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Agency Assessments of Compliance Programs

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I. INTRODUCTION

Compliance and ethics programs are the way organizations take management steps to prevent and detect illegal and unethical conduct. They can be more or less rigorous and effective, depending on the level of commitment. Historically it has been government that drives organizations to adopt such programs, and especially to move them beyond mere paper and preaching into meaningful steps.

Enforcement authorities have recognized that their role is not simply to collect fines and obtain convictions, but to prevent violations before the harm is done. They recognize that company compliance and ethics programs are essential tools in this mission. When government takes compliance and ethics programs into account and uses them as a means to transform industry conduct, there is enormous leverage to get companies to upgrade those programs. For government to be effective in this, however, it must be credible in its assessment and imposition of programs.

II. FUNDAMENTAL POINTS

For government officials dealing with compliance and ethics programs there are a few key concepts to begin the analysis:

A. The Burden of Proof is on the Company

The first is that generally, the burden of proof is on the company. Compliance and ethics programs become relevant after an agency has reason to believe a company has committed a violation. The company is then trying to convince the government to treat it better. At this point it is the company's job to come forward with proof that it had a diligent and effective program.

B. Assessing a Program is a Straightforward Issue of Fact

The second fundamental point is that assessing a program, when the company has the burden of making its case, is not terribly difficult and in fact is generally straightforward. Unlike digging out evidence of a crime from those who may be facing punishment, in assessing a compliance and ethics program the company has every motive to provide the evidence that its program is creditworthy. At the same time, there are well-established standards available for assessing the bona fides of a program. Moreover, a key measure of whether a program is effective is whether it reaches employees. Simply by talking with employees during the course of an

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investigation, investigators can get a very deep sense of whether the program was real or cosmetic.

C. Compliance & Ethics is a Separate Field

The third fundamental point is that compliance and ethics is a separate field of expertise. As is true for any field, before practicing in that field one needs to know the subject. Agencies that are working with compliance and ethics programs need to ensure that they have the expertise to do the job. This is not the same expertise needed to practice law or be a good litigator. To be effective, agencies need at least some staff members who have studied and know the field of compliance and ethics.

D. The Agency's Approach Must Be Serious and Practical.

No matter what an agency may say in speeches about the importance of compliance and ethics efforts, if it ignores good programs in practice, then businesses will correctly read the real message: programs do not count.

III. WHAT IS THE ASSESSMENT FOR?

Agencies may assess a company's compliance and ethics program for a number of reasons, depending on the nature of the legal system and the type of offense:

a) whether to proceed against the company at all;

b) whether a case should be administrative, civil, or criminal;

c) what charges to bring;

d) whether to settle or prosecute the case;

e) whether to offer to settle on more favorable terms;

f) whether to pursue individuals instead of the company;

g) whether to allow the company to conduct its own investigation and report back to the agency;

h) what type of relief to seek if a case is brought;

i) whether a company should be debarred or have other privileges denied;

j) if a financial penalty or fine is to be imposed, how much;

k) whether to impose a monitor; and

l) what entity is to be held responsible—e.g., a parent company or a subsidiary.

Whenever imposition, enhancement, or retention of a compliance and ethics program is a condition for going forward, the agency needs to be able to assess the company's actions in implementing a program.

In assessing programs, there are two different approaches. One is a pass-fail approach where programs either make the grade or they do not; this is the standard of the U.S. Sentencing Guidelines. However, while the Guidelines do an excellent job of spelling out the essential factors

in a program, they have not been used much in corporate sentencing and thus have been almost non-existent in terms of applying the pass-fail approach.

The alternative, and generally superior approach, is to assess programs on a graduated basis, not an absolute one. Rather than the simplistic, all-or-nothing judgment, this allows for the degrees of variance that are likely to be found in corporate compliance and ethics programs. This is suggested in the guidelines used by U.S. federal prosecutors under the *U.S. Attorneys Manual*, which covers the various options prosecutors have in determining how to treat a company and how to settle cases.

IV. WHAT STANDARD SHOULD APPLY?

Compliance and ethics programs need to be assessed according to a standard; this is not an "I'll know it when I see it" process. After decades of organized approaches to compliance and ethics programs, there are now well-established elements that should be expected in any program. It is neither necessary that an agency develop its own standards out of the ether, nor reasonable to make it a guessing-game for companies in dealing with this important issue.

Before assessing any company's compliance and ethics program, the agency should be able to define in general what such a program is. Fundamentally it consists of two things: (1) a management commitment to do the right thing, and (2) management steps to make that commitment happen. It is the management steps that give the concept its universality. All organizations need to be managed using basic management steps, and the process of doing so provides a consistent base for all organizations dealing with compliance and ethics. The details of how each organization does this may vary, but the core elements remain the same.

V. WHERE TO START

Where does an agency start in this process to assess company compliance and ethics programs competently? A basic management principle for any organization is the need to assign responsibility to someone to ensure that a project gets done. So, too, in undertaking a compliance and ethics program assessment, it makes sense to designate at least one staff expert on the subject—the compliance and ethics program "go to" expert within the agency. This person would then take the steps necessary to become an expert in the field of compliance and ethics, including by pursuing the training and resources available on this subject. There is a great deal of this available; for example, the Society of Corporate Compliance and Ethics' ("SCCE") website, www.corporatecompliance.org has useful material available, plus information on a variety of other sources. SCCE provides intensive training academies, including locations in South America, Europe, Asia, the United States, and the Middle East.

Once the agency's compliance expert is up to speed, that person can provide training, assistance, and research for others in the agency dealing with compliance and ethics programs. It is not necessary that this person actually do all the assessment and other related work, as long as the person is in position to ensure consistency and effectiveness in the agency's actions and approaches.

VI. FACT-FINDING AT THE BEGINNING OF AN INVESTIGATION

As noted, determining whether a company has a credible compliance and ethics program is an issue of fact. This means the objective is to gather relevant information about the program.

The best time to start this is at the very beginning of an investigation, rather than waiting for a company to make a formal presentation on its program. This can be done through discussions with anyone associated with the company and from company materials that are publicly available.

In the course of an investigation, whether through formal criminal investigative proceedings, or through interviews with current and former employees, the agency can obtain important insight into the culture and the actual steps taken in the company's compliance and ethics program. A company merely going through the motions does not constitute a compliance program. In an agency's investigation, if none of the employees who have information about an alleged violation have had any contact with the compliance and ethics program, this strongly indicates that the program was not credible. If there is no knowledge of a code of conduct, a reporting system, training, or the compliance officer/compliance program managers, then in effect there was no program.

