

[8] *See* Lachnit, *supra* note 5, at 38.

[9] The French competition authority (the Autorité de la concurrence) has issued compliance guide brochures in English and French (Antitrust compliance and Compliance Programmes - Corporate Tools for Competing Safely in the Marketplace)http://www.autoritedelaconcurrence.fr/doc/brochure_conformite_uk.pdf (2018); *see also*, Framework Document on Antitrust Compliance Programmes, AUTORITÉ DE LA CONCURRENCE (2012), http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf.

[10] *See* Guidelines on the Appropriate Amount of Penalty, COMPETITION COMMISSION OF SINGAPORE, https://www.cccs.gov.sg/legislation/cccs-guidelines (last updated Jan. 24, 2019).

[11] *See* Banks & Murphy, *supra* note 3, at 382.

designed compliance program is effectively and sustainably implemented.[12] The current debate on corporate compliance is largely based on optimal deterrence theory—it revolves around the use of "carrots" (fine reductions) and "sticks" (criminal penalties) to induce compliance.[13] However, the deterrence model has some shortcomings.[14] In the

[12] The need to consider not just the existence of a compliance program but also its effectiveness is stated succinctly by Transparency International-USA in the anti-corruption context: "Verification reviews should focus on two questions: is the program well-designed and is the program operating effectively?" *Verification of Anti-Corruption Compliance Programs,* TRANSPARENCY INT'L-USA (2014), https://www.coalitionforintegrity.org/wp-content/uploads/2016/03/TI-USA_2014_verificationreportfinal.pdf.

[13] *See generally* Anne Riley & Daniel Sokol, *Rethinking Compliance*, 3 J. ANTITRUST ENF. 31 (2015).

[14] *See* Kevin Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 7-11 (1983) (highlighting objections to deterrence theory that are based on, *inter alia*: the occasionally unrealistic nature of the rational actor model; a lack of convincing proof of causation between sanctions and deterrence; deterrence theory's indifference to morality; paradoxes such as the fact that the specific deterrent effect of sanctions has already failed if the sanction must be administered once an offense has been committed; certain classic critiques of utilitarianism, for example that it instrumentalizes human beings or is, even worse, "sadistic" in nature; and the possibility that the "ambiguity that often pervades the punishment message can diminish the deterrent effect"). S*ee also* KAREN YEUNG, SECURING COMPLIANCE: A PRINCIPLED APPROACH 63-72 (2004) (on the issue of the deterrence theory's assumption that firms carefully weigh the costs and benefits of illegal conduct and thus respond rationally to prescribed punishments, Yeung notes that "empirical studies suggest that corporations are not solely driven by self-seeking individuals concerned

context of compliance programs, no clear empirical evidence demonstrates a causal link between the threat of sanctions and effective compliance, and surveys show that business practitioners are often unaware of compliance requirements in relation to antitrust law.[15] Research also shows that severe sanctions alone are unlikely to achieve deterrence and optimal compliance. An effective motivation to comply with the law is better secured by increasing the perceived value of such compliance and increasing the perceived risk that misconduct will be detected.[16]

---

exclusively with the pursuit of profit, but who may be motivated, at least partially, by non-financial concerns, including a sense of social responsibility and respect for the rule of law. If so, then attempting to deter commercial firms from committing offences on pain of punishment may be only weakly effective, and perhaps less effective, than the use of non-punitive strategies to encourage compliance.").

[15] *See* D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think about Compliance*, 78 ANTITRUST L. J. 201 (2012).

[16] *See* Vibeke Lehmann Nielsen & Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings*, ANU CENT. FOR COMPETITION AND CONSUMER POL'Y (December 1, 2005), http://ssrn.com/abstract=906945 (summarizing national survey of business practitioners in Australia regarding their attitudes, beliefs and experiences on compliance with respect to competition and consumer protection law and with respect to the enforcement activities of the Australian Competition and Consumer Commission); Vibeke Lehmann Nielsen & Christine Parker, *Mixed Motives: Economic, Social and Normative Motivations in Business Compliance*, 34 L. & POL'Y 428 (2012). S*ee also* Christine Parker, *The*

Despite such problems with deterrence-based strategies to promote compliance, some competition agencies decline to explore the possibility of putting more attention on rewarding enterprises that show a bona fide commitment to compliance.[17] The use of carrots (notably in the form of fine reductions) to incentivize companies to design and implement competition programs[18] has been criticized.[19]

---

*"Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 L. & SOC'Y REV. 591 (2006) (recommending responsive regulation as a means of "leveraging" deterrence). S*ee generally* Christine Parker & Vibeke Lehmann Nielsen, *Deterrence and the Impact of Calculative Thinking on Business Compliance with Regulation,* 56 ANTITRUST BULL. 377 (2011).

[17] The European Commission explains its policy in the following terms.: "If a company which has put a compliance programme in place is nevertheless found to have committed an infringement of EU competition rules, the question of whether there is any positive impact on the level of fines frequently arises. The answer is: No. Compliance programmes should not be perceived by companies as an abstract and formalistic tool for supporting the argument that any fine to be imposed should be reduced if the company is 'caught.' The purpose of a compliance programme should be to avoid an infringement in the first place." *Compliance Matters: What Companies Can Do Better to Respect EU Competition Rules 21,* EUR. COMMISSION (2012), https://publications.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a/language-en.

[18] *See, e.g.*, Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 L. & CONTEMP. PROB. 127, 146-47 (1997).

[19] *See* Andreas Stephan, *Why the UK's New Approach to Competition Compliance Makes for Good Enforcement*, 1 CPI ANTITRUST CHRONICLE (2012); Wouters Wils, *Antitrust Compliance Programmes and Optimal*

As the debate on the desirability of rewarding compliance programs proceeds, there is not a clear consensus on how to determine whether a compliance program is effective, and there is no universal template for the content of such a program. It is true that efforts have been made to create and expand a set of ingredients for an effective compliance program.[20] On the other hand, many have pointed out that compliance programs are not "one size fits all," although overall objectives and

*Antitrust Enforcement*, 1 J. ANTITRUST ENF. 52 (2012); Damien Geradin, *Antitrust Compliance Programmes and Optimal Antitrust Enforcement: A Reply to Wouter Wils*, 1 J. ANTITRUST ENF. 325 (2013); Andreas Stephan, *Hear no Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels*, CCP WORKING PAPER 09-09 http://competitionpolicy.ac.uk/documents/107435/107587/1.122147!ccp09-9wp.pdf; D. Daniel Sokol & Rosa Abrantes-Metz, *Antitrust Corporate Governance and Compliance*, THE OXFORD HANDBOOK OF INT'L ANTITRUST ECON. VOL. 2 586 (2014).

[20] For example, Joe Murphy and William Kolasky have listed twenty features on an 'effective' compliance program. *See* Joe Murphy & William Kolasky, *The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior*, 26 ANTITRUST 61 (2012). S*ee also* Christine Parker & Sharon Gilad, *Internal Corporate Compliance Management Systems: Structure, Culture and Agency*, EXPLAINING COMPLIANCE: BUS. RESPONSES TO REG. (Christine Parker & Vibeke Lehmann Nielsen eds., 2011); Christine Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEORGETOWN J. LEGAL ETH. 201 (2009); Gary Weaver et al., *Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors*, 42 ACAD. MGMT. J. 41, 42 (1999).

principal features may be identified.[21] Indeed, the same type of compliance program may function differently in firms with different organizational cultures.[22] Similar to other competition enforcement instruments—such as criminal sanctions, severe fines,[23] leniency programs,[24]

---

[21] *See, e.g.*, Joe Murphy, *One Size Fits All: A Flawed Approach to Company Compliance Programs* (2012), https://www.competitionpolicyinternational.com/assets/Uploads/CartelColumnApril-2.pdf; OECD, *supra* note 2, at 13 (2012) ("Delegates and private sector representatives agreed that 'one size fits all' approaches to designing compliance programmes are not advisable because each sector and firm is so different. However, clarifying the overall objectives and principal features of good competition programmes can be helpful. There is general agreement that these objectives can be summarized as 'the 5 C's': (i) Commitment, (ii) Culture, (iii) Compliance know-how and organization, (iv) Controls and (v) Constant monitoring and improvement. Genuine compliance programmes are taken seriously at every level of the corporation, and they involve regular training, audits, screening and updates.").

[22] This argument is likely reinforced by the consideration that, like the proverbial "black box," the internal workings and cultures of different firms may be impervious to observation. *See* Ronald J. Mann & Curtis J. Milhaupt, *Foreword*, 74 WASH. U. L. Q. 317, 323 (1996). S*ee also* Daron Acemoglu & Simon H. Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949 (2005) (explaining the importance of policy and the protections it allows).

[23] *See, e.g*., Sanghyun Lee, *Using Action in Damages to Improve Criminal Penalties Against Cartels: Comparative Analysis of Competition Law of United States and South Korea*, 16 CURRENTS: INT'L TRADE L. J. 55 (2007).

[24] *See* ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION 149 (Caron Beaton-Wells & Christopher Tran eds., 2015) [hereinafter LENIENCY RELIGION].

and individual liabilities—it is thought that compliance programs should be implemented all around the world,[25] and yet, at the same time, there are doubts about whether the same enforcement tool can be transplanted with success in a vast number of countries with starkly different backgrounds and cultures. [26]

This article proposes that corporate culture has a significant impact on the effectiveness of compliance, since corporate culture contributes to the shaping of incentives and constraints in a firm and thereby drives behavior. Competition law compliance and the promotion of compliance by stakeholders external to the firm should be cognizant of, and where appropriate should be tailored to take account of, the corporate cultures found in a given country or relevant geographic space. It is argued that the effectiveness of compliance mechanisms will largely depend on the extent to which such mechanisms are embedded within the culture of local businesses and local communities, [27] and

---

[25] *See* John M. Connor, *Global Antitrust Prosecutions of International Cartels: Focus on Asia* (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027949.

[26] *See* Anzhela Korzhevskaya, *Achieving a Competition Compliance Culture in Russia: Assessing the UK Experience in Compliance Programmes to Deter Cartels*, 3 RUSS. L. J. 62 (2015).

[27] *See*, *e.g.,* Theodore Banks, *Antitrust Compliance—It's All About the Culture*, CPI ANTITRUST CHRON. 1 (2012) http://www.canadianadvertisinglaw.com/antitrust-compliance-its-all-

compatible with relevant social norms.[28] Where sensitivity to these features is lacking, a competition authority may be incapable of distinguishing between cosmetic and genuine compliance.[29] As the work of other commentators reveals, the objective should be to trigger a deep transformation of internal corporate culture and business ethics, as this may be the only sure way to secure robust compliance with the law.[30]

---

about-the-culture/. A more general debate on this issue relates to the cultural barriers that condition the prospects of success for legal transplants. This debate, particularly prominent since the 1970s, originates from Montesquieu's work *The Spirit of Laws* (Livre I) (Gallimard 1749) (reprinted: J.P. Mayer & A.P. Kerr eds., 1970). Whereas legal commentators (characterized as "legal scientists") such as Judge Easterbrook, propose sets of assumptions and criteria that purport to be capable of application anywhere irrespective of cultural-historical distinctions, "legal culturalists" such as Legrand and Hall argue that law is unique, locally based, and "untranslatable." *See* Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MODERN L. REV. 262 (1995); Stuart Hall, *Cultural Studies: Two Paradigms*, 2 MEDIA CULTURE & SOC'Y 57 (1980).

[28] Law and anthropology scholars often claim that law is a form of local "knowledge." *See* Janet Ainsworth, *Categories and Culture: On the Rectification of Names in Comparative Law*, 82 CORNELL L. REV. 19, 28 (1996). As argued by Clifford Geertz, "local" refers not only to place, time, class and variety of issue but also to "accent," which is closely linked to particularized local norms. *See* CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167-234 (3rd ed, 2000).

[29] *See generally* Miriam H. Baer, *Governing Corporate Compliance*, 50 B. C. L. Rev. 1 (2009); Wils, *supra* note 19.

[30] *See* LENIENCY RELIGION, *supra* note 24, at 301.

This article proposes that the discourse on compliance efforts and their effectiveness would be well served by explicitly considering the relevance of corporate culture, which may have distinct local characteristics. In this context, local culture can be relevant in two ways. First, there is a clear need to incentivize companies to establish an internal compliance program to prevent, or at least quickly detect, illegal conduct (*e.g.* price fixing, market sharing, bid-rigging and the like). Further, a firm's incentives to invest in compliance efforts are more likely to be successful if enforcement policies go far beyond the precarious assumption that "optimal deterrence" will produce optimal compliance. The second consideration, which concerns the wider public (including small businesses) is that enforcement by a competition agency, as well as judicial enforcement and the contributions of civil society, should all aim to demonstrate the harmful effects of cartels and establish a social norm that morally condemns them.[31]

These arguments are raised with the example of East Asian firms, which have been influenced by Confucian

[31] We are not alone in calling for broader public awareness and stigmatization of cartels. *See, e.g.*, Andreas Stephan, *Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures*, 37 J. L. & SOC'Y 345, 350 (2010).

beliefs and by particular corporate organizational cultures. The underlying contention is that if business success in East Asia has been culture-driven,[32] then a successful approach to competition law compliance should likewise be culture-driven. This article begins with the observation that in East Asia parts of Confucian philosophy have substantially shaped cultural and societal norms for thousands of years.[33] Confucianism provided the fundamental basis for ancient jurisprudence

---

[32] For the argument that the post-WWII economic success of East Asia is culture-driven, *see* Michael Bond & Geert Hofstede, *The Cash Value of Confucian Values*, CAPITALISM IN CONTRASTING CULTURES 383-90 (S.R. Clegg & S.G. Redding eds., 1990). A few studies have attributed the economic success of East Asian countries to Confucian business ethics. *See, e.g.,* Gary Kok Yew Chan, *The Relevance and Value of Confucianism in Contemporary Business Ethics*, 77 J. BUS. ETHICS 347 (2008); Edward Romar, *Globalization, Ethics, and Opportunism: A Confucian View of Business Relationships*, 14 BUS. ETHICS Q. 663 (2004); Kit-Chun Joanna Lam, *Confucian Business Ethics and the Economy,* 43 J. BUS. ETHICS 153 (2003); Daryl Koehn, *Confucian Trustworthiness and the Practice of Business in China*, 11 BUS. ETHICS Q. 415 (2001).

[33] *See* Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS J. 405, 437 (2011). "No other philosophy has so deeply influenced the life and thought of the East Asian people and character. Though many profess to be Taoist, Buddhist, or Christian, they also simultaneously profess to be Confucianist, as Confucianism has become an inseparable part of East Asian thought and society, and synonymous with what it means to be East Asian." In particular contexts this expansive statement may need to be tempered, as some societies exhibit some but not all of the classical Confucian characteristics, and other influences have certainly also left their own imprints.

and imperial governance in East Asia,[34] and it became the source of a "common Asian Law."[35] Ancient Confucian laws and philosophical norms in East Asia have deeply influenced the organization of social activities, the collective (un)conscious, and the behavior of individuals in a wide variety of contexts.[36] This distinctive cultural heritage and value system may impede the re-modeling of corporate governance according to assumptions and criteria of western, rule-based regimes.[37] Although there is a focus on competition law as a specific sphere of business regulation, the discussion in this article illustrates more generally that compliance programs should be tailored to take account of and if possible, harness the paradigms of societal and business culture.

---

[34] *See* CHONGKO CHOI, EAST ASIAN JURISPRUDENCE (2009).

[35] Takao Tanase, *Global Markets and the Evolution of Law in China and Japan*, 27 MICH. J. INT'L L. 873, 877 (2006).

[36] *See*, *e.g.*, Kim, *supra* note 33.

[37] *See* Kun Luen Alex Lau & Angus Young, *Why China Shall not Completely Transit from a Relation Based to a Rule Based Governance Regime: A Chinese Perspective*, 21 CORP. GOVERNANCE.: AN INT'L REV. 577 (2013) (explaining that relation-based governance was influenced by Confucian doctrines and moral codes regulating behavior and relationships and that, since relation-based governance is culturally embedded, firms in China are unlikely to abandon it entirely in favor of a rule-based system imported from the West.).

A caveat is required because there are many variations in business and management cultures in Asia.[38] This article acknowledges past criticism of attempts to link pre-modern beliefs with modern business organizations, and the risk of over-reliance on culture-based—plus for that matter institution-based—explanations.[39] Cognizant of the criticisms relating to the linear model of organizational culture and business performance,[40] and of the pitfalls of overestimating

---

[38] *See Managing Across Diverse Cultures in East Asia: Issues and Challenges in a Changing Globalized World* (Malcolm Warner ed., 2013); Michael Minkov & Vesselin Blagoev, *Is There a Distinct Asian Management Culture?*, 20 ASIA PAC. BUS. REV. 209 (2014).