Here are some sample questions to ask employees, former employees, and others associated with the company during the investigation process:

1. What does the person know about the company's compliance and ethics program?
2. Who was the compliance officer? If people do not know this, especially those at the executive level, that tells you something very important about the program's lack of impact.
3. Did they have a code of conduct? Did the person ever read it? Can the person remember anything at all about it?
4. Was there a system for reporting concerns? It is not important that anyone actually remember the number, as long as they knew there was a system for bypassing local management if needed.
5. Was there a system for getting compliance advice? If there is an available business unit lawyer who can provide compliance advice, this is an important sign of commitment to compliance, even if the person is not formally designated as part of the compliance program. But investigators need to distinguish between just having a business or deal lawyer from having one whose focus is ensuring that people follow the rules.
6. Were there ever any audits or reviews on compliance issues? This could be done by the legal, the internal audit, or the compliance and ethics office. While these reviews might have been confidential, if they were done word would get around.
7. Did the person have compliance training in the risk area? If they do not remember if they had any training, then that is equal to no training.
8. Was there anything in the person's annual assessment, evaluation, or objectives related to compliance and ethics? Again, if they do not remember that pretty much shows it was not taken seriously.
9. Did the person ever hear of anyone being disciplined under the compliance program? Much of this might be confidential, but word of these types of things travels in

companies, and the better programs provide some publicity relating to discipline (without disclosing names).

10. Did the person's supervisor ever say anything about the code of conduct or compliance?
11. Did the person personally know anyone associated with the compliance and ethics program? The more serious programs will have local representatives in the business units. These do not have to be full-time, but compliance should be a serious part of what they do (e.g., in the position description), and the people in the business unit should at least know the person is there.

For publicly traded companies there should also be information available relating to the compliance and ethics program in publicly available sources. The easiest to find is typically the code of conduct. As a matter of diligence it is useful to have this, and the code can provide background on the compliance and ethics program—but always take codes of conduct with some skepticism. By themselves they have no meaning unless they are actually used. There may also be other program elements available on a company's website.

VII. THE COMPANY PRESENTATION

A company under investigation may request the opportunity to present information about its program to the agency. Here there is an important initial note of caution: If, instead of proposing a presentation, the company offers to send its code of conduct and/or compliance manual, consider just politely saying that the agency is not interested. No piece of paper can constitute a compliance and ethics program, and just looking at such a manual or code will not have value, unless it is only a precursor to a full presentation.

What are the dynamics of such a presentation? It is useful to start with the company's supporting documentation (as long as the whole "program" is not just a manual) in advance. This provides important background for the live question-and-answer sessions with company personnel. Expect the company to have documentation relating to every element of the program. Thus, in applying a standard like the Sentencing Guidelines or the OECD's Good Practice Guidance, expect documents on each element and sub-element. Request that they be organized on this basis, rather than lumped indiscriminately together. Companies may resist this, but that may be because they realize they have gaps in the program.

It should be no burden on the company to cover each point separately. If the company sends over boxes of extraneous materials (e.g., stacks of unrelated internal audit reports, glossy PR reports on corporate social responsibility, etc.), do not be reluctant to send them back and ask that they be pruned down to materials only related to the compliance and ethics program, organized according to the applicable compliance program standards.

Even though the burden of proof is on the company, the agency should not be reluctant to ask questions. For example, if the initial paper has nothing on discipline, this should be pointed out to the company. If there is nothing on audits, ask for this as well, but be clear that it is only compliance audits, not standard financial audits that matter.

For the presentation, the agency needs to hear from the right people. If the presentation is only by outside counsel this is likely to limit the depth of any answers to questions. It may be necessary to remind counsel that the burden is on the company, and unanswered questions or

assumptions by counsel will not help. Even the company's general counsel may not be the best source for information.

Essential participants include the person actually responsible for the day-to-day operation of the program. Often, when the general counsel states that he or she is the compliance officer, this does not mean that person does the day-to-day work. In major corporations the general counsel position is a full-time job; in practical terms it is impossible for a general counsel in a major firm to be the person with day-to-day responsibility for the program. Typically it is someone lower in the organization who does the real work, and that operational person needs to be there in person to discuss the program.

Similarly, it is important to hear from whoever in the company specialized in compliance in the specific risk area under investigation. Included would also be others who work in the compliance and ethics program. So, if a problem occurred in a specific subsidiary or business unit, the agency should ask to speak with the compliance person responsible for that unit.

In recent years, one difficult question in investigations has been the role of privilege. In a jurisdiction that recognizes privilege, in the context of learning about a company's program agency personnel should not require that the company waive privilege. Nevertheless the burden of proof is on the company, and the company cannot ask enforcement personnel to simply "trust them" because they do not want to risk waiving privilege by showing the government what they have done in their program. The company is free to design and staff the compliance and ethics program as it sees fit, as long as it can prove what it has done and the impact it had. But the company cannot reasonably expect the government to simply trust them and take their word for the legitimacy of the program; if there is no real proof then there cannot be real credit.

VIII. IMPROVING COMPANY PROGRAMS

When an agency does take compliance and ethics programs into consideration and evaluates them, it has enormous potential leverage in moving companies to upgrade their program efforts. But if the consideration of programs is done in secret, or with no useful information provided to businesses, then the agency will lose much of the benefit of its work. Thus, in evaluating company compliance and ethics programs it is essential for the agency to publicize what it is doing.

Agencies should recognize that through this process of evaluating company programs they are molding corporate behavior. So it is essential that the information be specific. If the government points to specific steps in a compliance program, this can be electrifying in the compliance and ethics field. For example, if an agency said it refused to credit a program because the compliance officer was nothing more than an un-empowered lawyer in the legal department and the company had failed to have any form of incentives in its program, this could cause enormous progress in the development of good programs. Or, if an agency gave a company credit, and pointed out (i) that the chief ethics and compliance officer could only be fired by the board, (ii) the company's sales incentive program had to be reviewed by the compliance officer, and (iii) the company used computer-based screening to spot red flags of illegal conduct, this could give an enormous boost to the development of programs with real teeth.

If there is concern about confidentiality in investigations, examples can be publicized without identifying individual companies. As long as there are details of what program steps were good or deficient, how companies are treated when they have good programs, and the examples are clearly drawn from actual cases (albeit unidentified), such publicity will have the needed salutary effect.

Another strong caution is not to bury the compliance and ethics program's role under a list of factors. Anyone in industry who is paying attention already knows the government wants companies to come in and confess their violations, and to help the government in its investigation. It is no surprise when companies get credit for this. If an agency press release goes on at great length about how the company cooperated and accepted responsibility, and then tacks on a brief reference to the company's compliance program, this may be better than nothing, but not by much. Everyone already knows that agencies want them to turn themselves in and cooperate, so that should be treated as a separate matter.

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Why You Should Love Your Antitrust Compliance Monitor

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Why You Should Love Your Antitrust Compliance Monitor

Theodore L. Banks[1]

I. INTRODUCTION

Compliance monitors in antitrust cases are not as common as in other areas of enforcement, but the subject has received attention recently due to the controversy surrounding the judicially appointed monitor in the *Apple eBooks* pricing case. Much of what has been written about that case focuses on some unique considerations there,[2] and, while it is hardly a representative situation, it does illustrate some of the "features" of a monitorship.

Before getting tied-up in Apple, it is worthwhile to take a step back and take a look at the customary role of a monitor, and, in my opinion, how a monitor can be very beneficial to a company as a way to resolve a government dispute and enhance a compliance program.

II. WHAT IS A COMPLIANCE MONITOR?

Think of a monitor as a compliance consultant, but one with a little more power than the consultant you would hire off the street. Think of him or her as "consultant +." The monitor is an independent party who is brought into a case to ensure that the terms of a settlement or judgment are followed. The monitor is appointed by an agency or a court, but is paid for by the company being monitored.

The monitor enables the government to off-load some work to someone who is an expert in the field in question. A monitor may be an attorney, accountant, investigator, engineer, etc. Optimally, the expertise in question relates to the substantive subject of the proceeding. In other cases, the monitor may have what I would call "procedural" expertise, with experience in conducting investigations or compliance programs. The monitor may actually serve as a compliance manager, and involve a team of experts in related subjects such as auditing or computers. While the monitor may be an attorney, there is no attorney-client privilege between the company being monitored and the monitor.[3]

In criminal areas other than antitrust, using a monitor as part of the resolution of a case has been called a "stroke of genius" since it may allow the government to resolve a case without the need to go through a full trial,[4] thus avoiding the costs of trial and the possibility of an outcome that is not to the government's liking. Once a settlement is reached, use of a monitor

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[2] Some of the peculiarities of that case may derive from unique aspects of the Apple culture, which I discuss at T. Banks, *The Dominant CEO: Great for Business and Terrible for Compliance?* COMPLIANCE & ETHICS PROFESSIONAL 27 (March 2015).

[3] Such a privilege might be helpful. V. Root, *The Monitor-"Client" Relationship*, 100 VA. L .REV. 523 (2014).

[4] C. Ford & D. Hess, *Can Corporate Monitorships Improve Corporate Compliance?*" 34 J. CORP. L. 679 (2008), quoting J. Handzlik, CORP. CRIME REP. 12 (Sept. 10, 2007),

enables the government to have reasonable assurance that the terms of the settlement will be followed, without the need to use (or hire) government staff.

III. ARE THERE RULES?

Two memoranda from the U.S. Department of Justice ("DOJ") lay out the basic principles that the DOJ uses for the use of monitors. In the *Morford Memo* of March 7, 2008,[5] the agency acknowledged that a monitor may be a key part of resolving a matter with a non-prosecution ("NPA") or deferred prosecution ("DPA") agreement. The monitor's "primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals." The monitor would be used where appropriate, such as when a company does not have an effective compliance program. The monitor should be a "highly qualified and respected person or entity" and not present any conflicts of interest.

Although the memorandum states that the monitor is not an agent or employee of the government, this should be considered as a bit of a formality. In reality, the monitor is doing the job of the government and reporting to the government, acting "in loco imperium." So, maybe the monitor might be considered a *representative* of the government while not technically its "agent." The monitor's primary role, according to the memo, is to assess the effectiveness of the company's compliance program in preventing criminal misconduct. This is consistent with the standards in the Federal Sentencing Guidelines for an effective compliance program, and the directors and management of the corporation retain the obligation to the shareholders to implement such a program.

The memo acknowledges that the monitor needs to understand the scope of the conduct covered in the settlement agreement, but not to get involved in unrelated areas. Nevertheless, an understanding of historical misconduct may assist in compliance with the settlement, and each case is evaluated on its own facts.

The monitor is expected to communicate with the government as deemed appropriate. Periodic written reports to both the government and the monitored company should outline the monitor's activities, whether the company is complying with the agreement, and any changes necessary to facilitate compliance with the agreement. If the company does not accept the monitor's recommendations, the monitor should report that to the government, which would consider whether this refusal indicates a failure to abide by the settlement agreement.

The monitor is expected to disclose to the government previously undisclosed or new misconduct. The duration of the monitor agreement should be tailored to the problems that have been found and the remedial measures necessary to fulfill the monitor's mandate. The agreement should allow for the extension of the monitor where necessary, or where a change in circumstances allows for the elimination of the monitor.

[5] *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, Craig S Morford, Acting Deputy Attorney General (March 7, 2008).

Three years after the *Morford Memo*, another memo on the subject of monitors was issued by the DOJ.[6] The memo specified that a settlement agreement should explain the role of the DOJ in resolving disputes between the corporation and monitor. The DOJ does not consider itself a party to the monitor agreement, and will not arbitrate contractual disputes. The DOJ's role is limited to questions as to whether the company has complied with the terms of the agreement. If a company disagrees with the monitor's recommendation, it is urged to present an alternative and, if the parties cannot agree, then the DOJ would get involved.

It should be noted that for purposes of antitrust compliance these memos are interesting, but NPAs and DPAs are not used by the Antitrust Division of the DOJ at the present time (which of course may change at any time). The Antitrust Division had requested the appointment of a court-imposed monitor in the Apple[7] case (discussed below) and in AU Optronics.[8] The Antitrust Division sought probation to be supervised by a monitor because of a lack of commitment by the companies as to implementing a compliance program. Not only did AU Optronics refuse to acknowledge the illegality of its conduct, but it also refused to remove senior executives involved in price-fixing. A monitor, in the Division's view, was necessary to change the corporate culture and reduce the risk of recidivism.[9] The Antitrust Division insisted that indicted executives could not hold any pricing, sales, or marketing positions in the company.

In some cases, such as with Bridgestone Corp.,[10] probation may be part of a plea agreement where there are repeat offenses. The monitor may be appointed later if the company fails to make timely and complete reports. In general, the risk that a monitor will be appointed increases if a company refuses to take responsibility or simply refuses to implement a serious compliance program.