[39] *See* Barry Wilkinson, *Culture, Institutions and Business in East Asia*, 17 ORG. STUD. 421 (1996) (critical of both culturist and institutionalist perspectives, since each may lead to a determinist account that ignores human agency and neglects the issues of interests, power and ideology in business structures); *Contra* Sid Lowe, *Culture and Network Institutions in Hong Kong: A Hierarchy of Perspectives. A Response to Wilkinson: 'Culture, Institutions and Business in East Asia*, 19 ORG. STUD. 321 (1998) (criticizing Wilkinson's article and emphasizing, *inter alia*, the importance of social, political, economic and other influences that provide context for corporate behavior).

[40] For criticisms on the overly simple nature of the studies on corporate culture and organizational performance, *see* DANIEL R. DENISON, CORPORATE CULTURE AND ORGANIZATIONAL EFFECTIVENESS (1990); JOHN P. KOTTER & JAMES L. HESKETT, CORPORATE CULTURE AND PERFORMANCE (1992); Daniel Carroll, *A Disappointing Search for Excellence,* 6 HARV. BUS. REV. 78 (1982); George Gordon & Nancy Ditomaso, *Predicting Corporate Performance from Organizational Culture*, 29 J. MGMT. STUD. 83 (1992); Paul Reynolds, *Organizational Culture as Related to Industry, Position and Performance: A Preliminary Report*, 23 J. MGMT. STUD. 333

cultural factors to explain managerial issues in ethnic Chinese business,[41] this article nevertheless argues that corporate culture, which is a reflection of societal culture, partly determines the character and functioning of an organization and that, consequently, corporate culture may be an important factor in the development and operation of internal compliance systems. This article therefore identifies certain elements of East Asian corporate culture and considers how they might be further integrated into the design of compliance programs in order to enhance the effectiveness of competition laws to the benefit of societies that rely on market institutions.

The analysis is structured as follows. Part two argues that approaches to competition law compliance

---

(1986); Guy Saffold III, *Culture Traits, Strength and Organizational Performance: Moving Beyond "Strong" Culture*, 113 ACAD. MGMT. REV. 546 (1988).

[41] *See* Yuan Lu et al. *Knowledge Management and Innovation Strategy in the Asia Pacific: Toward an institution-based view*, 25 ASIA PAC. J. MGMT. 361, 374 (2008) discussing the theme of "Managing in Ethnic Chinese Communities." For an overview of the contributions to the Special Issue, *see* David Ahlstrom et al., *Managing in Ethnic Chinese Communities: Culture, Institutions, and Context*, 27 ASIA PAC. J. MGMT. 341, 344-9 (2010). Traditionally, many economists tended to be very negative towards the explanatory power of culture. As Amir N. Licht once vividly noted: "culture used to have a bad name among economists. It was not particularly popular among lawyers [either]. One reason probably was that culture is very difficult to observe. One therefore may fear that people would resort to cultural explanations when they run out of good ones, as the former would be impossible to disprove …." Amir Licht (2014), *Culture and Law in Corporate Governance*, ECGI L. Working Paper No. 247/2014, 15 (2014), http://ssrn.com/abstract=2405538 (last visited July 30, 2018).

should be culture-driven in the sense that culture should be considered and if possible, harnessed to enhance the quality and effectiveness of compliance. Part three begins by summarizing Confucian values and the impact of Confucianism on the general business environment. Specifically, this article discusses the influence of Confucian values by reference to three dimensions: hierarchy-based leadership, the role of family in business, and the interaction between internal and external actors. Part four discusses the theoretical and empirical literature on organizational culture, examines management studies and corporate governance, and identifies the organizational culture of East Asian companies according to different ownership types (i.e. state-owned companies, family businesses, and foreign-invested companies). Empirical literature from business and management studies on corporate and organizational culture in China, Japan, and Korea will be discussed in order to highlight the characteristics of companies in each country. This connection considers how competition law compliance could be facilitated by taking account of Confucian values and patterns of organizational culture. Part five focuses on competition law compliance and reflects on how it may be possible to harness cultural norms to enhance compliance efforts in this context.

## II. CORPORATE CULTURE AND COMPETITION COMPLIANCE

### *A. CORPORATE CULTURE AS AN INTERNAL CONTROL FORCE*

Almost every organization has common values to

maintain as a united entity.[42] Likewise, every business entity embodies certain values and corporate culture.[43] As with the concept of culture itself, defining "corporate culture" or the similar notion of "organizational culture" presents difficulties. [44] According to Edgar Schein, organizational culture is: "a pattern of shared basic assumptions that the group learned as it solved its problems of external adaptation and internal integration that has worked well enough to be considered valid and therefore to be taught to new members as the correct way to perceive, think and feel in relation to those problems." [45] Jay B. Barney defines organizational culture as "a complex set of values, beliefs, assumptions, and symbols that define the way in which a firm conducts its business." [46] Similarly, Rohit Deshpande and

---

[42] *See* Jennifer Chatman & Karen Jehn, *Assessing the Relationship Between Industry Characteristics and Organizational Culture: How Different Can You Be?*, 37 ACAD. MGMT. J. 522, 525 (1994); John Van Maanen & Stephen R. Barley, *Toward a Theory of Organizational Socialization*, 6 RESEARCH IN ORGANIZATIONAL BEHAVIOR 287 (1984).

[43] *See* Philip Selznick, Leadership in Administration: A Sociological Interpretation (1957).

[44] For example, A.L. Kroeber and Clyde Kluckhohn claimed already in the 1950s that 164 different meanings of "culture" had been identified in anthropology and sociology. *See* A.L. Kroeber & Clyde Kluckhohn, Culture: A Critical Review of the Concepts and Definitions (1952).

[45] EDGAR SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 11, 12 (2nd ed. 1992).

[46] Jay B. Barney, *Organizational Culture: Can It Be a Source of Sustained Competitive Advantage?*, 11 Acad. Mgmt. Rev. 656, 657 (1986).

Frederick Webster describe organizational culture as "patterns of shared values and beliefs that help individuals understand organizational functioning and thus provide them with norms for behaviors in the organization."[47] As Terrence Deal and Allan Kennedy point out, corporate culture is the "commercialized" version of organizational culture.[48] The definition of corporate culture provided by Jerald Greenberg and Robert Baron suggests that, similar to the concept of "culture" itself, *corporate* culture refers to the behavioral norms, values, and expectations within an organization.[49] Literature reviews provided by other authors shared the view that corporate culture consists of behavioral norms and "codes of conduct," expressed in varying combinations of formal and informal terms, and that such norms and codes are generally understood and accepted by the members of the organization.[50]

---

[47] Rohit Deshpande & Frederick E. Webster, Jr., *Organizational Culture and Marketing: Defining the Research Agenda*, 53 J. Marketing 3, 4 (1989).

[48] *See* Terrence E. Deal & Allan A. Kennedy, Corporate Cultures: The Rites and Rituals of Corporate Life (1982).

[49] *See* Jerald Greenberg & Robert A. Baron, Behavior in Organizations 544 (9th ed, 2008).

[50] *See, e.g.*, Golnaz Sadri & Brian Lees, *Developing Corporate Culture as a Competitive Advantage*, 20 J. Mgmt. Dev. 853 (2001); Choong Y. Lee & Jennifer Y. Lee, *South Korean Corporate Culture and Its Lessons for Building Corporate Culture in China*, 9 J. Int'l. Mgmt. Stud. 33, 34 (2014).

Business and management literature distinguish between strong and weak corporate culture.[51] Strong cultures are a source of competitive advantage,[52] organizational effectiveness,[53] innovation,[54] and better financial performance.[55] It has also been argued that corporate culture can be an instrument of "social control"[56] and can complement other control systems to change incentives and preferences.[57] Empirical

[51] *See* Barney, *supra* note 46.

[52] *See id.*; Denison, *supra* note 40; Kotter & Heskett, *supra* note 40; Charles O'Reilly, *Corporations, Culture, and Commitment: Motivation and Social Control in Organizations*, 31 Cal. Mgmt. Rev. 9 (1989); Alan Wilkins & William Ouchi, *Efficient Cultures: Exploring the Relationship Between Culture and Organizational Performance*, 28 Admin. Sci. Q. 468 (1983); Michael E. Porter, Competitive Strategy (1985).

[53] *See* Daniel R. Denison & Aneil K. Mishra, *Organizational Culture and Organizational Effectiveness: A Theory and Some Preliminary Empirical Evidence*, 6 ORG. SCI. 204-223 (1995); Denison, *supra* note 40.

[54] *See* Charlan Jeanne Nemeth & Barry M. Staw, *The Tradeoffs of Social Control and Innovation in Groups and Organizations,* 22 Advances in Experimental Social Psychology 175 (Leonard Berkowitz, ed., 1989).

[55] *See* THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE (1982); NOEL M. TICHY, MANAGING STRATEGIC CHANGE: TECHNICAL, POLITICAL, AND CULTURAL DYNAMICS (1983); Shinichi Hirota et al., *Does Corporate Culture Matter? Evidence from Japan*, WIAS Discussion Paper No.2008-001 (2008), https://core.ac.uk/download/pdf/46881754.pdf.

[56] *See* Charles A. O'Reilly & Jennifer A. Chatman, *Culture as Social Control: Corporations, Cults, and Commitment,* 18 RES. ORG. BEHAVIOR (Barry Staw & Larry Cummings, eds., 1996).

[57] *See* Luigi Guiso et al., *Social Capital as Good Culture*, 6 J. EUR. ECON. ASS'N. 295 (2008); Geoffrey M. Hodgson, *Corporate Culture and*

literature shows that corporate culture has a direct influence on corporate performance.[58] For example, the empirical study by Shinichi Hirota demonstrates that companies with strong culture managed to survive during the business fluctuations, recession, and banking crisis of 1997.[59] Economic literature portrays culture as a substitute for contracts in that it can solve coordination problems within sizable firms.[60] As Barney explained, organizational culture not only has "pervasive effects" that are sustainably applied to customers, suppliers, and competitors, it also affects how these actors engage with each other.[61] The literature reviewed above thus

---

*the Nature of the Firm*, TRANSACTION COST ECON. & BEYOND 249 (Jo Groenewegen ed., 1996).

[58] *See*, *e.g.,* Rohit Deshpandé et al., *Corporate Culture, Customer Orientation, and Innovativeness in Japanese Firms: A Quadrad Analysis*. 57 J. Marketing 23 (1993); Daniel R. Denison & Aneil K. Mishra, *Toward a Theory of Organizational Culture and Effectiveness*, 6 Org. Sci. 203, 203-04 (1995); Jin Han et al., *Market Orientation and Organizational Performance: Is Innovation a Missing Link?*, 62 J. MARKETING 30 (1998).

[59] *See* Hirota et al., *supra* note 55.

[60] *See* David M. Kreps, *Corporate Culture and Economic Theory,* PERSP. ON POSITIVE POL. ECON. 90 (James Alt & Kenneth Shepsle eds., 1990). According to Robert Cooter and Melvin Eisenberg, the cultural norm of fairness was a "stable platform" serving to induce cooperative behavior of agents and thus promoting productive firm behavior. *See* Robert Cooter & Melvin A. Eisenberg, *Fairness, Character and Efficiency in Firms*, 149 U. PA L. REV. 1717 (2001). For a detailed review of some of the economic literature on corporate culture, *see* BENJAMIN E. HERMALIN, ECON. & CORP. CULTURE (1999).

[61] *See* Barney, *supra* note 46, at 657.

provides a helpful landscape for organizational behavior, although understanding specific organizational, commercial decisions, or both also requires a focused examination of the business functions of the entity concerned as well as its incentives, constraints, and a variety of other factors that depend on the relevant facts and circumstances.

### *B. COMPLIANCE AS AN INTERNAL FORCE FOR LAW ENFORCEMENT*

In many jurisdictions there has been an increasing use of criminal sanctions and individual liabilities to sanction cartel behavior.[62] However, empirical evidence shows that the effectiveness of severe penalties is often insufficient because business people often ignore or rationalize messages they receive and their knowledge about anti-cartel law is often limited.[63] For example, a survey of 567 business people in Australia by Christine

---

[62] *See, e.g.*, Jingyuan Ma & Mel Marquis, *Moral Wrongfulness and Cartel Criminalization in East Asia*, 36 ARIZ. J. INT'L & COMP. L. 1, 1-63 (forthcoming, 2019) (discussing the uneven but growing international trend toward harsher penalties and criminal sanctions in cases where cartel laws are violated).

[63] *See* Christine Parker & Chris Platania-Phung, The Deterrent Impact of Cartel Criminalisation: Supplementary Report on a Survey of Australian Public Opinion Regarding Business People's Views on Anti-Cartel Laws and Enforcement http://ssrn.com/abstract=2026725 (last visited August 1, 2018).

Parker and Chris Platania-Phung indicated that, although at that time cartels had been criminalized for over a year in Australia (since 2010), fewer than half of the respondents realized that cartel behavior was a criminal offense. [64] Furthermore, many of the respondents believed that the risk of being caught for cartel activities was low, and that, hypothetically speaking, they would not be detected in the context of their own circumstances. [65] More recently, a 2014 telephone survey of around 1,200 private sector businesses in the United Kingdom (UK) revealed that, despite higher levels of awareness of competition law among large UK enterprises compared to smaller firms, an overall remarkably low rate of nineteen percent (19%) of the respondent firms engaged in discussions at senior level of the requirements of competition law (compared to a seventy-eight percent (78%) rate for health and safety). [66] Only six percent (6%) of the respondents held

[64] *See id.*

[65] *See id.*

[66] *See* IFF RESEARCH, UK BUS.' UNDERSTANDING OF COMPETITION L. 28 (2015) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses__understanding_of_competition_law_-_report.pdf. For discussion, see Barry Rodger, *Competition Law Compliance: The CMA 2015 Study, Compliance Rationales and the Need for Increased Compliance Professionalism and Education*, 36 EUR. COMP. L. REV. 423 (2015).

competition law training sessions for employees.[67] Only twenty-three percent (23%) considered that they know competition law well, and twenty percent (20%) had never heard of it[68]—a disappointing result later seized by the UK Comptroller and Auditor General.[69] It is also quite telling that nineteen percent of respondents thought that the "Federal Trade Commission," a rather widelyknown organ of the American federal government, was responsible for enforcing competition law in the UK.[70] Considering the significant transparency of the enforcement and outreach efforts of the Office of Fair Trading and its successor, the Competition and Markets Authority, these figures from the UK can hardly bode well for other jurisdictions worldwide.[71]

Considering the findings from the above studies in Australia and the UK, many observers and anti-trust regulators recognize that merely increasing cartel penalties and enhancing detection by means of leniency programs are unlikely to achieve the goal of effective

---

[67] *See* UK BUSINESSES' UNDERSTANDING, *supra* note 66, at 5, 30.

[68] *Id.* at 5, 31.

[69] *See* The UK Competition Regime, UK NATIONAL AUDIT OFFICE, 8, 27-28 (2016), https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf.

[70] *See* UK BUSINESSES' UNDERSTANDING, *supra* note 66, at 57.

[71] *See id.* at 59.

enforcement, unless, those measures are complemented by suitable and widespread compliance programs.[72]

### *C. COMPLIANCE SHOULD BE CULTURALLY DRIVEN*

Much of the global debate about corporate compliance in the field of competition law fails to push past a discussion of the *external* consideration of carrots and sticks and to consider compliance as an *internal* force that can change values, norms, and behavior within the corporation.[73] Seen from this perspective, culture and cultural change within organizations should be high on the agenda.[74] In light of the above-reviewed evidence

---

[72] Some commentators recommend making the grant of immunity under a leniency program conditional on the establishment of a well-designed compliance program. *See, e.g.*, Brent Fisse, *Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity*, https://www.brentfisse.com/images/Fisse_Compliance_Programs_as_Condition_of_Corporate_Immunity_201114.pdf

[73] *See, e.g.*, Riley & Sokol, *supra* note 13, 34-36 (arguing that the discourse on competition law compliance should not only revolve around punishment and penalty mitigation but should aim at changing the "normative values" of the corporation).