Compliance monitors (sometimes referred to as monitor trustees) are also sometimes used by the Federal Trade Commission ("FTC") as part of its consent agreement process. Interestingly, a 1999 study of compliance effectiveness by the Office of Inspector General noted that while the Compliance Division in the FTC Bureau of Competition was doing an effective job overall, there were some systemic improvements that could be made, and it needed more paralegals to assist in routine compliance monitoring activities.[11] The use of more independent monitors was not suggested.

However, since that time, the FTC has made use of monitors to extend the capabilities of the Compliance Division. In 2002, the FTC, in "Frequently Asked Questions About Merger

[6] "Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," Gary G. Grindler, Acting Deputy Attorney General (May 25, 2010).

[7] United States v. Apple, Inc., No. 1:12-CV-2826 (S.D.N.Y. Sept. 5, 2013)(Final Judgment).

[8] United States v. AU Optronics Corp., No. CR-09-0110 (N.D. Cal. Sept. 11, 2012)(Sentencing Memorandum).

[9] *Prosecuting Antitrust Crimes*, Speech by Bill Baer, Asst. Atty. General (Sept. 10, 2014); *Compliance is a Culture, Not Just a Policy*, Speech by Deputy Asst. Atty. General Brent Snyder to International Chamber of Commerce, New York (Sept. 9, 2014).

[10] United States v. Bridgestone Corp., No. 14-CR-00068 (N.D. Ohio Apr. 30, 2014) (Plea Agreement).

[11] *Survey of the Systems and Processes Used by FTC's Bureau of Competition Staff to Ensure Compliance with Non-Monetary Provisions of FTC Administrative Orders in Competition Cases*, F. Zirkel, Inspector General, Audit Report No. 99-042 (July 16, 1999).

Consent Order Provisions,"[12] noted that a "monitor trustee is an independent third party appointed by the Commission to oversee certain terms of the consent order. The Commission has required a monitor trustee, sometimes called an auditor trustee or an interim trustee, in cases in which the order imposes obligations on the respondent of a specialized nature that may result in a temporary relationship between the respondent and the buyer of divested assets." It also noted that virtually every merger order issued by the Commission included a provision authorizing the FTC to appoint a "divestiture trustee," and that it had done so in 12 transactions. The terms of a divestiture order may include obligations to provide services to the recipient of the divested assets for a period of time.[13]

A monitor may also have specific expertise to supervise technical aspects of a consent agreement.[14] An order from the Commission may require a respondent to appoint a compliance officer acceptable to the Commission to supervise compliance with the order.[15] The FTC may seek a judicial appointment of a monitor in connection with injunction enforcement, but there should be some evidence that the respondent has violated the terms of the preliminary injunction.[16]

IV. WHY A MONITOR IS A GOOD THING FOR THE COMPANY

Having a monitor looking over your shoulder is an uncomfortable feeling, and it does add costs. But the cost element should be looked at in the same way the government looks at monitors that are put in place as part of a settlement agreement: you have saved the money that would have been expended by a protracted trial, and avoided the risk of a much worse outcome.

The monitor then can become a kind of insurance policy. The monitor's recommendations can help the company implement a compliance program that will almost surely satisfy the government[17] and minimize the risk of any enforcement actions.[18] Plus, the

[12] https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq#Trustee Provision.

[13] *See*, e.g., the consent agreement with Reed Elsevier in connection with its acquisition of ChoicePoint, Inc., which included the appointment of a monitor to supervise the divestiture of certain assets to Thomson Reuters Legal Inc. In the Matter of Reed Elsevier NV, Dkt. No. C-4257 (June 5, 2009)(Decision and Order), https://www.ftc.gov/news-events/press-releases/2008/09/ftc-challenges-reed-elseviers-proposed-41-billion-acquisition (Sept. 16, 2008); In the Matter of Polyport International, Inc., Dkt. 9327 (Feb. 23, 2011)(Monitor Trustee Agreement); Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (Jan, 2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

[14] *See*, e.g., In the Matter of America Online, Inc., Dkt. No. C-3989 (Dec. 14, 2000) (Decision and Order).

[15] In the Matter of Rambus Inc., Dkt. No. 9302 (May 14, 2009).

[16] FTC v. ProMedica Health System Inc., No. 3:11-cv-00047 (N.D. Ohio Feb. 3, 2012), denying the FTC's request to amend a preliminary injunction to appoint a monitor since the "assertion of a probability of violations is, under the circumstances, neither appropriate nor convincing." The court's civil contempt power was available to punish injunction violations.

[17] The author is unaware of any compliance recommendations made by a monitor that were found to be inadequate by an enforcement agency.

[18] Reliance on the advice of a monitor, if not preventing an enforcement action, would certainly mitigate any action. In the securities area, an SEC administrative law judge recently found that when the Robare Group relied on third-party compliance experts, there was no intent to defraud. In the Matter of the Robare Group, Ltd., File No. 3-16047 (June 4, 2015)(Initial Decision).

monitor can be used tactically by the compliance department in the company to get things done when it may have been facing budget or headcount resistance previously.

The compliance program that results from the monitor and the compliance department working together can benefit from the monitor's breadth of experience in compliance. At a minimum, the monitor can serve the same function as an outside consultant brought in to the review the compliance program. The monitor provides another set of eyes to identify areas where the compliance program can be improved, with the added benefit of providing a "stamp of approval" that will carry a lot of weight with the government. The monitor would be expected to be familiar with best practices in the compliance field, and bring to bear technical expertise (e.g., how to establish certain information technology procedures to effectuate a compliance program) that might not be available in the company.

The monitor can also mitigate the trust issue. In some cases, a monitor is part of a settlement or judgment since the government or a court needs additional assurances that the company will follow a compliance program. If there is a history of not following prior agreements or orders, even with a change in management, additional assurances may be needed. Third parties who are impacted by the case may also ask that a monitor be imposed.[19]

V. OK, SO WHAT ABOUT APPLE?

The *Apple eBooks* pricing case, and the disputes with the appointed monitor have attracted a lot of attention. Probably anything involving Apple and legal proceedings will attract attention because of the company's prominence, but the case involving its efforts to change the way that electronic books were distributed presented a particularly thorny conundrum for the antitrust community. Did offsetting the power wielded by Amazon in the distribution of eBooks justify the actions that Apple took in arranging a new, commission-based, system of distribution with the major publishers? Providing competition is usually thought of as a good thing, but here, the government alleged (and proved at trial) that Apple essentially coordinated a conspiracy among publishers to do business the way that Apple wanted. The evidence seemed to show that prices rose under Apple's system, which is usually not the hallmark of competition.

As part of the resolution of the case, the trial judge imposed a compliance monitor to ensure that Apple's antitrust compliance polices would deter future anticompetitive conduct. The monitor was expected to work with an internal antitrust compliance officer who would report exclusively to the outside directors on Apple's audit committee, and would be responsible for training Apple's senior executives about the antitrust laws and would ensure that Apple abides by the final judgment.

Apple, which disagreed with the outcome of the case, also disagreed with the imposition of the monitor. But the evidence seemed to indicate that Apple did not have a history of robust antitrust compliance programs. For a company of its size, this was surprising. So, one might assume that a monitor would be employed to create an antitrust compliance program, or

[19] On the assumption that a monitor imposes burdens on the monitored company that might not be borne by a competitor, the risk of some non-price predation as a tactical move is present, of course. But the glass-house syndrome should keep competitors who have raised the issue and thereby invited scrutiny in line.

revitalize the existing program. Compliance with the specific terms of the court's order would be something new for the company in any case. Monitors are usually expected to have access to senior management and executives as needed, and Apple resisted this.

Apple objected to many of the monitor's actions and sought to disqualify the monitor. The district court refused,[20] and the appellate court ruled that there was no abuse of discretion in declining to disqualify the monitor.[21] The appellate panel was somewhat critical of the monitor's behavior, and noted that there was a difference in approach between an imposed monitor and one that is in place as a result of a voluntary settlement of a case. There were *ex parte* conversations between the monitor and the trial judge, and with the DOJ, to which Apple objected. Notwithstanding language regarding assessment of compliance programs 90 days after the monitor was appointed, the monitor got started quickly, apparently in response to conversations with the trial judge. Apple resisted, the monitor complained of foot-dragging, and attempted to talk directly to senior officers. At the same time Apple complained about the monitor's fees, which resulted in a charge in excess of $130,000 during the first two weeks.

The court noted that a monitor is subject to the same disqualification rules as a judge: lack of impartiality, personal bias or prejudice, or a financial interest in the subject matter.[22] The appellate court could not say that the district court abused its discretion when it concluded that the monitor's ex-parte communications and declaration in opposition to Apple's attempts to stop or remove the monitor did not justify his removal. While the monitor's rate was high, it was approved by the court, and, since transparency is important in these matters, a negotiated reduced rate should not have been placed under seal. The amount of the fee would not work a hardship on Apple, and the mere fact that the monitor received a fee did not mean that he had a disqualifying financial interest.

As noted in a concurring opinion by Judge Furman, a dispute resolution procedure was established by the district court to resolve any future objections. If the parties could not resolve it themselves, then they could bring it to the attention of the court. Apple did not use this process in good faith. Rather it largely sat on its hands, allowing the relationship to worsen without the district court's knowledge. While the monitor may have used poor judgment in some of his actions, the court could not be faulted in failing to address issues of which it was unaware.

If one looks back at the Morford and Grindler memos from the Justice Department, most of the contentious issues between Apple and the monitor were addressed in those documents. If the parties have a dispute, it should be surfaced early. A monitor should not stray into areas unrelated to the violation, but does need to understand the context of the violation. From what has been reported, it does not appear that the Apple monitor went beyond his mission of making sure that an antitrust compliance program was implemented. Apple objected to the way he went about that mission as overly intrusive. The monitor viewed it as being diligent in following his mandate.

[20] United States v. Apple Inc., 992 F. Supp. 2d 263 (S.D.N.Y. 2014).
[21] United States v. Apple Inc., No. 14-60, 2015 U.S. App. LEXIS 8854 (May 28, 2015).
[22] 28 U.S.C. § 455, Fed. R. Civ. P. 53.

VI. WHAT DOES IT ALL MEAN?

Monitors can provide a lot of assistance to both parties as part of a negotiated resolution to a case. The government gets a quicker resolution than would be provided by a full-blown trial, and it has assurances that its remedies will be followed without devoting its internal resources to supervision. The defendant will have the benefit of an expert helping it implement a program to comply with the requirements of the antitrust laws and any specific terms of the settlement.

Monitors that are appointed by a court to implement a judgment may not be welcomed by the defendant. Nevertheless, under current DOJ policy, the conditions under which they are appointed certainly indicate that a monitor is appropriate: recidivism, failure to accept responsibility, or failure to implement a compliance program. The Apple objections to the activities of its monitor were unique, but do serve to illustrate that the terms of a court-appointed monitor's duties need to be consistently understood by all parties, even if the monitor is greeted with "chilly reticence" rather than "warm hospitality."[23] Apple seemed to engage in some of the same conduct as A.U. Optronics, the only other case (so far) where the Antitrust Division has sought a court-appointed monitor. But regardless of the reasons why a monitor was imposed, Apple failed to avail itself of the process that was available to resolve disputes with the monitor. Once it did, things seemed to get better.

So, if you have a chance to negotiate for a monitor, use the opportunity to get the best compliance program you can. See the monitor as your ally in improving compliance beyond what you might otherwise have been able to accomplish on your own. If the monitor comes as part of a judgment, even if your case is on appeal, make sure that you understand exactly what the monitor can do under the terms of the judgment. There should rarely be a reason not to follow the monitor's recommendations, but if it seems like there is overreaching, communicate with the court to resolve the differences.

[23] United States v. Apple Inc., No. 14-60, 2015 U.S. App. LEIS 8854 (May 28, 2015), Slip Op. at 5, n.1.

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Antitrust Snoops on the Loose

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Antitrust Snoops on the Loose

Keith N. Hylton[1]

Perhaps the most fascinating feature of the continuing Apple litigation—based on the dubious claim that the tech giant conspired to fix e-book prices—is Manhattan district court Judge Denise Cote's imposition in October 2013 of a monitor to watch over the company's compliance with antitrust laws. The monitor, a lawyer named Michael Bromwich, was put in place over Apple's objections and has conducted a wide-ranging investigation, demanding meetings with top executives and board members. He billed Apple for more than $138,000 after two weeks on the job.[2]

Compliance monitors have become a popular item on the wish lists of antitrust plaintiffs and prosecutors. However, the appointment of such a monitor is beyond the statutory authority of judges in antitrust cases, and unsupportable on the basis of other cases in which courts have appointed monitors.