[74] On the importance of culture, *see, e.g.*, LAI CHEN, THE CORE VALUES OF CHINESE CIVILIZATION (2016); Calvin Boardman & Hideaki Kiyoshi Kato, *The Confucian Roots of Business Kyosei*, 48 J. BUS. ETHICS 317, 318 (2003); Rick Hackett & Gordon Wang, *Virtues and Leadership: An Integrating Conceptual Framework Founded in Aristotelian and Confucian Perspectives in Virtues*, 50 MGMT. DECISION 868, 889 (2012); Liang-Hung Lin & Yu-Ling Ho, *Confucian Dynamism, Culture and Ethical Changes in Chinese Societies—A Comparative Study of China, Taiwan, and Hong Kong*,

suggesting a strong relationship between organizational culture and corporate performance, this article argues that competition regulators and practitioners should shift their focus from the deterrence-based enforcement model towards a more *culturally-driven* compliance model.[75] The debate on compliance, this article submits, should not treat corporations as "black boxes"; such an entity should instead be studied taking account of the details of the corporate culture of the entity and the manner in which that culture shapes norms and behavior.[76] Since corporate culture in East Asia reflects more than two millennia of Confucian civilizations, this article will turn to an overview of the Confucian tradition and its relevance to the present discussion.

---

20 INT'L J. HUM. RES. MGMT. 2402, 2043 (2009); Shu-hsien Liu, *A Philosophic Analysis of the Confucian Approach to Ethics*, 22 PHIL. EAST & WEST 417, 424 (1972).

[75] *See generally* CHEN, *supra* note 74; Boardman & Kato, *supra* note 74 (explaining the effects of implementing kyosei virtues into corporate culture to reward proper behavior); Hacket & Wang, *supra* note 74 (discussing the importance of leaders using confusion values in the business world); Liang-Hung Lin & Yu-Ling Ho, *supra* note 74 (explaining cultural transformation can diversify behaviors in a corporation); Shu-hsien Liu, *supra* note 74 (discussing confusion ethics and its importance to achieving rationality).

[76] *See* Riley & Sokol, *supra* note 13, 46-48.

## III. CONFUCIAN TRADITION AND CORPORATE CULTURE IN EAST ASIA

### *A. CONFUCIAN TRADITION AND ITS INFLUENCE ON BUSINESS ENVIRONMENT*

The starting point for studying corporate culture in East Asian companies is to understand the long and profound tradition of Confucianism and its ethical values, which have had a continuing influence on the work attitudes of employees in modern organizations.[77] This tradition has even affected employees' cognitive processes and their metaphysical beliefs.[78] Confucianism, which is not a single strand of philosophy but a family of related traditions that evolved over centuries,[79] has had a dominant and enduring influence on economic activities and business organizations in East Asian countries.[80] In China, for example, a Confucian system of self-regulated governance was a

---

[77] *See, e.g.*, Bih-Shiaw Jaw et al., *The Impact of Culture on Chinese Employees' Work Values*, 36 PERSONNEL REV. 128, 129-32 (2007).

[78] *See* Richard Nisbett et al., *Culture and System of Thought: Analytic and Holistic Cognition*, 108 PSYCHOL. REV. 291, 299-305 (2001).

[79] *See* Jingyuan Ma & Mel Marquis, *Business Culture in East Asia and Implications for Competition Law*, 51 TEX. INT'L L. J. 1, 7 n.31 (2016) (Confucianism consists not just of the contributions of Confucius himself but on a "multitude of subsequent and sometimes famous scholars, interpreters, and glossators," leading to many sub-strands of Confucian thought and ethics).

[80] *See* Ma & Marquis, *supra* note 79, 9-10.

functional equivalent for company law for centuries until the first company law, largely transplanted from European civil codes, was implemented in 1904.[81] Today, in mainland China and Hong Kong, Confucian concepts are still relevant when businesses make corporate governance decisions.[82] Confucianism has likewise deeply influenced values in Korea and has significantly shaped (together with other influences including Christianity) inter-personal relations in both social and work environments.[83] Confucianism in China has enjoyed a cautious resurgence over the last three decades; many of its fundamental precepts are acknowledged and respected by the government, particularly because it represents an alternative to Western-style systems and ideologies.[84] In September 1999, the government officially celebrated the 2,550th

---

[81] *See* Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1677 (2000). S*ee also* Alex Chu Kwong Chan & Angus Young, *Chinese Corporate Governance Regime from a Historical-Cultural Perspective: Rethinking Confucian System of Governance*, 3 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156300 (last visited Aug. 1, 2018).

[82] *See* Chan & Young, *supra* note 81, at 28.

[83] *See* Tan Soo Kee, *Influences of Confucianism on Korean Corporate Culture*, 36 ASIAN PROFILE 9, 9 (2008).

[84] S*ee e.g.,* Jeremy Page, *Why China is Turning Back to Confucius*, WALL ST. J., (Sept. 20, 2015), http://www.wsj.com/articles/why-china-is-turning-back-to-confucius-1442754000 (last visited Aug. 1, 2018).

birthday of Confucius in Qufu, his hometown in Shandong Province.[85] Another celebration was held worldwide in 2014 for Confucius's 2,565th birthday.[86] With regard to business culture both in China and among the widely dispersed Chinese diaspora, Confucian values are indispensable to understanding the behavior, organization, and management of family businesses.[87]

It is significant that the East Asian business ethos did not entirely lose its Confucianist character even when the 1997 financial crisis jolted the South Korean and Japanese economies and prompted substantial reforms to corporate governance.[88] As part of those reforms, and following the Anglo-American model, independent

---

[85] *See* Jun Yan & Ritch Sorenson, *The Effect of Confucian Values on Succession in Family Business*, XIX FAM. BUS. REV. 235, 248 (2006).

[86] *See* China Central Television News, broadcast of (Sept. 28, 2014) (in Chinese), http://news.cntv.cn/special/jkr/index.shtml (last visited Aug. 1, 2018).

[87] *See* Jean Lee, Culture and Management - *A Study of Small Chinese Family Business in Singapore*, 34 J. SMALL BUS. MGMT. 63 (1996); Murray Weidenbaum, *The Chinese Family Business Enterprise*, 38 CALIF. MGMT. REV. 141 (1996); Richard Whitley, *The Social Construction of Business Systems in East Asia*, 12 ORG. STUD. 1 (1991); Yan & Sorenson, *supra* note 85, at 248.

[88] *See* Lilian Miles & S.H. Goo, *Corporate Governance in Asian Countries: Has Confucianism Anything to Offer?,* 118 BUS. & SOC'Y REV. 23, 24-25, 37-38 (2013) (In relation to Japan, that "[l]ifetime employment, collectivism, and pursuit of harmony continue to characterize Japanese corporate governance, and the traditional keiretsu system of related party transactions, reinforced by cross-shareholdings will continue to exist.").

directors were recruited and internal financial reporting and corporate control were strengthened, yet many of the core values defined by Confucian doctrine, such as collectivism and the pursuit of harmony, remained unchanged or have since re-emerged in East Asian companies.[89] Janis Sarra and Masafumi Nakahigashi have argued that, although the Commercial Code and the Audit Special Exception Code took effect in Japan in 2003 and aimed at introducing Anglo-American elements of corporate governance, local culture and business norms in Japan should never be overlooked.[90] The corporate board in Japan is still "like a small community" with a consensus-building culture.[91] Workers' representation on corporate boards is dependent upon employees' long-term loyalty and commitment, and promotion depends to a large extent on contributions to the team, rather than on individual achievements.[92] According to Sarra and Nakahigashi, although there has been a perception that Japanese corporate law has shifted towards the corporate

---

[89] *See id.* at 37-38 (stating in relation to China, the authors note "the enduring influence of Confucius on Chinese culture, despite the ongoing corporate governance reforms along Anglo-American lines").

[90] *See* Janis Sarra & Masafumi Nakahigashi, *Balancing Social and Corporate Culture in the Global Economy: The Evolution of Japanese Corporate Structure and Norms*, 24 LAW & POL'Y 299, 330 (2002).

[91] *See id.*

[92] *See id.* at 339.

governance model prevalent in North America since the Commercial Code was amended in 2003, the key traditional elements in business ethnic and corporate culture remain constant.[93]

Moreover, the long-standing Confucian tradition is also often manifested in informal institutions.[94] These institutions play the role of guiding principles and polices in doing business; they remove conflicts while strengthening information flow, trust, and mutual understanding within and among business firms.[95] Many have claimed that these informal institutions and cultural norms bridge the gap between formal legal institutions and the judicial system, and sometimes provide more efficient solutions.[96]

Collective behavioral and decision-making norms, strong internal hierarchical relationships, moral values,

---

[93] *See id.*

[94] *See* Chenting Su et al., *Enabling Guanxi Management in China: A Hierarchical Stakeholder Model of Effective Guanxi*, 71 J. BUS. ETHICS 301 (2007).

[95] *See id.*

[96] *See* Ricky Y.K. Chan et al., *The Dynamics of Guanxi and Ethics for Chinese Executives*, 41 J. BUS. ETHICS 327 (2002); *see also* Sven Horak & Andreas Klein, *Persistence of Informal Social Networks in East Asia: Evidence from South Korea*, 33 ASIA PAC. J. MGMT. 673, 677 (2016) ("Several authors point out the efficiency and flexibility guanxi offers as a substitute to sometimes unclear and frequently changing rules and policies. In business, guanxi is effective in resolving conflicts more easily than the judicial system." (citations omitted)).

and family and community ties are often regarded as constituting typical Asian or Confucian values."[97] In the following sections, this article focuses on five main aspects of corporate culture in East Asian companies that derive from Confucianism influences. Specifically, this article discusses: paternalistic leadership, family ownership, corporate governance, rules of business ethics, external relations (*e*.g., the relations between a given enterprise and other entities), and social responsibilities.

### *B. CONFUCIAN TRADITION AND CORPORATE CULTURE*

While Confucian values and the Confucian ethical system were originally designed for application at the micro level in the family and at the macro level of the government of the Chinese empire, they have also had a defining role in East Asian commercial life.[98] Indeed,

---

[97] *See* Russell Dalton & Doh Chull Shin, *Weber's Theory of Capitalism in Confucian East Asia*, CITIZENS, DEMOCRACY, AND MARKETS AROUND THE PACIFIC RIM: CONGRUENCE THEORY AND POLITICAL CULTURE 159, 174-79 (Russell Dalton & Doh Chull Shin eds., 2006) (As observed by Kim, the literature highlights four dimensions of Asian values: familialism, communalism, authority orientation, and work ethic.); see So Young Kim, *Do Asian Values Exist? Empirical Tests of the Four Dimensions of Asian Values*, 10 J. EAST ASIAN STUD. 315 (2010).

[98] *See, e.g.*, Marc Dollinger, *Confucian Ethics and Japanese Management Practices*, 7 J. BUS. ETHICS 575, 575-76 (1988) (describing the

the influence of Confucianism in the business environment throughout East Asia has been credited for the Asian values of hard work, education, thrift, and social order that fueled the economic miracle of the four, so-called, *tigers* (Korea, Taiwan, Hong Kong, and Singapore).[99]

In Korea, for example, Confucian values contributed to the economic development and industrialization in the 1960s and 1970s.[100] There, the Confucian tradition was fused with strong economic nationalism and provided an important cultural and ideological basis for the economic development of the country.[101] Important aspects of that tradition—loyalty, respect for authority and for elders, self-cultivation, and harmony in the workplace and in families—were all incorporated as part of the modern work ethic.[102] In the 1980s and 1990s, harmony,

---

importance of Confucian moral concepts and social duties in relation to Japanese business management styles).

[99] *See* Angus Young et al., *Corporate Governance in China: The Role of the State and Ideology in Shaping Reforms*, 28 COMPANY LAWYER 204, 205 (2007). Use of the term "tigers" in reference to Hong Kong, South Korea, Taiwan and Singapore seems to have been popularized originally by the World Bank; *See* WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY 2, 24, 37-38 (1993).

[100] *See* Andrew Eungi Kim & Gil-sung Pak, Nationalism, Confucianism, Work Ethic and Industrialization in South Korea, 33 J. CONTEMP. ASIA 37, 39 (2003).

[101] *See id.* at 45.

[102] *See id.* at 44.

solidarity, and cooperation were the most prominent company mottos in South Korean enterprises.[103] "Family" is frequently used as a metaphor, both within the company[104] and also to describe relationships with other firms; for example, terms such as *moche* ("mother company") and *jamaehoesa* ("sister companies") are common expressions in business.[105] Analogous vocabulary is found in Japan as well, as illustrated by the terms *oya gaisha* ("parent company"), *kogaisha* ("child company"), and *magogaisha* ("grandchild company").[106] Of course, expressions such as parent company and daughter company are also found in many other parts of the world, but there may be somewhat deeper psychological associations in countries where, as in Japan, the company often assumes a family-like

[103] *See* Roger Janelli, Making Capitalism: The Social and Cultural Construction of a South Korean Conglomerate, 239 (1993).

[104] *See, e.g.*, Yung-Ho Cho & Jeonkoo Yoon, *The Origin and Function of Dynamic Collectivism: An Analysis of Korean Corporate Corp. Culture*, 7 Asian Pac. Bus. Rev. 70, 76 (2010) (noting that CEOs in Korea emphasize "strong family-like bonds among employees," and that CEOs adopt the role of a father figure).

[105] *See* Kim & Pak, *supra* note 100, at 44-5.

[106] *See* Gregory Ornatowski, *Confucian Values, Japanese Economic Development, and the Creation of a Modern Japanese Ethics*, INT'L BUS. ETHICS: CHALLENGES AND APPROACHES 386, 395 (Georges Enderle ed., 1999) (discussing Japanese business terms); Chan, *supra* note 32, at 348 (citing Ornatowski and referring to the same terms).

role.[107] Furthermore, the prominence of Confucian values in East Asian companies may also be distinguished by the use of such values as motivational tools.[108] In 1989, Hak Chong Lee conducted a survey of seventy-seven (77) Korean companies and found that words and phrases central to Confucian moral values, such as diligence, social responsibility, unity, reliability, and sacrifice, were emblazoned on the walls of factories, offices, and elevators.[109] Lee found these values positively motivated workers to make determined efforts to achieve the goals of the company.[110]

While Japan's economic afflictions in the 1990s sharply distinguished the country from the four tigers, some of the same Confucian values have also profoundly influenced Japanese business culture.[111] Famously, loyalty to one's organization or company, often as part of a lifelong reciprocal commitment, is of crucial

---

[107] On the traditional role of the Japanese company serving in some circumstances as a substitute for the family, *see* Ma & Marquis, *supra* note 79, at 11 (f n.75) ("First-born sons in Japan inherited the family business and other assets, leaving younger sons to strike out on their own with their new employers assuming a role akin to an adopted family.").

[108] *See* Hak Chong Lee, *Managerial Characteristics of Korean Firms*, KOREAN MANAGERIAL DYNAMICS 147, 160-61 (Kae Chung & Hak Chong Lee eds., 1989) (achieving company goals was also regarded as consistent with the goals of the nation).

[109] *See id.* at 149.

[110] *See id.* at 160-61.

[111] *See generally* Dollinger, *supra* note 98.

importance to employees.[112] When employees mention their company, instead of saying they are "working for Toyota," they would say that they "belong to Toyota."[113] Similarly, when young people were recruited by large companies in China, they moved from other parts of the country to company dormitories and they called the company their new home.[114] These young workers expect companies to organize collective activities in the spheres of culture, education, or sports, and to develop their potential in a paternalistic environment.[115] In Japan, senior managers require young employees to listen to and obey their commands and promotion can only be expected when the employees meet relevant age requirements, which prove they have spent sufficient time in the company.[116] Furthermore, loyalty and trust are not only important for the relationship between managers and employees, but also important for business partners and even competitors to nurture and maintain.[117] Norimasa Furuta, then-President of Mazda, expressed a

---

[112] *See* Ma & Marquis, *supra* note 76, at 27-28.

[113] *See* Charles Rarick, *The Philosophical Impact of Shintoism, Buddhism, and Confucianism on Japanese Management Practices*, 7 INT'L J. VALUE-BASED MGMT. 219, 223 (1994).

[114] *See* Colin Hawes, *Representing Corp. Culture in China: Official, Academic and Corp. Perspectives*, 59 CHINA J. 33, 37 (2008).

[115] *See id.*

[116] *See* Rarick, *supra* note 113, at 224.

[117] *See id.*

typical sentiment in this regard as he once said in reference to automobile manufacturers, "strategic alliances" need to be formed with competitors and suppliers in order to achieve success.[118] This article interprets Furuta's statement as reflecting a particular ethos and worldview not driven merely by considerations such as the integration of complementary assets and the achievement of synergies.

### C. *INFLUENCES OF CONFUCIAN CULTURE ON THE STRUCTURE OF BUSINESS ORGANIZATIONS*

#### *1. Paternalistic Leadership*

The concept of role-based relationships emphasized by Confucianism has had a profound influence on business entities in East Asia.[119] By analogy to the fundamental principle of filial piety in the family, superiors expect employees at an inferior level to respect them and follow orders.[120] Paternalistic leadership is

---

[118] *See id.* at 223. S*ee also* Thomas Bellows, *Bridging Tradition and Modernization: The Singapore Bureaucracy,* in CONFUCIANISM AND ECON. DEV.: AN ORIENTAL ALTERNATIVE? 195, 195-96 (Hung-chao Tai ed., 1989).

[119] *See, e.g.*, John Hill, *Confucianism and the Art of Chinese Management*, 1 J. ASIA BUS. STUD. 1, 8-9 (2006) (focusing on links between Confucianism and elements of Chinese management culture such as its emphasis on paternalism and personal relationships).

[120] As one might expect, the exaltation of obedience has been criticized, in particular because it may curb creativity in private and professional settings. *See* Kyung Hee Kim, *Exploring the Interactions*

another prominent feature of Chinese family businesses in Hong Kong, Taiwan, Singapore and Indonesia.[121] In a family enterprise, it is often the head of the family that adopts the relevant business policies, and his decision-making power is highly authoritarian and discretionary.[122] Supervisors expect subordinates to implement their policy by interpreting the boss's idea carefully, and disagreements can only be expressed in a polite, indirect way through private and personal channels.[123] With the patriarch or the matriarch acting as the head of the company, key members of the family hold executive positions, and when kinships link subsidiaries, a network of companies can be formed;

---

*between Asian Culture (Confucianism) and Creativity*, 41 J. CREATIVE BEHAV. 28, 34 (2007) ("Overemphasis on following rules and traditions at work creates organizational barriers to creative innovation …. Creative potential is only realized in work situations where employees can influence decision-making and communicate new ideas …." (citations omitted)); Another obvious weakness of historical Confucianism is that it systematically undervalued women and generally deprived them of voice. *See id*. at 37-38.

[121] *See* GORDON REDDING, THE SPIRIT OF CHINESE CAPITALISM 143, 156-69 (1990). S*ee also* Robert Westwood & Andrew Chan, *Headship and Leadership*, in ORGANIZATIONAL BEHAV.: A SOUTHEAST ASIAN PERSPECTIVE 123 (Robert Westwood ed., 1992).

[122] *See* Gordon Redding, *The Conditional Relevance of Corporate Governance Advice in the Context of Asian Business Systems*, 10 ASIA-PAC. BUS. REV. 272, 285 (2004).

[123] *See* Min Chen, Asian Management Systems 73 (2d ed. 2004).

ownership is thus distributed throughout the family.[124] Given the complex and sometimes concealed relationships within the company, it often takes time for an outsider, such as independent non-executive directors, to access core information. For these reasons, the role and functions of outsiders can be merely symbolic.[125]

The majority of leadership studies concerning Chinese business organizations have concluded that paternalistic rule is the prevalent leadership type.[126]

---

[124] *See* Ming-Jer Chen, Inside Chinese Business: A Guide for Managers Worldwide 26 (2001).

[125] *See* Angus Young, *Corporate Governance in China and Hong Kong: Reconciling Traditional Chinese Values, Regulatory Innovation and Accountability* 1, 12 (2010), http://ssrn.com/abstract=1533904 (last visited Aug. 2, 2018). The role of independent directors in Korea is likewise rather limited. S*ee also* Amir Licht, *Legal Plug-Ins: Cultural Distance Cross-Listing, and Corporate Governance Reform* 22 Berk. J. Int'l Law 195, 225 (2004) ("[A] truly independent director may be considered an outsider rather than an outside director. Even if perceived as an integral part of the group of board members (and to the extent that this is so), it would be difficult for her to identify the complex cases and to ask the hard questions. This is not to say that independent directors would be worthless in Korea …. Yet the trend toward giving independent directors greater pride of place is somewhat puzzling.").

[126] *See* Chin-Yi Chen et al., *Spiritual Leadership, Follower Mediators, and Organizational Outcomes: Evidence from Three Industries Across Two Major Chinese Societies*, 42 J. APP. SOC. PSYCH. 890, 923 (2012); Bor-Shiuan Cheng et al., *Paternalistic Leadership and Subordinate Responses: Establishing a Leadership Model in Chinese Organizations*, 7 ASIAN J. SOC. PSYCH. 89, 90-92 (2004).

Decision-making power is often centralized at the top or at least at the level of senior management.[127] Michael Witt and Gordon Redding's study on the institutional characteristics of thirteen Asian business systems (mainland China, Hong Kong, India, Indonesia, Japan, Korea, Laos, Malaysia, Philippines, Singapore, Taiwan, Thailand, and Vietnam) shows that top-down decision - making and internal hierarchical structures are commonly observed in Asia.[128] Top managers usually have the major decision-making power, and among the above-mentioned thirteen systems, the only exception was Japan, which features a participatory model.[129]

Studies on the organizational culture in Chinese firms have incorporated theories of management, organizational science, and leadership behavior. [130]

---

[127] *See* Lee & Lee, *supra* note 50, at 37.

[128] *See* Michael Witt & Gordon Redding, *Asian Business Systems: Institutional Comparison, Clusters and implications for Varieties of Capitalism and Business Systems Theory*, 11 SOCIO-ECON. REV. 270 (2013). S*ee also* Jeffrey Podoshen et al., *Materialsm and Conspicuous Consumption in China: A Cross-Cultural Examination*, 35 INT'L J. CONSUMER STUD. 17, 18 (2011).

[129] *See* Witt & Redding, *supra* note 128. S*ee also* Ma & Marquis, *supra* note 79, at 16, 28 (discussing the unusual ringiseido system in corporate Japan).

[130] *See generally* Daniel Denison et al., *Corporate Culture in Chinese Organizations*, in THE HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE 1, 561 (Neal Ashkanasy et al. eds., 2nd edn 2010); Denison & Mishra, *supra* note 53, 205-07.

Although the styles of management are clearly influenced by multiple factors, few authors would disagree that traditional values informed both the philosophy management and the psychological motivations underlying the behavior of employees and employers.[131] A particular feature of the management style of Chinese companies is the dominant role of leaders,[132] who may be the local managers at foreign firms doing business in China[133] or foreign-based

[131] *See* Lee Cheuk Yin, *Do Traditional Values Still Exist in Modern Chinese Societies? The Case of Singapore and China*, 1 ASIA EUR. J. 43, 57 (2003). Yin points out that traditionalism is not manifest uniformly in Asian societies. Yin points out that "circumstances in various regions differ greatly. Japan, South Korea and Taiwan have a richer ambience of indigenous cultural tradition, whereas Hong Kong and Singapore are more ''westernized.' … What the people [in the latter countries] still widely accept and preserve are the basic tenets of individual moral conduct and interpersonal relations in Confucianism. These do not come from classical tradition, but mainly from implicit influence from within the family and subtly internalized moral values. Some call this 'secular Confucianism' or 'popular Confucianism,' others deem it to be hybridized with Buddhist and Taoist values and therefore can no longer be called 'Confucianism.' (footnotes omitted).

[132] *See* Zhi-Xue Zhang et al., *Business Leadership in the Chinese Context: Trends, Findings, and Implications*, 10 MGMT. & ORG. REV. 199, 204 (2014).

[133] *See* Crystal Zhao, *Management of Corporate Culture Through Local Managers' Training in Foreign Companies in China: A Qualitative Analysis*, 9 INT'L J. TRAINING & DVPMT 232, 232-35 (2005) (showing that local managers play an important role in foreign companies located in China, and that the main values, beliefs of foreign corporate culture are mainly applied through the management practices of local managers).

Chinese managers of Chinese firms operating overseas.[134] In these settings of Chinese management, leaders have a tendency to be less reliant on formal contracts.[135] Leaders are paternalistic; and at least ideally, they combine discipline, authority, fatherly benevolence, and moral integrity.[136] Among East Asian countries, hierarchical structures and paternalistic leadership are especially prevalent in Chinese,[137] and Korean companies.[138] The rules of the game are evident down to the level of concrete behavioral ritual, for example, in both China and Korea, elders as well as persons of higher social status, are granted priority to initiate activities, such as being the first to enter the

---

[134] *See* Stijn Claessens et al., *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FINAN. ECON. 81, 82-83 (2000); John Kao, *The Worldwide Web of Chinese Business*, 71 HARV. BUS. REV. 1, 24 (1993).

[135] *See* CHEN, *supra* note 123, at 80. As Chen noted, "[i]n an environment structures by the implicit rules of loyalty and mutual obligation, a contract is seen as unnecessary at best and offensive at worst. Historically, important deals have been executed among Chinese firms without legal contracts of any kind." A paper contract can symbolize suspicion and fear, and it "implies that the obligations and loyalty of partnership are not taken seriously, and it is rarely resorted to among Chinese businesses as a means of protecting the parties against each other."

[136] *See* Zhang et al., *supra* note 132, at 204.

[137] *See* Min Wu & Erica Xu, *Paternalistic Leadership: From Here to Where?*, in HANDBOOK OF CHINESE ORGANIZATIONAL BEHAV.: INTEGRATING THEORY, RES. AND PRAC. 449 (Xu Huang & Michael Bond eds., 2012).

[138] *See* Kee, *supra* note 83.

room, or being served food first during a business banquet, and so on.[139] Senior officials, who are often the decision makers, are unwilling to meet negotiating teams with junior members.[140] A company expects a hierarchical and reciprocal relationship—similar to the respective roles of father and son—between superiors and their subordinates.[141] Similar patterns are observed in family firms and state-owned businesses, where managers and employees tend to fulfill reciprocal obligations; superiors expect subordinates to perform duties and show respect, while subordinates expect superiors to lead with loyalty, fairness and justice.[142] In Korea, companies employ a highly centralized and top-down decision-making process.[143] Personnel policies relate closely to seniority and embody unwavering respect for elders.[144] In such an environment, the authoritarian nature of leadership and decision-making makes it difficult for employees to express dissenting opinions.[145] The exchange of ideas during business

---

[139] *See* Choong Lee, *Korean Culture and Its Influence on Business Practice in South Korea*, 7 J. INT'L MGMT. STUD. 184, 186 (2012).

[140] *See id.* at 187.

[141] *See* Wei-Ming Tu, *Probing the "Three Bonds" and "Five Relationships" in Confucian Humanism*, in CONFUCIANISM AND THE FAMILY 121, 122-23 (Walter Slote & George De Vos eds., 1998).

[142] *See* Kee, *supra* note 83, at 13.

[143] *See id*. at 14.

[144] *See* Lee, *supra* note 137, at 185.

[145] *See* Kee, *supra* note 83, at 15.

meetings, particularly between juniors and senior managers, becomes infrequent and psychologically challenging, leaving many insightful and creative views unvoiced.[146] It is worth adding that, in this type of environment where work relationships are highly personal and relation-based, two studies conducted by Zhen Xion Chen show that the performance of employees correlates more strongly with their loyalty to a supervisor than with commitment to the organization.[147] Loyalty to the supervisor strongly influences employees' attitudes.[148]

The above discussion highlights a contrast between the structured, process-oriented style and rule-based style that tends to characterize governance in the West.[149] In East Asian business, as demonstrated above, corporate governance is generally relation-based, top-down, structured, stable, informal, and less

---

[146] *See id. See also* Kim, *supra* note 120, at 34 (referring to organizational barriers to creative innovation arising from rigid business hierarchies that dampen the input of subordinates in decision-making).

[147] *See* Zhen Xiong Chen et al., *Loyalty to Supervisor vs. Organizational Commitment: Relationships to Employee Performance in China,* 75 J. OCCUPATIONAL & ORG. PSYCHOL. 339, 343 (2002).

[148] *See* Chen, *supra* note 147, at 340.

[149] *See* Shaomin Li et al., *The Great Leap Forward: The Transition from Relation-Based to Rule-Based Governance*, 33 ORG. DYNAMICS 63, 64-66 (2004).

transparent.[150] However, paternalistic leadership is also credited for the superior performance of many multinational companies. First, Zhang Riumin, an authoritarian but also benevolent CEO, led the Haier Group to great commercial success.[151] Similarly, Li Ka-Shing, Chairman of the Cheung Kong Group (today, CK Hutchinson) has had enormous success with his businesses and has become a legendary figure in Hong Kong while earning the status of Knight Commander (KBE) of the Order of the British Empire.[152] Having experienced hardship and difficulties in wartime, Li educated himself and has used Confucian principles throughout his life.[153] In particular, he developed a reputation for being polite, trustworthy, hardworking,

---

[150] *See* Young, *supra* note 125, at 9.

[151] Hawes and Chew attribute the success of the Haier Group to Zhang Ruimin's leadership. He defined the organizational culture, created the firm's value and incentivized all employees to work for the company. He also accommodated the company's 800 workers, kept them motivated and provided them with improved working conditions. *See* Colin Hawes & Eng Chew, *The Cultural Transformation of Large Chinese Enterprises into Internationally Competitive Corporations: Case Studies of Haier and Huawei*, 9 J. CHINESE ECON. & BUS. STUD. 67 (2011); Paul McDonald, *Confucian Foundations to Leadership: A Study of Chinese Business Leaders Across Greater China and South-East Asia*, 18 ASIA PAC. BUS. REV. 465, 476 (2012); Ruimin Zhang, Raising Haier, 85 HARV. BUS. REV. 141 (2007).

[152] *See* McDonald, *supra* note 151, at 477-78.

[153] *See id.*

philanthropic, and loyal to families.[154] His nickname in Hong Kong, "Superman," reflects both the success of his family business and the exceptional esteem he earned among the public in his country.[155] After a 68-year career, Li is settling into retirement in 2018.[156]

*2. Family Ownership*

Consistent with Confucian philosophy, many East Asian companies treat their work environment like a family household. for example, companies expect managers and supervisors to play a role analogous to that of family elders.[157] Employees often value the feeling of belonging to a company—like the feeling of belonging to a family—more than they value financial compensation."[158] Empirical studies in recent years show that the majority of East Asian firms are owned by families,[159] and family relationships play a key role in

---

[154] *See id.*

[155] *See id.* S*ee also* BIOGRAPHICAL DICTIONARY OF NEW CHINESE ENTREPRENEURS AND BUS. LEADERS 81 (Wenxian Zhang & Ilan Alon eds., 2009).

[156] *See* Luisa Kroll, *Hong Kong's Richest, Li Ka-shing, Announces Plans to Retire After 68 Years*, FORBES (March 16, 2018), https://www.forbes.com/sites/luisakroll/2018/03/16/hong-kongs-richest-li-ka-shing-announces-plans-to-exit-after-68-years/#57fd102d3436.

[157] *See* Kee, *supra* note 83, at 14.

[158] *See* Lee & Lee, *supra* note 50, at 36.

[159] *See* Claessens et al., *supra* note 134, at 82.

business organizations.[160] In Korea, many of the sprawling conglomerates, *i.e.* the *chaebol* (Samsung Electronics, The Hyundai Group, The LG Group, Hanjing Group, The Ssangyong Group, etc.), are owned and controlled by the families of their respective founders.[161] It is the chairman's eldest son or another close family member, and not a professional manager, that often becomes heir to the corporate throne.[162] In the Taiwan region, research by Wen-Hsien Tsai on Taiwanese family firms shows that, when the performance and productivity of managers in family firms are poor, the managers are more likely to be replaced by other family members than by non-family members.[163] The research also suggests family firms change CEOs three times more often than non-family firms, reflecting the prevalence of managerial-level power struggles within the family.[164] Furthermore,

---

[160] *See* Xiaowei Luo & Chi-Nien Chung, *Keeping It All in the Family: The Role of Particularistic Relationships in Business Group Performance During Institutional Transition*, 50 ADMIN. SCI. Q. 404, 410 (2005).

[161] *See* Kee, *supra* note 83, at 16-18.

[162] *See* Sang-Woo Nam, *Business Groups Looted by Controlling Families, and the Asian Crisis*, 27 ASIAN DEV. BANK INST. RESEARCH PAPER SERIES 1, 21 (2001), <https://think-asia.org/bitstream/handle/11540/4133/2001.11.rp27.controlling.families.crisis.pdf?sequence=1>.

[163] *See* Wen-Hsien Tsai et al., *CEO Tenure in Taiwanese Family and Nonfamily Firms: An Agency Theory Perspective*, 19 FAM. BUS. REV. 11, 12 (2006).