Numerous courts have reflected on the scope of judicial authority under the 1890 Sherman Antitrust Act; this scrutiny is important because antitrust laws are all-encompassing. In a competitive market, everything a business does involves competition. A statute that regulates competition therefore provides a potential basis to regulate every aspect of a business charged with violating it.

But courts have never read their authority under the Sherman Act so broadly. In the 1897 case *U.S. v. Trans-Missouri*,[3] the Supreme Court noted it could not determine "reasonable prices" because such an inquiry would require information that judges do not possess. In 1953 the court ruled in *U.S. v. United Shoe*[4] that the judiciary could not regulate United Shoe's pricing because such an effort, as Justice Charles Wyzanski noted in his opinion, would turn "the Court into a public utility commission."

More recently, in the 2004 case *Verizon v. Trinko*,[5] Justice Antonin Scalia said that he was reluctant to force Verizon to give access to its telecommunications network to rivals because such an order would require "the Court to assume the day-to-day controls characteristic of a regulatory agency." In the same opinion he said that the Sherman Act does not invite "antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited."

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[2] On May 28, 2015, the U.S. Court of Appeals for the Second Circuit in New York rejected Apple's bid to disqualify Michael Bromwich as antitrust compliance monitor.

[3] *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

[4] *United States v. United Shoe Machinery Corp*. 391 U.S. 244 (1968).

[5] *Verizon v. Trinko*, 540 U.S. 398 (2004).

In short, courts have pretty consistently viewed their authority under the Sherman Act as much narrower than that of a regulatory agency. They have generally not interpreted the statute as granting them authority to regulate the details of pricing, output, product design, and similar matters. Apple's compliance monitor is flatly inconsistent with this view of limited statutory authority. Mr. Bromwich has assumed he has the power to inquire into pricing and product design. One of his targets for interrogation was Jonathan Ive, famous as Apple's chief technology designer.

If judges do not have the authority to regulate pricing and product design, how can they have the power to delegate such authority to a compliance monitor? The answer is obvious: They don't.

I should be clear that I am not a fan of constraining judges generally. The overwhelming majority of them are very good at what they do. Moreover, judges have inherent authority to impose orders that enable their decisions to take practical effect. If they did not have such authority, their judgments would be ignored by losing defendants.

But antitrust is special. A consistent line of authority-limiting interpretation has developed around the Sherman Act precisely because thoughtful judges have realized that if their authority is read expansively, the statute would open the door to the most intrusive regulatory system imaginable. This was clearly not envisioned by the framers of the statute.

It is true that compliance monitors have been appointed in other areas of litigation. One important case is *Sheet Metal Workers v. EEOC*,[6] in which the Supreme Court upheld the appointment of an Equal Employment Opportunity Commission monitor to oversee the union's efforts to racially diversify membership.

However, there is an enormous difference between a monitor overlooking racial diversity and a monitor overlooking antitrust compliance. The diversity monitor has a limited scope of interest; either the union is admitting minority members or it is not. The antitrust monitor has an unlimited scope. There is almost nothing a company does that cannot be viewed as affecting his mission. The precedent established by an EEOC monitor isn't sufficient justification for an antitrust monitor like the one at Apple.

It is time for courts to start questioning requests for monitors under the Sherman Act. The statute was not designed to enable the government to impose an invasive scheme of surveillance and control over businesses—like the Communist Party cells embedded in Chinese firms.

Courts have often described the Sherman Act as a charter of free enterprise. The Cote-Bromwich compliance monitor model turns the Sherman Act into a charter of unending encroachment by the state into the private economy.

[6] *Sheet Metal Workers v. EEOC* 478 U.S. 421 (1986).

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Antitrust Compliance 2.0: The Use of Structural Analysis and Empirical Screens to Detect Collusion and Corruption in Bidding Procurement Processes

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Antitrust Compliance 2.0: The Use of Structural Analysis and Empirical Screens to Detect Collusion and Corruption in Bidding Procurement Processes

Rosa M. Abrantes-Metz & Elizabeth Prewitt[1]

I. INTRODUCTION

Collusion among bidders is a recurring problem in both public and private procurements. This is evident from recent U.S. enforcement actions and those of other jurisdictions across the globe targeting bid-rigging cartels and resulting in substantial fines, civil damages, and terms of incarceration for individuals in jurisdictions with criminal penalties. The harm caused by such cartels is perhaps most keenly felt by government entities in emerging markets with limited budgets to develop and maintain infrastructure and obtain necessary goods and services. But private companies making significant purchases through tender or bidding processes are similarly vulnerable.

Moreover, collusive conduct between horizontal competitors is not the only means by which the integrity of such procurement processes can be undermined; individuals with purchasing authority have facilitated bid-rigging cartels in return for bribes or kickbacks. Such corruption can therefore operate hand-in-hand with bid-rigging, often increasing the potential harm and likelihood of detection by enforcers and civil litigants.

Instead of waiting for the proverbial "knock on the door" by an enforcer, companies are increasingly adopting proactive detection methods to assess risk and target compliance efforts a trend that will arguably be encouraged by recent statements by the U.S. Department of Justice ("DOJ") warning that compliance programs are expected to incorporate auditing and testing functions. Similarly, in recent years some enforcers have eschewed waiting for leniency applicants to come forward with evidence of a cartel in favor of examining market structures and behavioral patterns to detect collusive conduct.

This article explores how the increase in enforcement actions targeting bid-rigging and corruption globally raises the risk of detection, and how screens can be used as a proactive tool to successfully uncover this conduct.

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II. INCREASED DETECTION RISKS

A. Increased Antitrust Enforcement Directed at Bid-Rigging Cartels Raises the Risk of Detection

Bid-rigging poses a substantial risk of large administrative and criminal fines and penalties, as demonstrated by recent enforcement actions across the globe. In Fiscal Year 2014 alone, the Antitrust Division of the DOJ collected $1.3 billion in criminal fines and penalties,[2] and approximately $760 million of this total 59 percent came from cases involving at least some allegation of bid-rigging.[3]

Penalties arising from such conduct can extend beyond fines and civil damages to include debarment from future government procurements. For example, the World Bank proscribes behavior that is corrupt, fraudulent, collusive, coercive, or obstructive,[4] and actions that amount to "collusion"—such as bid-rigging—can therefore lead to debarment from contracts funded by the World Bank.[5]

While historically examples of bid-rigging cartels have most frequently appeared in infrastructure industries such as construction and road paving, cartels have been found in a number of industries and taken a number of forms. In connection with the DOJ's ongoing investigation into market allocation, price-fixing, and bid-rigging in the automotive parts industry, as of June 2015, 55 individuals have been charged and 35 companies have pleaded guilty or agreed to plead guilty with fines totaling more than $2.5 billion.[6] In those matters, bid-rigging presented with a range of other anti-competitive conduct. But bid-rigging in its most classic form has been the core or sole antitrust allegation in a number of other DOJ investigations, such as in the food distribution industry, where the NYC Board of Education's school food contracts to serve 1.1 million schoolchildren were rigged by competing suppliers.[7]

And enforcement actions have also been directed at less traditional forms of bid-rigging, often called "a-typical" or "hub and spoke" cartels.[8] For example, the DOJ filed a number of charges in the financial service industry in connection with its investigation of brokers conspiring with competing providers to rig bids for municipal bond investment contracts, and as

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[2] Bill Baer, Assistant Attorney General, Antitrust Division, DOJ, Statement before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary, U.S. House of Representatives 2-3 (May 15, 2015), *available online at* http://www.justice.gov/atr/public/testimony/313877.pdf.

[3] This percentage was calculated by reviewing all DOJ press releases during this period.

[4] World Bank, *Guidelines on the Procurement of Goods, Works, and Non-Consulting Services*, Art. 1.16(a) (Jan. 2011, rev. July 2014), *available online at* http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement_GLs_English_Final_Jan2011_revised_July1-2014.pdf.

[5] For example, in 2008 and 2009, the World Bank debarred seven firms, including two for up to eight years, for alleged bid-rigging in the Philippines. *See* Bob Davis, *World Bank Bans Chinese Firms Due to Bid-Rigging Allegations*, WALL ST. J. (Jan. 15, 2009), *available online at* http://www.wsj.com/articles/SB123200130285285123.

[6] DOJ, Press Release, *Current and Former Executives of an Automotive Parts Manufacturer Indicted for Roles in Conspiracy to Fix Prices—Investigation Has Resulted in Charges Against 90 Individuals and Corporations* (May 21, 2015), http://www.justice.gov/atr/public/press_releases/2015/314206.htm.

[7] *See* Indictment, *United States v. Penachio*, No. 00 CR 583 ¶¶ 27-29 (S.D.N.Y. May 31, 2000).

[8] Elizabeth Prewitt & Greta Fails, *Indirect information exchanges to hub-and-spoke cartels: enforcement and litigation trends in the United States and Europe*, 1 COMP. L. & POL'Y 63, 63-64 (2015).

of May 2015, seventeen individuals have been convicted or have pleaded guilty.[9] Moreover, states have filed their own actions targeting bid-rigging conduct even when there has been no parallel DOJ enforcement action, as we have seen perhaps most notably in New York State's insurance brokerage rigging investigation.[10]

Investigations targeting bid-rigging have become increasingly prevalent over the last few years. In the DOJ's ongoing real estate foreclosure auction-rigging investigation over 50 individuals have pleaded guilty or agreed to plead guilty, and 20 other real estate investors have been charged.[11] And in connection with an ongoing DOJ investigation into the rigging of municipal tax liens in New Jersey over 20 individuals and entities have been charged, with 15 guilty pleas to date.[12] And, in recent weeks, we have seen both a Georgia real estate investor plead guilty to conspiring to rig bids at public real estate foreclosure actions[13] and five school bus owners in San Juan, Puerto Rico indicted for participating in a conspiracy to rid bids in a Caguas municipality auction for public school bus contracts.[14] But these recent U.S. actions are only part of a global enforcement trend.

Worldwide enforcement trends also show an increased focus on bid-rigging. For example, in 2013 South Korea's Fair Trade Commission ("KFTC") formed an investigative division focusing exclusively on bid-rigging,[15] and in 2014 the Malaysia Competition

[9] *See, e.g.*, DOJ, Press Release, *Former Bank of America Executive Sentenced to Serve 26 Months in Prison for Role in Conspiracy and Fraud Involving Investment Contracts for Municipal Bond Proceeds* (May 18, 2015), http://www.justice.gov/atr/public/press_releases/2015/314127.htm (former managing director of Bank of America's municipal derivatives group was sentenced to serve 26 months in prison); DOJ, Press Release, *Three Former UBS Executives Sentenced to Serve Time in Prison for Frauds Involving Contracts Related to the Investment of Municipal Bond Proceeds* (July 24, 2013), http://www.justice.gov/atr/public/press_releases/2013/299604.htm (former UBS AG executives sentenced to serve 18 months in prison with a U.S. $1 million fine, 27 months in prison with a $400,000 fine, and sixteen months in prison with a $300,000 fine).

[10] In October 2004, the New York State Attorney General filed a civil complaint against Marsh & McLennan ("Marsh"), an insurance broker, alleging that Marsh had solicited rigged bids for insurance contracts and had received improper contingent commission payments in return for steering its clients to a select group of insurers. Complaint, *State v. Marsh & McLennan Cos.*, No. 04-43342 (N.Y. Sup. Ct. Oct. 14, 2004); *see also* William Kolasky & Kathryn McNeece, *Contingent Commissions and the Antitrust Laws: What Can We Learn from the In re Insurance Brokerage Antitrust Litigation?*, Bloomberg BNA Antitrust & Trade Regulation Report (Apr. 10, 2015), *available online at* http://www.hugheshubbard.com/Documents/Contingent%20Commissions%20and%20the%20Antitrust%20Laws.pdf.

[11] DOJ, Press Release, *Two Northern California Real Estate Investors Agree to Plead Guilty to Bid Rigging and Fraud Conspiracies at Public Foreclosure Auctions* (Apr. 23, 2015), http://www.justice.gov/atr/public/press_releases/2015/313378.htm.

[12] DOJ, Press Release, *Former New York Tax Liens Investment Company Executive Pleads Guilty for Role in Bid Rigging Scheme at Municipal Tax Lien Auctions* (May 12, 2014), http://www.justice.gov/atr/public/press_releases/2014/305817.htm.