[164] *See id.*

networks within families are self-dependent and closed.[165] In Hong Kong, research by Henry Wai-chung Yeung shows closed networks may include non-family members, but only when they can develop "family-like trust."[166] This occurred in the case of Hong Kong Toys Ltd. when the Hong Kong-based family firm developed its new markets in Singapore.[167] It is argued that Confucian values contribute to the success of overseas Chinese family firms, and that these firms value mutual obligations, cooperation, frugality and hard work—elements which mitigate the classic principal-agency problem where authority is delegated to company managers.[168]

The subject of family ties also raises the topic of *interpersonal networks*, specifically as they relate to relationships between family businesses and non-family

---

[165] *See* Sun-Ki Chai & Mooweon Rhee, *Confucian Capitalism and the Paradox of Closure and Structural Holes in East Asian Firms*, 6 MGMT. & ORG. REV. 5, 16 (2010).

[166] *See* Henry Wai-chung Yeung, *Limits to the Growth of Family-owned Business? The Case of Chinese Transnational Corporations from Hong Kong*, 14 FAM. BUS. REV. 55 (2000).

[167] *See id.*

[168] *See* Irene Yeung & Rosalie Tung, *Achieving Business Success in Confucian Societies: The Importance of Guanxi (Connections),* 25 ORG. DYNAMICS 54 (1996); Lee Jean & Francis Tan, *Growth of Chinese Family Enterprises in Singapore,* 14 FAM. BUS. REV. 49 (2001); Eric Tsang, *Internationalizing the Family Firm: A Case Study of a Chinese Family Business*, 39 J. SMALL BUS. MGMT. 88; Whitley, *supra* note 87.

partners or clients. In mainland China, the business network system is often called *guanxi*.[169] In the context of *guanxi*, it is important for entities outside the family, such as business partners or clients, to maintain a reciprocal relationship with the family business.[170] Long-term, interpersonal relationships are highly valued, and often family businesses prefer to hire family members and their relatives.[171] These relationships are hierarchal in nature; when conflicts arise, the person of lower status is expected to find ways of compromise without open confrontation.[172]

In Korea, the relations established through kin, school, or regional ties are defined as *yongo*.[173] Similar

---

[169] *See* Chao Chen et al., *Chinese Guanxi: An Integrative Review and New Directions for Future Research*, 9 MGMT. & ORG. REV. 167 (2013) (for a review of different guanxi ties).

[170] *See* Jun Yan & Ritch Sorenson, *The Influence of Confucian Ideology on Conflict in Chinese Family Business*, 4 INT'L J. CROSS CULT. MGMT. 5, 11 (2004).

[171] *See id.*

[172] *See id.* at 11. *See also* Yan & Sorenson, *supra* note 85, at 237 ("The basic unit of society is not the individual, but the family. Family is always more important than any individual member, and harmony is the most important value for all family members. Without harmony, no family can stand, neither can a family business."). *See* Joyce Leong et al., *Perceived Effectiveness of Influence Strategies in the United States and Three Chinese Societies*, 6 INT'L J. CROSS CULT. MGMT. 101 (2006), showing that, in contrast to the case of managers in the United States, gentle persuasion may not be an effective management tool in mainland China.

[173] *See* Horak & Klein, *supra* note 96, at 675.

to *guanxi* networks, the less formal institution of *yongo,* which delineates between in-group and out-group trust levels, is considered an efficient alternative to markets and hierarchies in business transactions.[174] *Yongo* can be developed through sharing the same bases of experience such as the same home town (*Jiyon*), the same school (*Hakyon*), or sharing blood ties or indirect family ties through marriage (*Hyulyon*).[175] Therefore, it is typical for a Korean to simultaneously belong to various associations within the loyalty-based *yongo* network, and *yongo* is commonly used for daily interactions such as exchanging favors, gathering information or attaining career achievements.[176] Hierarchical relationships are a predominant feature of the *yongo* network, and it is often the case that a senior can ask a favor from a junior but not vice versa.[177] The *yongo* concept is similar to another concept—*yonjul*—which also refers to an interpersonal network but which is used for a particular and often dubious purpose: for

---

[174] *See id.; see also* SEOK-CHUN LEW, THE KOREAN ECONOMIC DEVELOPMENT PATH: CONFUCIAN TRADITION, AFFECTIVE NETWORK (2013); Jaehyuck Lee, *Society in a Vortex? Yonjul Network and Civil Society in Korea*, 40 KOR. J. 366 (2000); Jaeyeol Yee, *The Social Networks of Koreans*, 40 KOR. J. 325 (2000).

[175] *See* Horak & Klein, *supra* note 96, at 675.

[176] *See id.*

[177] *See id.*

example, personal gain through unfair or deceitful means.[178]

*3. Business communities*

As mentioned previously, many business networks in East Asia are structured through personal relations and family ties. The *guanxi* system in China encompasses and shapes both the internal relations among family members and the complex connections between a given entity and its business partners, clients and shareholders.[179] Individuals and business operators are

[178] *See* Sven Horak, *Antecedents and Characteristics of Informal Relation-Based Networks in Korea: Yongo, Yonjul and Inmaek*, 20 ASIAN PAC. BUS. REV. 78, 89 (2014), ("Yonjul refers to informal and rather particular ties between individuals that exist for a purpose. The word itself shares with the word *Yongo* the '*yon*,' again standing for 'tie', but the second syllable—the '*jul*'—translates to 'rope' or 'string.' The common judgement based on the interviews conducted is that the word *Yonjul* itself has a rather negative connotation …, as *Yonjul* presupposes a purpose or intention and objective, such as personal gains. The purpose of *Yonjul* ties is often to secure favours or benefits granted because of those ties, and not based on fair competition or equal treatment. Examples include, on the individual level, the usage of *Yonjul* for job entry, career progression or the acquisition of secret competition-relevant information or, on an organizational level, receiving subsidies or securing monopoly rights in the market …. Based on the interviews conducted it is clear that *Yonjul* blurs the border between legality and illegality and is often associated with illegal transactions." (citations omitted)).

[179] *See* Sun-Ki Chai, *supra* note 165; *see* Wen-Hsien Tsai, *supra* note 163; *see also* Henry Wai-chung Yeung, *supra* note 166.

interdependent; network circles are cross-connected.[180] In Japan, as William Laufer and Iwao Taka have explained, interest groups in one circle often constitute a part of another circle, and the hierarchies in each circle sometimes overlap.[181] Politics play a role as well: for example, a company executive may also be a politician's supporter, or he may be a member of one of the advisory councils, known as *shingikai*, that provide input to public bodies on questions of policy.[182] Among business circles, the government is viewed as having the highest position in all the hierarchies within a given industry.[183] Government intervention at all levels of the society has traditionally been widely accepted and has even been

---

[180] *See* William Laufer & Iwao Taka, *Japan, Regulatory Compliance, and the Wisdom of Extraterritorial Social Controls*, 18 HAST. INT'L & COMP. L. REV. 487, 505, 521 (1995).

[181] *See id.* at 521.

[182] *See id. Shingikai* are often composed of representatives from business, academia, and other sectors to deal with policy questions and specialized administrative issues. Since industries and market actors generally hope to maintain a good relationship with the regulatory agency, regulations and polices are rarely challenged or criticized. *See* Curtis Milhaupt, *A Rational Theory of Japanese Corporate Governance: Contract Culture, and the Rule of Law*, 37 HARV. INT'L L. J. 3, 31 (1996).

[183] *See* Laufer & Taka, *supra* note 180, at 521 ("Private corporations or industries, in particular, view the government as occupying the highest position in the industrial hierarchies. The government is also perceived as an important interconnection among different hierarchies.").

perceived as natural and necessary.[184] Attempts have been made since 2001 to draw sharper distinctions between the State and the market, and in the field of competition policy Japan's engagement is more convincing today than it once was.[185] Still, the burden of history is not easily shrugged off: structural reforms have often been stymied, and the interconnections between industry, politicians, and agencies of the State remain significant.[186] The relatively stable hierarchies that are part of those interdependent circles generate

---

[184] *See id.* at 521 (bureaucratic informalism is "underwritten by a consensus among citizens that bureaucratic intervention and informal coordination are necessary and meaningful."). S*ee also* FRANK UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 207 (1987) (extensive discussion of Japan's bureaucratic informalism).

[185] *See, e.g.*, Mel Marquis, *Firebird Suite: Cartel Suppression Reborn in Japan*, 4 J. ANTITRUST ENF. 84 (2016).

[186] *See* William Pesek, *Corporate Japan Thinks it's 1985,* BLOOMBERGVIEW, https://www.bloomberg.com/view/articles/2015-06-15/corporate-japan-thinks-it-s-1985 (last visited August 2, 2018) ("Abe's new initiatives are no match for Japan's traditional 'iron triangle'—the clubby nexus of elected officials, bureaucrats and CEOs that has long dominated Japan's economy and resisted any prime minister who dared challenge them. That's not to say change isn't afoot. Aside from nudging corporate boards to add more outsiders and women, Abe's new regulations have forced companies to disclose their policies on cross-shareholdings and the exercise of shareholder voting rights. And it's a sign of progress that Japan Exchange recently declared it is 'ashamed' at Toshiba's accounting scandal."); *see also*, Richard Colignon & Chikaku Usui, *The Resilience of Japan's Iron Triangle*, 41 ASIAN SURV. 865 (2001).

resistance against changes to the status quo.[187] Long-standing and stable interconnected relationships have become a particular characteristic intrinsic to social and commercial life in Japan.[188] Corporations have traditionally prioritized the goal of maintaining stable and predictable relationships with other actors (including competitors), and this value originates from the Japanese conception of "co-existence" or "co-survival" whereby opportunities for cooperation and mutual benefit arise when, proverbially speaking, people "eat from the same rice pot" (*onaji kama no meshi wo kū*).[189]

---

[187] *See* Pesek, *supra* note 186. *See also* Laufer & Taka, *supra* note 180, at 522.

[188] *See* Sung-Joon Roh, *Evolution of "Partnership Rationality" in Japan: The Logic of Collaboration between Rival Firms*, 22 BUS. & ECON. HIST. 138, 141 (1993).

[189] *See id.* at 145. The present authors have provided the relevant Japanese expression and have loosely translated it as "eating from the same rice pot" to capture the sense in English whereas Roh refers to rivals eating rice together. The expression onaji kama no meshi wo kū dates back to the Tokugawa period in which samurai apprentices lived in common dormitories, shared experiences and thereby developed a sense of brotherhood, bondedness and solidarity. *See* Thomas Tudor et al., *Significant Historic Origins That Influenced the Team Concept in Major Japanese Companies*, 12 J. APP. BUS. RES. 115, 123 (1996) (citing ROBERT MARCH, WORKING FOR A JAPANESE COMPANY: INSIGHTS INTO THE MULTICULTURAL WORKPLACE (1992)).

### *D. CORPORATE AND ORGANIZATIONAL CULTURE IN CHINA, JAPAN AND KOREA: EMPIRICAL EVIDENCE*

Among various models on the study of organizational culture, the Competing Values Framework is one of the most influential models applied internationally to test the impact of culture on organizational effectiveness, change, and performance.[190] The Competing Values Framework is also one of the few models that has been used extensively in studying Asian firms.[191] This model, which was first developed by Robert Quinn and John Rohrbaugh, identifies two dimensions of organizational effectiveness: the vertical axis of stability and control versus flexibility and discretion, and the horizontal axis of internal focus versus external focus.[192] Cameron and Quinn later proposed attributes corresponding to the four types of organizational culture: Clan, "Adhocracy",

---

[190] *See* Kim Cameron & Robert Quinn, *Diagnosing and Changing Organizational Culture Based on the Competing Values Framework* (3rd edn, 2011).

[191] *See* David Ralston et al., *Today's State-owned Enterprises of China: Are They Dying Dinosaurs or Dynamic Dynamos?,* 27 Strat. Mgmt. J. 825, 830 (2006).

[192] *See* Robert Quinn & John Rohrbaugh, *A Competing Values Approach to Organizational Effectiveness*, 5 PUB. PRODUCTIVITY REV. 122 (1981); Robert Quinn & John Rohrbaugh, *A Spatial Model of Effectiveness Criteria: Towards a Competing Values Approach to Organizational Analysis*, 29 MGMT. SCI. 363 (1983).

Market, and Hierarchy.[193] *Clan* culture is concerned with interpersonal loyalty, relationship building, teamwork, trust, and commitment.[194] It has a flexible internal orientation and indicates the family-type atmosphere of the organization.[195] *Adhocracy* culture emphasizes entrepreneurship, experimentation, and innovation, and attaches importance to individual initiative and freedom to react to quick market changes and develop new strategies.[196] It has a flexible external orientation.[197] *Market* culture values market competition, competitiveness, and results, with a focus on control and external "winning."[198] Market culture aims at maximizing productivity and profits through assessable goals and procedures.[199] *Hierarchy* culture is dominated by internal control and bureaucratic, formalized rules and procedures.[200] An organization with hierarchy culture is governed by predictable and stable policies.[201]

---

[193] *See* Cameron & Quinn, *supra* note 190, at 41-50.
[194] *See id.*
[195] *See id.*
[196] *See id.*
[197] *See id.*
[198] *See id*.
[199] *See id.*
[200] *See id.*
[201] *See id.* S*ee also* Ralston et al., *supra* note 191, at 832.

The following three subsections explain the relevance of the above-described Competing Values Framework for the three jurisdictions discussed in this article: China, Japan, and Korea. Highlighted are empirical findings that have emerged by reference to the Competing Values Framework approach.

*1. China*

Despite more than two decades of reform, State-owned enterprises (SOEs) are still pervasive in China's economy; there is no way to seriously discuss economic activity or business culture in China without reference to SOEs.[202] SOEs followed a clan organizational culture prior to China's decision to transition to a more open, market-based economy in 1978.[203] Under the centrally-planned economic system, employees were strongly oriented toward the internal factors of stability and production, and they treated their organization like a family.[204] However, David Ralston has shown that the organizational culture of Chinese SOEs post-1978 has been shifting from a clan/hierarchy culture toward a market culture, with the least focus on Adhocracy

[202] *See generally* Sheng Hong & Zhao Nong, CHINA'S STATE-OWNED ENTERPRISES: NATURE, PERFORMANCE AND REFORM (2013).

[203] *See* Ralston et al., *supra* note 191, at 832.

[204] *See id.*

(innovation, experimentation, and change).[205] The executive management system used by SOEs reflects the significant influence of Chinese political institutions. This system utilizes an institutionalized personnel rotation scheme similar to the management of civil servants in the government. In this system, executives are mainly incentivized by political promotion.[206] Top managers of SOEs are frequently rotated across business groups to reduce the concentration of managerial power and to promote management skillsharing among SOEs.[207] Empirical studies show that the managerial culture of SOEs is "hierarchical" and "paternalistic," and that decision-making power is concentrated.[208]

The authors in the above-mentioned Ralston survey compared the organizational cultures of SOEs to private-owned enterprises and foreign-controlled businesses.[209] Their data sample was 435 Chinese managers from three

---

[205] *See id.* at 839.

[206] *See generally* Li-Wen Lin, *State Ownership and Corporate Governance in China: An Executive Career Approach*, 3 COLUM. BUS. L. REV. 743 (2013).

[207] *See id.*

[208] *See id.*; *See also* Cherrie Jiuhua Zhu et al., *Development of HR Practices in Transitional Economies: Evidence from China*, 19 INT'L J. HUMAN RES. MGMT. 840 (2008); Siew-Huat Kong, *An Empirical Investigation of Mainland Chinese Organizational Ideology*, 5 ASIAN BUS. & MGMT. 357 (2006).

[209] *See* Ralston, *supra* note 191.

ownership types, and the average age of the respondents was 35.[210] Their findings show that the executives running SOEs have learned market-oriented management styles, market strategies, and business values.[211] In contrast, privately owned enterprises are least focused on structure and control (Hierarchy or Market culture), and instead they are most oriented toward Clan culture, followed by Adhocracy.[212] The authors also found that the organizational culture of foreign-owned enterprises is balanced across the four types, reflecting a managerial strategy of balancing traditional Chinese culture with commercial constraints and logic.[213]

*2. Japan*

The Competing Values Framework described above has been applied to assess organizational culture in

---

[210] *See id*. at 835.

[211] *See id*. at 838-41. At page 839, the authors state that their findings are "understandable in the sense that management education or learning the Western style management theories and practices has been a priority in [China's] reform strategy …. SOE managers, who have been influenced by what they have learned about Western business practices, have apparently applied them in their organizations." (citation omitted)).

[212] *See id*. at 839.

[213] *See id*.

Japanese businesses as well.[214] From October to December 2009, Masaki Sugita and Takuya Takahashi surveyed numerous Japanese corporations appearing in the environmental management rankings of a leading daily newspaper called Nippon Keizai Shinbunsya.[215] The survey, which returned 109 responses, divided corporations into their cultural types, as summarized in Tables 1 and 2.[216] The Tables are divided into a manufacturing category (76 respondents) and a non-manufacturing (services) category (33 respondents).[217] The authors of the survey found that Adhocracy culture (experimentation and innovation) was positively correlated with the better performance in terms of environmental management or sustainability management.[218] By contrast, excessive Hierarchy culture (high stability, predictability, control, and an internal focus) correlated negatively with environmental management performance.[219] For present purposes, it is worth noting that Market culture type (demanding leaders, results, and winning) and Hierarchy culture

---

[214] Masaki Sugita & Takuya Takahashi, *Influence of Corporate Culture on Environmental Management Performance: An Empirical Study of Japanese Firms*, 22 CORP. SOC. RESP. & ENVIRON. MGMT. 182 (2015).

[215] *See id.*

[216] *See id.* at 186.

[217] *See id.*

[218] *See id*. at 187.

[219] *See id.*

(formality, structure, and efficient procedures) are relatively prevalent in both manufacturing and nonmanufacturing cultures.[220] While inferences must remain tentative since industry-specific data are not included, these figures may to some extent reflect both the competitive pressures that shape the high-productivity side of Japan's "dual" economy[221] and the adherence to formality and ritualized norms in Japanese society.[222] However, the finding of a Market culture in

---

[220] *See id*. at 186.

[221] Many authors have written about Japan's dual economy, consisting of high- (but declining) productivity sectors driven by competition and low-productivity sectors (including service sectors) where dynamism was often dampened by weak competition and sometimes ill-conceived economic policies; in some cases there are links between two sides of the productivity gap since, for example, inputs from low-productivity sectors may make it harder for high-productivity sectors to reach their full potential in terms of competitiveness. For discussion, *see, e.g*., WILLIAM LEWIS, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY AND THE THREAT TO GLOBAL STABILITY 23-49 (2004); RICHARD KATZ, JAPANESE PHOENIX: THE LONG ROAD TO ECONOMIC REVIVAL 40-58 (2003). *See also* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD ECONOMIC SURVEYS: JAPAN OVERVIEW 26-28 (2017) (graphically depicting a decline of productivity in Japan in manufacturing and especially non-manufacturing sectors and making recommendations to boost productivity).

[222] As McVeigh and others have pointed out, formality and ritualized practices permeate Japanese social life. *See* Brian McVeigh, *Ritualized Practices of Everyday Life: Constructing Self, Status, and Social Structure in Japan*, 8 J. RITUAL STUD. 53 (1994). There is a "constant emphasis" on ceremony and ritual behavior, and the rules of social convention make it imperative to know the "right way" to do things. *Id*. at 60-64. At the same time, the formality of procedures in Japanese companies co-exists with

a significant number (14 of 33) nonmanufacturing organizations is somewhat counter-intuitive given the relatively low level of productivity in Japan's nonmanufacturing sectors.[223]

---

informal modes of decision-making. *See* Caslav Pejovic, *Japanese Corporate Governance: Behind Legal Norms*, 29 PENN ST. INT'L L. REV. 483, 504 (2011) ("In Japan the formal processes are rigid top-down involving a kind of ritual formality with importance given to seals and do not allow much deviation from the established rules. On the other hand, the informal processes are far more flexible and have a very different logic with great importance given to consensus and collective participation in making a decision. This informal way of making decisions through various forms of meetings and communications is based on personal relations rather than on formal ways of communication.").

[223] The persistence of low productivity in Japan's service industries is underlined by Haruhiko Kuroda, the current governor of the Bank of Japan. As Kuroda points out, the service sector continues to lag behind manufacturing, and productivity in services is only around 70 percent of the levels prevailing in the US and Europe. *See* Leika Kiraha, *BOJ Kuroda Calls for Raising Japan's Service-Sector Productivity,* REUTERS BUSINESS NEWS (March 15, 2018), https://www.reuters.com/article/us-japan-economy-boj/boj-kuroda-calls-for-raising-japans-service-sector-productivity-idUSKCN1GR0E0 (last visited August 5, 2018).

Table 1 Japanese Manufacturing Corporation Initiatives According to Cultural Types (Total number = 76)

| Cultural type | Number (out of 76 total) |
|---|---|
| Clan | 16 |
| Adhocracy | 4 |
| Market | 20 |
| Hierarchy | 26 |
| Clan/Market | 3 |
| Clan/Hierarchy | 4 |
| Adhocracy/Market | 1 |
| Market/Hierarchy | 2 |

Table 2 Japanese Nonmanufacturing
Cooperation Initiatives According to Cultural Types
(Total number = 33)

| **Cultural Type** | **Number (out of 33 total)** |
|---|---|
| Clan | 5 |
| Adhocracy | 1 |
| Market | 14 |
| Hierarchy | 9 |
| Clan/Market | 2 |
| Market/Hierarchy | 2 |

*3. Korea*

According to a number of studies, Korean organizations score most highly for Hierarchy culture, followed by Clan culture and Market (results-focused)

culture.[224] Their lowest score is for Adhocracy (entrepreneurial) culture.[225] Other studies corroborate the finding that Korean organizational culture is largely associated with Hierarchy culture.[226] In a comparative study, Ali Dastmalchian examined organizational culture in thirty-nine (39) Canadian and forty (40) Korean organizations operating in six different industries.[227] Their data shows that Korean firms, when compared to Canadian organizations, exhibit more hierarchy culture and are characterized by greater tendencies toward rigidity and control.[228] Historically, Korean corporate culture offered some advantages, leading to the observation that some traditional work culture—like loyalty to organizations and superiors, readiness to take and execute orders without questioning and sacrificing private life—were part of the force that drove the government-led economic development and the

---

[224] *See* Ali Dastmalchian et al., *The Interplay Between Organizational and National Cultures: A Comparison of Organizational Practices in Canada and South Korea Using the Competing Values Framework*, 11 INT. J. HUMAN RES. MGMT. 388 (2000).

[225] *See id.* at 392.

[226] *See id.* at 392-94.

[227] *See id.*

[228] *See id*. at 402, 408 ("the predominance of the hierarchy culture among Korean firms irrespective of the industry is apparent from the six graphs"; "Canadian organizations showed a considerably higher climate of openness and lower climate of rigidity and control than the Korean sample.").

consequent expansion of the Korean corporate sector during the past several decades.[229] However, recent assessments suggest that the traditional tendencies toward authoritarianism and rigidity in business are holding Korean companies back and hampering their global competitiveness.[230]

### *E. INCORPORATING CONSIDERATIONS OF CORPORATE CULTURE IN COMPETITION COMPLIANCE STRATEGIES IN EAST ASIA*

It has been noted that Confucian philosophy has substantially influenced the values and cultural norms that are prevalent in East Asia.[231] Particularly, it is suggested that *guanxi*-type networks, which are generally rigid hierarchy-based internal structures, and family ownership are particular features that distinguish East Asian corporate governance from modern governance approaches in the West.[232] In the light of

---

[229] *See Editorial notes: Change work culture to improve competitiveness: The Korea Herald*, THE STRAITS TIMES (March 21, 2016), https://www.straitstimes.com/asia/east-asia/change-work-culture-to-improve-competitiveness-the-korea-herald (last visited August 5, 2018).

[230] *See id.* (referring to studies linking poor "organizational health" to indicators such as top-down command structures, frequent demands that employees perform work after hours, unproductive internal meetings, and unfair job performance assessments).

[231] *See supra* section 1.

[232] *See supra* section 3.

research showing that a high degree of "traditionality" is relevant to the manner in which employees interact with their employers, it is expected that these features of East Asian business culture and governance are liable to significantly impact the effectiveness of competition compliance programs.[233] Internal control mechanisms may lose their power when employees are concerned that reporting misconduct will affect long-term relations, or when employees at different levels of a company tend to fulfill their duties and obligations based on implicit *guanxi* rules or the equivalent of such rules. In relation to such control mechanisms, Irwin has explained that in view of "the Confucian values of loyalty to one's group, respect for superiors in a hierarchy, and avoiding loss of 'face,' the willingness of Chinese to speak up or 'blow the whistle' on fellow employees if they become aware of [an] unethical practice is low."[234]

The investments that firms make in achieving compliance with regulation is often motivated according

---

[233] *See* Larry Farh et al., *Individual-level Cultural Values as Moderators of Perceived Organizational Support-Employee Outcome Relationships in China: Comparing the Effects of Power Distance and Traditionality*, 50 ACAD. MGMT. J. 715 (2007); showing that employees with high *traditionality* in China would react to their employers in accordance to social role obligations.

[234] Judith Irwin, *Doing Business in China: An Overview of Ethical Aspects*, INSTITUTE OF BUSINESS ETHICS OCCASIONAL PAPER 6, 16 (2012), https://www.ibe.org.uk/userfiles/chinaop.pdf (last visited August 5, 2018).

to the expected financial consequences and benefits, including the value of avoiding the pain of legal sanctions.[235] However, in light of the cultural specificities discussed in this article, it is suggested that more attention should be given to these other factors. In the following subsections, the implications of the Confucian tradition and of local norms for developing effective competition compliance in East Asian companies are discussed. Particular attention will be given to the duties incumbent on CEOs and senior managers, the role of the compliance officer, internal control mechanisms, and the education function of the compliance program.

*1. Competition Compliance Programs*

Compliance programs are designed to perform three main functions. The first function is to *educate* personnel and to provide relevant information about what types of conduct are prohibited by antitrust or competition law.[236] The second is to *signal* to the outside world that the

[235] *See, e.g.*, Donald Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 937 (2017) (stating the basic formula that "[i]f the law imposes the right mix of detection and sanctions, firms will for that reason alone have an incentive to take steps to reduce legal risk" but also recognizing the practical complications arising from imperfect detection and a range of other factors).

[236] *See, e.g.,* Wils, *supra* note 19.

company has the commitment and determination to comply with competition rules, which contributes to building a positive brand for "ethical businesses."[237] And the third function is to either *prevent* anticompetitive behavior or, if misconduct has already occurred, to *detect* that misconduct, preferably at an early stage.[238] It has been said that the goal of a compliance program is to let the businessman feel the antitrust laws, and to make him think twice before engaging in conduct liable to constitute a violation.[239] This palpable awareness of the law and its consequences will thus create conditions in which cartel activity is more likely to be avoided.[240] This perspective may not be sufficiently ambitious. While it is necessary to clearly disseminate information that enables a potential infringer to consider the risks and rewards of illicit

---

[237] *See* Lachnit, *supra* note 5, at 35.

[238] Early detection by a company (by way of internal audit and/or effective compliance efforts) of its own cartel infringement may enable it to benefit from immunity or leniency in any subsequent public enforcement proceedings; in some jurisdictions this may also secure benefits for the company in the context of private damages claims. *See, e.g.*, William Kolasky, *Antitrust Compliance Programs: The Government Perspective*, address before the Corporate Compliance 2002 Conference, San Francisco, July 12, 2002, http://www.justice.gov/atr/public/speeches/224389.pdf (last visited August 8, 2018) (discussing the detection function of compliance programs).

[239] *See* James Withrow, *Compliance with the Antitrust Laws*, 9 N.Y. L. F. 187, 194 (1963).

[240] *See* Kolasky, *supra* note 238, at 14.

conduct, the deeper objective should be to trigger a change in the logic of appropriateness that sets the parameters of conduct of that agent.[241] If such a change is achieved, the agent will act ethically—not necessarily due to the hypothetical consequences of a legal regime external to the business organization, but as a function of the standards for exemplary behavior within the environment of the organization.[242]

Although there is no internationally accepted one-size-fits-all template of a competition compliance

---

[241] On the logic of appropriateness, which may be contrasted with (but which in some specific circumstances may overlap and interact with) the logic of consequences, *see* James March & Johan Olsen, *The Logic of Appropriateness*, in THE OXFORD HANDBOOK OF PUBLIC POLICY 689 (Goodin et al. eds., 2008). March and Olsen summarize this concept as follows: "The logic of appropriateness is a perspective that sees human action as driven by rules of appropriate or exemplary behavior, organized into institutions. Rules are followed because they are seen as natural, rightful, expected, and legitimate. Actors seek to fulfill the obligations encapsulated in a role, an identity, a membership in a political community or group, and the ethos, practices and expectations of its institutions. Embedded in a social collectivity, they do what they see as appropriate for themselves in a specific type of situation." *Id*. at 689. A general account is given in JAMES MARCH & JOHAN OLSEN, REDISCOVERING INSTITUTIONS (1989). For the important point that the logic of appropriateness and the logic of consequences should not be regarded as necessarily mutually exclusive, *see* Kjell Goldman, *Appropriateness and Consequences: The Logic of Neo-Institutionalism*, 18 GOVERNANCE 35 (2005).

[242] *See* March & Olsen, *supra* note 241.

program,[243] and though competition authorities have not officially agreed upon uniform contents for a "good" compliance program,[244] many scholars have listed a number of key elements that should be incorporated

[243] The Organization for Economic Development and Cooperation Working Group on Bribery issued the first international compliance and ethics program standard in 2009. The basic elements of this standard are applicable to any type of compliance program. *See* OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, November 26, 2009, https://www.oecd.org/daf/anti-bribery/44176910.pdf (last visited August 8, 2018). *See also* Banks & Murphy, *supra* note 3, at 375. Murphy and Boehme referred to the 2010 version of the Canadian Competition Bureau's Bulletin on Compliance Programs as an excellent example. *See* Joseph Murphy & Donna Boehme, *Fear No Evil: A Compliance and Ethics Professionals' Response to Dr. Stephan* (2011), http://ssrn.com/abstract=1965733 (last visited August 8, 2018). *See also* Joseph Murphy, *Good News from Canada for the Compliance & Ethics Profession*, 6 COMP. & ETHICS MAG. 34 (2009). The Canadian Competition Bureau has issued revised Bulletins in 2015 and 2018 which have been influential.

[244] *See* Lachnit, *Compliance Programmes*, *supra* note 5, at 41. *See also* Pier Luigi Parcu & Maria Luisa Stasi, *Antitrust Compliance Programs in Europe: Status Quo and Challenges Ahead*, EUI/RSC POLICY BRIEF 2016/1 (2016), 2, http://cadmus.eui.eu/bitstream/handle/1814/39644/ENTraNCE_PB_2016_01.pdf?sequence=3 ("While there seems to be a wide and increasing consensus among public and private stakeholders around the benefits of compliance programs, such benefits are identified and present only in cases of 'good' programs. Thus, the main challenge lays in the identification of what is a 'good' compliance program, in order to elaborate best practices for its implementation.").

within such a program.[245] These include, for example: the genuine support of senior managers; the appointment of an ethics and compliance officer; the maintenance of an internal auditing, monitoring, and reporting system; effective communications to ensure that employees are fully informed; frequent evaluation of the compliance program and improvements where necessary; and appropriate risk assessments for anticompetitive conduct.[246] These ingredients may be further tailored and scaled up or down according to a variety of factors such as, among others: the size of a company, its sophistication and resources, its compliance record, the

---

[245] *See, e.g.*, William Lawrence, *Protecting Against Problems—Corporate Compliance Programs*, 57 ANTITRUST L. J. 601 (1988); Kate Taylor & John Pratt, *Anti-Trust Compliance Programs*, 8 INT'L BUS. L. J. 981 (1994); Joseph Murphy, *How DG Competition and US DOJ Antitrust Division Hurt Compliance Efforts*, CPI ANTITRUST CHRON. (Feb. 2012) 1; Banks & Murphy, *supra* note 3, at 381.

[246] *See* Lawrence, *supra* note 245; Taylor & Pratt, *supra* note 245, at 984-85; Murphy, *supra* note 245, at 4-5; Banks & Murphy, *supra* note 3, at 381. Murphy has argued that the necessary management techniques are very extensive, and that there is no easy way to reduce them to a simple list. A good compliance program should employ the full range of compliance techniques, and the different elements of the program work together coherently. *See* JOSEPH MURPHY, 501 IDEAS FOR YOUR COMPLIANCE AND ETHICS PROGRAM 93-6 (2008); Murphy & Boehme, *supra* note 243, at 4-5.

nature of its activities, the industries in which it operates, and, of course, the applicable legal environment.[247]

Materials that discuss and encourage compliance measures, such as brochures and similar materials, PowerPoint slides, and policy books, are common and widely distributed.[248] Nevertheless, the training and education provided to managers and employees do not seem fully effective, and the rate and seriousness of antitrust violations, including repeat offenses, persist largely unabated.[249] That is not to say that PowerPoint training is useless—presentations that convey eye-opening information and provide accurate and predictable information for business operators can make a key contribution to inducing compliance.[250] It is

---

[247] *See generally* INT'L CHAMBER OF COMMERCE, *The ICC Antitrust Compliance Toolkit* (2013), https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdfhttps://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf (suggesting practical tips for building compliance programs).

[248] *See generally* Banks, *supra* note 27 (indicating that there is ample information available about antitrust in the form of policies, handbooks, slides, etc.).

[249] *See generally id.* (stating that antitrust violations continue regardless of access to information).

[250] *See generally* Murphy & Boehme, *supra* note 243 (highlighting examples of times that employees have admitted to accidental noncompliance after receiving proper training on what constitutes compliance).

doubtful that a compliance program relying solely on classroom-style teaching sessions will make the difference between compliance and non-compliance. Conceivably, there may even be a risk that a determined price-fixer might be emboldened by enhanced knowledge about how the enforcement system works rather than deterred.[251] While it may be useful for a company manager to know specifics about the law, such as maximum corporate penalties for misconduct, focusing too much on such details may dilute the more fundamental objective which is to trigger a cultural change within the corporate environment.[252] From this point of view, a policy of promoting effective compliance programs requires a solid understanding of the relevant corporate culture and the relevant social and political norms. A holistic approach that takes account of these factors will help to create a strong and sustainable compliance culture at all levels of the organization and thus contribute to the success of the competition law that applies in a given jurisdiction. It will induce company personnel to develop effective internal mechanisms consonant with the external regulatory pressure of the law and tailored specifically to

---

[251] However, a determined price-fixer may of course attempt to engage in misconduct irrespective of whether he has a sophisticated understanding of the applicable legal prohibitions.

[252] *See generally* John Galgay, *Corporate Plans and Policies for Voluntary Antitrust Compliance*, 19 BUS. LAW 637 (1964) (suggesting that businessmen do not need to understand antitrust law as intimately as an antitrust lawyer but having a basic understand will help businessmen see that compliance programs are good for businesses).

the firm in light of its managerial, corporate, and social culture. As Galgay observed more than fifty years ago, compliance efforts should aim to achieve a level of *sympathetic understanding* of the antitrust prohibitions which:

> [I]s in the constant and conscious forefront of the minds of businessmen, so that [this sympathetic understanding] may operate as an *ever-present and conscious guide* in future actions. … [Bringing that sympathetic understanding] to the forefront of their minds is, it seems to me, the most important task of lawyers concerned with compliance programs emphasis added).[253]

When a business actor achieves what John Galgay calls a sympathetic understanding of the law, a process of internalization of norms has taken place; the will to comply with the law has become the actor's own norm and has become part of his or her identity.[254] Because the agenda of promoting sympathetic understanding, internalized norms, and the will to comply is effected by the interplay between external discipline of the law and internal corporate dynamics, the "black box" of the firm needs to be uncovered, not only to develop better

---

[253] *Id.* at 641.

[254] *See* George Akerlof & Rachel Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9, 12 (2005) ("Psychologists say that people can *internalize* norms; the norms become their own and guide their behavior.").

understandings of the structure and internal governance of the organization, but more importantly to understand the invisible, and often psychological rules, governing the communication channels between managers and employees.[255]

Regardless of the position competition authorities take on the debate about whether compliance programs should be taken into account when those authorities calculate fines, or whether such programs should be made a mandatory condition for the grant of leniency,[256] there is no doubt that several authorities are trying to provide both financial and reputational incentives for firms to actively invest in compliance programs.[257] The key issue in making a compliance program effective is

---

[255] *See* D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 789 (2013) (indicating that after nearly three decades, the myth of the "black box" of the firm is still perpetuated in antitrust scholarship). *See generally* Ronald Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 714 (1992) (using the "black box" metaphor, which was originally used in the very different context of electronic circuit theory and cybernetics and later used in numerous other fields, and now appears to have been transposed to the subject of corporate behavior).

[256] *See generally* Fisse, *supra* note 72 (arguing that corporations should not be given any leniency in anti-cartel sanctions against them unless the corporation has a compliance program in place).

[257] *See* Florence Thépot, *Can Compliance Programmes Contribute to Effective Antitrust Enforcement?*, COMPETITION LAW COMPLIANCE PROGRAMS: AN INTERDISCIPLINARY APPROACH 191 (Johannes Paha ed., 2016).

how an authority can best collaborate with business operators to ensure that they internalize the potential costs of infringements caused, at least in part, by poor corporate governance, and to encourage a change in corporate culture so that a *compliance culture* prevails at all levels of the businesses concerned.[258] On the corporate side, cultural elements need to be taken into account; CEOs, managers, sales staff, and other employees at various positions within the corporate hierarchy must cooperate and communicate effectively and third parties may also be relevantas Nielsen and Parker have pointed out, the influence of customers, shareholders, business partners, and employees can have a significant and positive impact on corporate compliance.[259]

*2. Paternalistic Leadership at CEO and Senior Manager Level*

Although it has been acknowledged that competition compliance programs are important, the design and implementation of such programs are often weak, and while lectures, workshops, and compliance

[258] *See* Riley & Sokol, *supra* note 13, at 47-9 (2015).

[259] *See* Vibeke Lehmann Nielsen & Christine Parker, *To What Extent Do Third Parties Influence Business Compliance?* 35 J. L. & SOC. 309, 340 (2008).

manuals can be helpful, they are unlikely to suffice.[260] It is doubtful that a thin or merely *pro forma* approach to compliance will make a difference in securing better compliance, at least absent more comprehensive efforts. In the context of East Asia, this point is reflected in a study by Van Uytsel that led him to conclude that the compliance manuals of the large Japanese firms surveyed, along with the compliance training sessions organized by those firms, are of low value.[261]

Therefore, a compliance policy is more likely to be successful when it is embedded within the corporate culture.[262] The policy has to be implemented through the continuous dedication and support of managers and employees.[263] As Stephany Watson advises, there must

---

[260] *See, e.g.*, Joseph Murphy, *Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play?* ORG. FOR ECON. CO-OPERATION AND DEV. (2012) at 251-52 ("In the past companies might have satisfied themselves that they were doing 'all they could possibly do' by sending out codes and manuals, having employees sign certifications, and having lawyers give lectures on the statutes but this is no longer considered an effective approach.").

[261] *See* Steven Van Uytsel, *Leniency in Japan—An Empirical Survey of its Use* (2015), at 18-20, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692445.

[262] *See* Rachel Taylor, *A Cultural Revolution: The Demise of Corporate Culture Through the Whistleblower Bounty Provisions of the Dodd-Frank Act*, 15 TRANSACTIONS: TENN. J. BUS. LAW 69, 78 (2013).

[263] *See* Stephany Watson, *Fostering Positive Corporate Culture in the Post-Enron Era*, 6 TRANSACTIONS: TENN. J. BUS. L. 7 (2004).

be specific individuals "from top to bottom" that are responsible for building a strong compliance culture.[264] Companies must promote This compliance culture through building trust, commitment, and cooperation between employees.[265] The most responsible public companies have devoted significant efforts to promoting trust, ethics, and good compliance practices, which are positively correlated with business success, and companies with a strong and sustainable culture of voluntary compliance at all levels can derive substantial value from their compliance efforts.[266]

The paternalistic leadership style in East Asian companies suggests that senior managers and employees are expected to fulfill mutual obligations.[267] Subordinates are willing to perform the tasks that their senior managers assign to them, and father-like managers, who provide support and protection for the employees' professional (and sometimes even personal)

---

[264] *See id.* at 38.

[265] *See id.* at 31-2.

[266] *See* Taylor, *supra* note 262, at 81-5 (2013).

[267] Paternalistic leadership is also observed in countries such as India, Turkey and Mexico, among others. *See* Zeynep Aycan et al., *Impact of Culture on Human Resource Management Practices: A 10-Country Comparison*, 49 APPLIED PSYCH.: AN INT'L REV. 192 (2000); Ekin Pellegrini & Terri Scandura, *Paternalistic Leadership: A Review and Agenda for Future Research,* 34 J. MGMT. 566 (2008).

lives, repay subordinates' obedient behavior. [268] However, since leaders and subordinates are engaged in a long-term reciprocal relationship of a very broad scope that extends to personal and affective-emotional dimensions,[269] employees in East Asian firms may be less willing to "blow the whistle" by reporting the misconduct of managers or other employees, or by coming clean about their own transgressions.[270] Indeed, the fact that CEOs and senior managers in East Asia often play a paternal role might have the effect of intensifying the "loss of face" that may come with self-reporting misconduct and correcting past errors.[271]

---

[268] *See* Pellegrini & Scandura, *supra* note 267, at 567; Ying Chen et al., *Supervisor-Subordinate Guanxi: Developing a Three-Dimensional Model and Scale*, 5 MGMT & ORG. REV. 375, 378 (2009) (suggesting that there are three key components of the supervisor-subordinate *guanxi* relationship: affective attachment, personal life inclusion, and deference to the supervisor).

[269] *See* Xiao-Ping Chen et al., *Affective Trust in Chinese Leaders: Linking Paternalistic Leadership to Employee Performance*, 40 J. MGMT. 796, 802 (2014).

[270] *See* Irwin, *supra* note 234, at 16. *See also* Bor-Shiuan Cheng et al., *A Triad Model of Paternalistic Leadership: Evidence from Business Organizations in Mainland China*, 20 INDIGENOUS PSYCH. RES. CHINESE SOC'Y. 209 (2003); Tsung-Yu Wu et al., *Expressing or Suppressing Anger: Subordinate's Anger Responses to Supervisors' Authoritarian Behaviors in a Taiwan Enterprise*, 18 INDIGENOUS PSYCH. RES. CHINESE SOC'Y. 3 (2002).

[271] *See* P. CHRISTOPHER EARLEY, FACE, HARMONY AND SOCIAL STRUCTURE: AN ANALYSIS OF ORGANIZATIONAL BEHAVIOR ACROSS CULTURES 137 (Oxford University, 1st ed. 1997) (explaining the nexus

Many empirical studies show that a serious commitment to compliance must be observed at the highest echelons of the organization.[272] For example, on the basis of their examination of forty-three (43) antitrust cases covering a span of twenty (22) years, Sally Simpson and Christopher Koper argue that, compared with other factors, antitrust violations are most likely to be correlated with managerial variables that depend on the characteristics of a company's top leadership.[273]

---

between the importance of face in East Asian societies and the collectivism prevailing in those societies); *See also* Hsien Chin Hu, The *Chinese Concepts of Face*, 46 AM. ANTHROP. 45, 61 (1944) (linking social standing and the fear of isolation and noting that "[i]n extreme cases the realization that one's conduct has been damned by group standards drives an individual to suicide."); *See* Qiumin Dong & Yu-Feng L. Lee, *The Chinese Concept of Face: A Perspective for Business Communicators*, 20 J. BUS. & SOC. 204, 205 (2007) (noting in Chinese and other group-oriented Asian cultures, a "loss of face" is closely associated with a loss of status within a given social network. Conversely, a gain of face indicates enhanced respect or attention from others in the network.).

[272] *See, e.g.*, Sally Simpson & Christopher Koper, *The Changing of the Guard: Top Management Team Characteristics, Organizational Strain, and Antitrust Offending, 1960-1986*, 13 J. QUANT. CRIM. 373 (1997).

[273] *See id.* at 394 (finding that "chief executive officers from certain subunits, most notably finance and administration, increase company involvement in antitrust offending. To the extent that the philosophies of finance and administration are used to assess problems and promote solutions within the organization, internal strain [from poor or declining corporate performance, or from the fear thereof] may develop among managers, subunits, and divisions, as resources, power, and upward mobility are all affected by bottom-line performance criteria. These results lend credence to… speculation of almost two decades ago that an

Another study focusing on forty (40) international cartels prosecuted in Europe and the U.S. from 1998 to 2008 shows that most episodes of collusion were organized by senior managers such as general managers, heads of sales, company presidents and vice-presidents, managing directors and CEOs.[274] The resulting argument that the top corporate leadership must set the tone for compliance at all levels of the firm applies *a fortiori* in Confucian societies where hierarchical leadership and patriarchal relationships are prominent and where loyalty and obedience are expected from subordinates.[275] In this context, the external discipline of the law may seem quite remote compared to the immediacy of the norms that apply within the confines of the organization. Therefore, the efficacy of the law may depend to a great degree on whether the corporate leadership's commitment to compliance is genuine and sufficiently visible within the firm, and whether the

---

overemphasis on organizational goals [in this case efficiency] may come with an unanticipated price.").

[274] *See* Andreas Stephan, *Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels*, ESRC CENTRE COMP. POLICY & NORWICH L. SCH. 8-9, http://competitionpolicy.ac.uk/documents/8158338/8256108/CCP+Working+Paper+09-09.pdf/9d0cd693-8796-408c-b6eb-90b414d1ecf3 (last visited August 8, 2018).

[275] *See* Akerlof & Kranton, *supra* note 254 (noting the emphasis on the internalization of norms, which shapes an actor's identity).

requirements of relevant legal norms are translated within the firm into social norms that employees then internalize and make their own.[276] Of course, tone-setting is important at lower levels of the organization as well,[277] but the "tone at the top" is the indispensable driving force for the whole company's investment in compliance.[278] In scenarios where senior executives have disproportionate importance in corporate governance,[279] it is essential to ensure that their commitment to antitrust compliance is beyond question.[280] In this context, where a business' authority is highly centralized, an executive must act as a role

---

[276] *See* Akerlof & Kranton, *supra* note 254 (noting the emphasis on the internalization of norms, which shapes an actor's identity).

[277] *See* Hon. Patti Saris, Chair, U.S. Sentencing Comm'n, Remarks at the 12th Annual Compliance & Ethics Institute (Oct. 7, 2013) (http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/special-reports/saris-remarks-annual-compliance-and-ethics-institute.pdf).

[278] *See* Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J. LAW, ETHICS & PUB. POL'Y 169, 187 (2015).

[279] *See* Len Gainsford & Angus Young, *Compliance Heroes, Leadership, and Ethnical Values: In Search of a Chinese Benchmark* (Aug. 31, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1464602 (last visited August 8, 2018).

[280] *See* Sokol & Abrantes-Metz, *supra* note 19, at 593 ("The CEO must project a sincere desire to comply. This will set the tone for the entire organization in terms of its antitrust compliance. The CEO must be fully committed to the antitrust compliance program and be consistent in such commitment.").

model for the company. As Confucius once said in plain terms: if the leader acts properly, the common people will obey him without being ordered to; if the leader does not act properly, the common people will not obey him even after repeated injunctions.[281]

*3. The Compliance Officer*

A company's chief compliance and ethics officer is a core element of an effective compliance program.[282] Ideally, this person should play a direct and central role in ensuring the success of the program.[283] They should be independent in performing their duties, highly trusted

---

[281] K.C.P. Low & Sik-Liong Ang, *Confucian Leadership and Corporate Social Responsibility (CSR): The Way Forward*, 2 ASIAN J. BUS. RES. 85, 88 (2012) (quoting Analects of Confucius, XIII:6).

[282] *See generally* Deborah DeMott, *The Crucial but (Potentially) Precarious Position of the Chief Compliance Officer*, 8 BROOK. J. CORP. FIN. & COM. L. 56, 59 (2013) (discussing compliance and the role of compliance officers with reference to financial and banking scandals); John Krenitsky, *Defining the Chief Compliance Officer Role*, 6 AM. U. BUS. L. REV. 303, 311 (2017) (noting the potential complexity facing compliance officers due to the numerous regulatory fields that may apply in the corporate context and pointing out that responsibilities for compliance may well have to be divided among different specialists and coordinated by the chief compliance officer.).

[283] *See* Banks & Murphy, *supra* note 3, at 381 (calling for "[a]n empowered, senior officer-level chief ethics and compliance officer with sufficient autonomy, empowerment, and resources. If there is not a strong compliance and ethics officer at the top, the program may be nothing more than a corporate decoration.").

and visible to all employees, and well-informed about all aspects of the company's compliance program.[284] They should not wear multiple or conflicting hats; playing the part of teammate in one meeting and referee in the next.[285] The notion of establishing a dedicated compliance officer within the management structure and of situating that officer in an independent compliance department is relatively new.[286] Traditionally, compliance matters were typically handled by the company's general counsel or by a subordinate. in some organizations, this trend is still the norm.[287] In a survey by the Association of Corporate Counsel in 2010, nearly half of the respondents confirmed that either the general counsel was the chief compliance officer, or that compliance was part of the general counsel's duties.[288] Similarly, in a 2013 Corpedia survey in which 630 compliance professionals participated, only thirty-six percent (36%) answered that they reported to the general counsel.[289] Of course, separating the compliance officer

---

[284] *See* Lachnit, *supra* note 5, at 43.

[285] *See* John McNeece IV, *The Ethical Conflicts of the Hybrid General Counsel and Chief Compliance Officer*, 25 GEO. J. LEGAL ETHICS 677 (2012).

[286] *See* Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L. J. 71, 75 (2014).

[287] *See id.* at 74.

[288] *See id.* at 99.

[289] *Id.*

from the legal department is only realistic if it is possible to allocate substantial budget and decision-making power to separate compliance personnel.[290] The arguments for establishing a separate and autonomous compliance department to encourage intramural competition leading to better compliance practices[291] seem to be less compelling when the management structure of a company is highly centralized, and where bottom-up and cross-department communication is weak.[292]

Another issue is whether East Asian firms are willing to hire in-house lawyers as independent compliance officers.[293] In a survey of ninety-seven (97) listed companies in Shenyang, Shenzhen and Shanghai, 51.5 percent of the respondents replied that the company had hired in-house lawyers, but the number of lawyers hired was either one or two.[294] Thirty-four percent (34%) answered that they had not hired any in-house lawyers, and 14.4 percent did not provide an answer.[295] The most

---

[290] *See id.* at 82.

[291] *See id.* at 83.

[292] *See id.*

[293] *See generally* Kota Fukui, *On Prevailing Corporate Legal Compliance: Comparative Empirical Study on Need for Lawyers in Corporations in China and Japan*, 63 OSAKA U. L. REV. 1, 2 (2016).

[294] *See id.* at 4.

[295] *See id.*

frequent answer for not hiring an in-house lawyer was either that there was, "no work that needs a lawyer's help," or that the company did not have a sufficiently organized structure to use a lawyer.[296] When asked to describe the ideal type of in-house lawyer, the most common response valued the "general counsel type" (29.9%).[297] This implies that in-house lawyers are expected to hold an authoritarian position similar to the executive directors and to work closely with the executive body on legal issues.[298] When asked about the capacities and personal attributes most desired for in-house lawyers, respondents identified a "sense of commitment" (62.9%) and "loyalty to the corporation" (56.7%).[299] Since the task of implementing a corporate compliance program is often discharged by a company's Chief Legal Officer and carried out by in-house corporate lawyers,[300] these answers might indicate that the role and function of the compliance officer in Chinese firms are similar to those of a senior executive as opposed to a fully independent professional. In

---

[296] *See id.* at 4-5.
[297] *See id.* at 9.
[298] *See id.*
[299] *See id.*
[300] *See* Robert Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L. J. 203, 203 (2016). *See also* Riley & Sokol, *supra* note 13, at 6.

smaller companies, it may be more realistic to let the CEO take responsibility for compliance.

*4. Effective Communication and Education*

Many empirical studies on unethical and illegal conduct show that the reason some managers violate the law is not because they are oblivious to legal prohibitions—the prohibitions are deliberately disregarded.[301] In a study surveying 2,321 business firms to assess the deterrent effect of the criminalization of cartel conduct by the Australian Parliament in July 2009 (given effect by the Competition and Consumer Act 2010), Parker and Nielsen showed that the very serious applicable sanctions and other consequences—including criminal penalties, corporate fines, and private actions for damages—had little impact on compliance management.[302] Furthermore, there was no correlation between the fear of being punished and any change in compliance performance.[303] Recent empirical studies show that informing industry of legal sanctions does not

[301] *See* Parker & Nielson, *Deterrence and the Impact*, *supra* note 16, at 386.

[302] *See id.* at 393.

[303] *See id*. at 406.

deter until the prohibited conduct is perceived to be sufficiently associated with moral opprobrium.[304]

The findings of the above studies call for further reflection on the issue of how managers and employees could be trained to comply with the requirements of competition law and policy. The notion that the risk of significant sanctions and possible detection alone suffice to stimulate compliance is increasingly archaic.[305]

---

[304] *See* N. Craig Smith et al., *Why Managers Fail to Do the Right Thing: An Empirical Study of Unethical and Illegal Conduct*, 17 BUS. ETHICS Q. 633 (2007). *See also* Tom Tyler et al., *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CALIF. MGMT REV. 31, 34 (2008) (finding over 80 percent of the sample of compliance choices made by employees were incentivized by internal judgements on right and wrong, and by perceptions regarding the legitimacy of the manager's authority. Only, whereas only 20 percent of the compliance choices were motivated by concerns about being punished.).

[305] *See, e.g.*, Maurice Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 769 (2014). Stucke distinguishes between "intrinsic" and "extrinsic" approaches to compliance. An intrinsic approach involves the development of an ethical culture within a company for its own sake (i.e., for moral reasons), and not to tradeoff between the costs and benefits of lawful versus unlawful conduct. *See id.* at 825. In reaction to this dichotomy between intrinsic and extrinsic compliance, Ma and Marquis have cautioned that "it may not be prudent to establish a strict hierarchy between an ethics-based approach and a more calculative approach focused on tradeoffs. Maintaining conditions that favor both self-rewarding and materially rewarding benefits in parallel may be desirable insofar as these benefits may have mutually reinforcing effects." Ma & Marquis, *supra* note 79, at 40 n. 368. However, the latter authors endorsed Stucke's suggestion that "too much emphasis has been placed on material,

Consequently, it is necessary to develop a strategy that takes account of the social construction of compliance and the need to understand and then shape, where necessary, the logic of appropriateness that prevails within the walls of an organization.

In the context of East Asia, part of the strategy should build on the cultural-historical infrastructure which underlies commercial life, as outlined in this article. Confucian doctrines could thus be applied as part of the effort to educate corporate leaders[306] and employees and build moral engagement on the subject of cartel activities. Confucian ethics emphasize the importance of moral education, and it is usually the responsibility of parents and leaders to educate children and subordinates with moral codes; the ideal result is to produce a "moral gentleman" (*junzi*). [307] The Confucian system of

---

cost-benefit reasoning, and not enough on the idea that doing the 'right thing' and implementing ethical leadership are self-justifying pursuits."

[306] To some extent, this idea may also apply to top leadership and company managers. However, top management bears additional responsibility in that they must *actively* take the steps necessary to ensure an adequate compliance culture throughout the organization. This entails, among other things, a more proactive approach to learning, including self-education, as compared to the typical Confucian learning style. *See* Baiyin Yang et al., *Confucian View of Learning and Implications for Developing Human Resources*, 8 ADVANCES DEVELOPING HUMAN RES. 346, 349 (2006).

[307] *See* Chau-kiu Cheung & Andrew Chi-fai Chan, *Philosophical Foundations of Eminent Hong Kong Chinese CEOs' Leadership*, 60 J. BUS. ETHICS 47, 49 (2005).

teaching and education attaches high value to morality and social responsibility and less attention is given to discovering the truth.[308] Learners usually prefer an accurate, systematic, and slow approach when receiving instructions, and teachers usually employ tools such as lists, rote memorization, and repetition.[309] Since employees are accustomed to an instructor-centered approach to education, and since they rarely express dissent or personal opinions in front of a group,[310] providing a list of "do's" and "don'ts" through formal training courses might be manageable and easy to implement. While employees in countries with Confucian traditions may prefer a more systematic, slow approach compared to the interactive, spontaneous, and quick approach often seen in western countries,[311] it is crucial to ensure that employees understand why and how the compliance program is implemented—to show why cartel behavior is unambiguously unethical. Although it is simple and expedient for multinational corporations with subsidiaries spread across continents to give employees slide presentations outlining the finer

[308] *See* Yang et al., *supra* note 306, at 351.
[309] *See id.* at 349.
[310] *See id.* at 352.
[311] *See id.* at 351-52.

points of competition law,[312] it is more important to instill the idea that conduct such as fixing prices or colluding on tenders is tainted with moral stigma and leads to a loss of face for the individuals concerned and for the entire organization.[313] Teaching employees that cartel conduct is unambiguously unethical and raising the specter of social stigma are more likely to be more effective than emphasizing the threat of severe administrative and/or criminal sanctions. The Confucian value of moral "righteousness" (*yi*) is taught in East Asian countries, and the sense of right or wrong is cultivated through the transmission and absorption of moral rules.[314] It follows that explicitly moral messages should be a natural part of a company's efforts to shape the norms and behavior of employees.[315] Moreover,

---

[312] *See* Michele Lee, *Building an Effective Antitrust Compliance Program: International and Cultural Challenges*, ANTITRUST COMP. BULL. 16, 18 (ABA Section of Antitrust Law, March 2006).

[313] *See* Tsung-Yu Wu et al., *supra* note 270.

[314] *See*, e.g., Mei-Ju Chou et al., *Confucianism and Character Education: A Chinese View*, 9 J. SOC. SCI. 59, 64 (2013) ("Character education has provided the means by which the values and teachings of Confucius has been transmitted to the people.").

[315] Educators in the field of business ethics are also calling for a synthesis of the Confucian virtues and the more modern business ethos associated with globalized business. *See* Peter Woods & David Lamond, *Junzi and Rushang*: *A Confucian Approach to Business Ethics*, A CONTEMPORARY CHINESE CONTEXT, 3 (2011) https://www.anzam.org/wp-content/uploads/pdf-manager/623_ANZAM2011-434.PDF ("The ideal new Confucian business person in the modern day would be a virtuous

tapping into Confucian-oriented moral education to implement compliance concepts is also consistent with the argument that the command-and-control style of compliance education should be de-emphasized in favor of value-based compliance training.[316] In this vein, and as empiricists suggest creating *identity* between the values of the company and the values of its employees, and making ethical rules and boundaries credible, are elements more apt to secure compliance than relying on either command-and-control mechanisms or carrots and sticks.[317] Indeed, it may be that aspiring to compliance is not aiming high enough. In the East Asian context, a more ambitious and fruitful objective would be to cultivate *virtue* at all levels of a company, and to instill the idea that lawfully competitive conduct is a necessary

---

business person who possess qualities such as benevolence (*ren*), [righteousness] (*yi*), propriety (*li*), wisdom (*zhi*), and trustworthiness (*xin*), meantime, the business person is able to make use the advanced management techniques from the Western world.").

[316] *See* Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961, 975 (2012).

[317] *See id.* at 375-77; *See also* Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CALIF. MGMT. REV. 131, 135-36 (1999).

part of virtuous conduct that enables the company to flourish as a good corporate citizen.[318]

*5. Cultural Changes to Shape Business Incentives*

In the many countries where competition law is not a long-standing tradition, business executives and employees may not be fully aware of the illegality of cartel activities (all the more so in the case of SMEs), and they may be either unaware of leniency programs or may have only weak incentives to use such programs to report violations to the competent authorities. [319]

---

[318] *See* Woods & Lamond, *supra* note 315, at 8, (as noted above, others have likewise called for a more explicit virtue-based approach to good business ethics.).

[319] Indonesia is an example of a developing country where competition law has been in place for two decades, yet there is still limited cognizance of the law among the business community. However, the strong outreach efforts of the Indonesian competition authority have raised the level of business awareness. *See* Deswin Nur, *Understanding the Competition Law and Policy of Indonesia*, CPI ANTITRUST CHRON. 1, 9 (2015). Nur refers to two studies conducted by the Indonesian competition authority in 2009 and 2014 to measure awareness on the part of businesses in metropolitan Jakarta with regard to the existence of the applicable competition law. *Id*. In 2009, only 26 percent of surveyed businesses were aware of the law even after about nine years of enforcement. *Id*. However, following intensive outreach efforts, the figure increased to 60 percent by 2014. *Id.* Experience from the UK indicates that low business awareness of competition law can be a significant issue even in a developed country where the law has been applied actively by the national and European competition authorities. As summarized by O'Regan, research published in 2014 showed that only 30%

Inducing competition compliance would not only require the development of an internal mechanism to facilitate the function of the compliance programs, but also to change business incentives to promote compliance ethics and competition values.[320] The path-dependent legacy of Confucianism in East Asian countries implies that the government and relevant executive organs and enforcers wield abundant influence and are well-placed to promote competition culture and compliance and to actively shape appropriate incentives for business operators. But in order to ensure that such incentives are established, a fundamental (though not sufficient) condition for success is political will.[321] It is already well known that enforcing laws against cartels in countries with weak political support for competition policy is extremely challenging.[322] Indeed, to achieve legal and cultural

---

of UK businesses knew that market sharing was illegal, and only 55% of UK businesses knew that price fixing was illegal. *See* Matthew O'Regan, *Criminal Enforcement of Competition Law: The UK Experience* 1, 2 (2017), http://www.stjohnschambers.co.uk/dashboard/wp-content/uploads/MO-Advanced-EU-Competition-Law.pdf.

[320] *See generally*, Riley & Sokol, *supra* note 13.

[321] "The introduction and implementation of a competition law is fraught with problems. Political will is necessary every step of the way." SUSAN JOEKES & PHIL EVANS, COMPETITION AND DEVELOPMENT: THE POWER OF COMPETITIVE MARKETS 61 (2008).

[322] *See, e.g.*, Rijit Sengupta & Cornelius Dube, *Competition Policy Enforcement: Experiences from Developing Countries and Implications for Investment*, OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT VII, 10 (2008), http://www.oecd.org/investment/globalforum/40303419.pdf ("In

change in societies where the government historically encouraged cartel behavior, it was necessary for institutional elites to repudiate misguided policies which caused a cultural and behavioral tipping point.[323] Where this process of legal and cultural change does not take hold and where efforts fail to reach the tipping point, there will be a lack of "moral seriousness" with regard to cartels; without moral seriousness, it will be difficult if not impossible to create and reinforce an anti-cartel social norm among the public, and to attach serious social stigma to cartel behavior.[324] People are only likely to comply with a behavioral law if they believe in the "legitimate authority" of the law and of the agency that enforces it.[325] In this light, it is crucial to consider

---

many countries, governments are seen not to have any plans or commitment to the promotion of competition in the market. Such apathy could be a result of a pre-determined approach to evolving the market, or merely a lack of awareness of the economic benefits of competition.").

[323] A dramatic example of a country where a cartel culture has successfully transformed into a competition culture that embraces the functioning of markets and the application of competition law is Germany. *See generally* David Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe*, 42 AM. J. COMP. L. 25 (1994) (tracing a broad arc of twentieth century history in which, among other things, Germany's cartel economy in the 1930s and 1940s was repudiated notably in 1958 with the adoption of Germany's modern competition law and cartel prohibition).

[324] *See Cf*. Parker, *supra* note 16.

[325] *See* TOM TYLER, WHY PEOPLE OBEY THE LAW (2006); Tom Tyler & John Darley, *Building a Law-Abiding Society: Taking Public Views about*

how regulatory schemes and enforcement tools could be adapted to change a firm's behavior. For example, behavior may be modified when granting conditional fine reductions or conditionally immunizing a firm from criminal liability when it can show a good faith effort to comply notwithstanding the infraction for which it was investigated.[326]

## IV. CONCLUSION

This article has expressed the view that efforts to secure competition law compliance among commercial operators can be tailored in a way that takes account of cultural characteristics. The cultural background forms part of the conditions in which the development of a robust and credible compliance system occurs. Therefore, it makes sense to approach compliance issues in a manner sensitive to that cultural background. In the context of East Asian enterprises, this implies a need to take account of the legacy of Confucian ethics, which has had a profound influence on the psychology and behavior of commercial organizations in the region. The importance of that legacy suggests that compliance will

---

*Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 735 (2000).

[326] For comprehensive discussion, *see* Stucke, *In Search of*, *supra* note 305. We note that the research conducted thus far on compliance has not unambiguously established, in empirical terms, that the offer of specific rewards by enforcement authorities guarantees that the business community as a whole will make a deeper commitment to compliance. Nevertheless, we consider that visible signs of commitment to "compliance policy" on the part of enforcers can send important and valuable signals to enterprises and to the wider public.

not be achieved within East Asian firms solely based on the external legal environment; an environment in which deterrence-oriented factors such as sanctions and the threat of detection play a central role. More attention should be given to the internal moral and social environment, and to the logic of appropriateness within a given firm. A compliance culture can thus be constructed on the basis of elements such as moral commitment, Eastern-style education, the cultivation of virtue and a convergence between the interests of the enterprise and those of its employees.