[13] DOJ, Press Release, *Georgia Real Estate Investor Pleads Guilty to Bid Rigging and Fraud Conspiracies at Public Real Estate Foreclosure Auctions* (June 5, 2015), http://www.justice.gov/atr/public/press_releases/2015/314842.htm. The investor also pled guilty to mail fraud. *Id.*

[14] DOJ, Press Release, *Five School Bus Owners Indicted for Bid-Rigging and Fraud Conspiracies at Puerto Rico Public School Bus Action* (May 21, 2015), http://www.justice.gov/atr/public/press_releases/2015/314217.htm. The school bus owners were also charged with mail fraud and conspiracy to commit mail fraud. *Id.*

[15] Jae-Chan Jeong, *Korea: Korean Fair Trade Commission*, Global Competition Review Asia-Pacific Antitrust Review 2015, http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2755/korea-korea-fair-trade-

Commission ("MyCC") announced the launch of new initiatives to detect bid-rigging.[16] In the last few weeks alone, we have seen examples of enforcement actions directed at bid-rigging, including the Russian Federal Antimonopoly Service ("FAS") announcement of fines against four companies for bid-rigging cartel behavior,[17] and an individual who participated in a bid-rigging conspiracy related to Canadian government contracts was sentenced.[18] These are just recent anecdotal examples of enforcement actions resulting from the increased scrutiny of procurements for anti-competitive conduct.

Patterns of enforcement actions occurring over the last decade warn that future enforcement actions should be anticipated in jurisdictions that embrace leniency programs and in industries that have already experienced aggressive enforcement. This is, in part, because companies implicated in existing investigations may be rewarded with immunity from fines in exchange for being the first to report on any separate undisclosed conspiracy, as well as a reduction in fines related to the prior conspiracy. The policy, known as amnesty plus, has been extremely successful in incentivizing targeted companies to race to disclose any additional misconduct they have undertaken before their co-conspirators[19] and that trend is expected to continue.

B. The Rise in Anti-Corruption Enforcement Further Increases the Risk of Detection

While collusion and corruption both pose their own challenges to the integrity of procurements, they "may frequently occur in tandem, and have a mutually reinforcing effect."[20]

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commission/. In February 2014, Korean courts sentenced three individuals to six months' imprisonment for rigging bids on tenders to supply cables to nuclear power plants under the Penal Code and one individual for two years' imprisonment for rigging bids on tenders for construction projects under the Construction Industry Regulation Act.

[16] Press Release, Malaysia Competition Commission, *MyCC Launches Two Handbooks on Bid Rigging* (Nov. 4, 2014), http://mycc.gov.my/wp-content/uploads/2014/07/News-Release-MyCC-Launches-Two-Bid-Rigging-Handbooks_041114_kch.pdf. In addition to the handbooks, the MyCC launched a number of seminars attended by procurement officials country-wide. *Id.* at 2. Some of these materials are available in English. *See, e.g.*, Malaysia Competition Commission, *Help Us Detect Bid Rigging* (June 2014), http://mycc.gov.my/wp-content/uploads/2014/06/MYCC_Handbook_HelpUsDetectBidRigging.pdf; Malaysia Competition Commission, *Overview of Bid Rigging Under the Competition Act 2010* (June 2014), http://mycc.gov.my/wp-content/uploads/2014/06/BID-RIGGING-UNDER-THE-CA2010-Final-iskandar.pdf. The MyCC announced in 2015 that—working with the Malaysian Anti-Corruption Agency—it intended to focus on bid-rigging. Veena Babulal, *MyCC to enforce anti bid-rigging laws soon*, NEW STRAIT TIMES ONLINE (May 16, 2015), http://www.nst.com.my/node/84442.

[17] MLex, *Russian antitrust watchdog to fine bid-rigging cartel* (June 8, 2015). FAS also announced that it had forwarded information on the companies' executives to the pertinent authorities to pursue criminal charges against them. *Id.*

[18] MLex, *Former Microtime employee sentenced after pleading guilty to bid-rigging* (May 21, 2015). The employee must serve an 18-month conditional sentence, perform 60 hours of community service, and pay a $23,000 fine. *Id.*

[19] *See* Scott D. Hammond & Belinda A. Barnett, U.S. DOJ Antitrust Division, *Frequently Asked Questions Regarding the Antitrust Division's Antitrust Program* 8 (Nov. 19, 2008) ("A large percentage of the Division's investigations have been initiated as a result of evidence developed during an investigation of a completely separate conspiracy."), http://www.justice.gov/atr/public/criminal/239583.pdf.

[20] OECD, Report, *Collusion and Corruption in Public Procurement* 1 (2010), *available online at* http://www.oecd.org/competition/cartels/46235884.pdf.

Over the last several years we have seen a rise in U.S. Foreign Corrupt Practices Act ("FCPA") charges targeting bribery of foreign officials, along with increased anti-corruption efforts worldwide.[21]

The policy argument for increased enforcement is plain to see. A 2012 study by the European Commission estimated that corruption could be responsible for increasing the cost of public procurement in Europe by 20-25 percent.[22] And such incremental costs associated with corruption are perhaps even more deeply felt in emerging markets where funds to build and service critical infrastructure are more limited.[23]

Given the potential impact on government budgets, enforcers around the globe are increasingly turning the microscope on public bidding to uncover evidence of corruption involving the public officials overseeing the bidding process and the companies submitting bids. These investigations have revealed evidence of agreements between competing bidders to rig bids and fix prices, at times paying bribes to officials to facilitate these collusive agreements.

When bribery payments are made to local government officials to facilitate the allocation of contracts as part of a bid-rigging conspiracy, these can and have given rise to FCPA violations. And in circumstances where the Antitrust Division has discovered evidence of corrupt payments in the course of international cartel investigations, it has charged violations of both Sherman Act and the FCPA simultaneously. For example, in 2011 Bridgestone Corporation was charged with conspiracy to rig bids and to violate the FCPA because Bridgestone's employees bribed sales agents at state-owned enterprises in Argentina, Brazil, Ecuador, Mexico, and Venezuela, among other countries, to secure the confidential information necessary to effectuate the bid-rigging scheme.[24] While this matter stands as an atypical example of an Antitrust Division enforcement action directed at a FCPA violation, the Criminal Division of the DOJ has a dedicated FCPA unit with a mandate to detect and prosecute such offenses.

It should be noted that there are other types of corruption schemes operating hand-in-hand with schemes to rig bids, but that are not charged as violations of the FCPA or the Sherman Act. Most often these enforcement actions involve persons within the contracting authority or entity engaging in improper communication with one or more of the bidding companies and transmitting sensitive bidding information to secretly assist one or more companies to win contracts. For example, in March 2015, the DOJ announced a plea agreement with Asem Elgawhary, a former vice president of Bechtel Corporation and the general manager of a joint venture with Egypt's state-owned electrical company. Elgawhary accepted $5.2 million in kickbacks from three power companies to manipulate the bidding process for state-run power

[21] *See generally* Hughes Hubbard, *FCPA/Anti-Bribery Alert Winter 2015* 1-4 (February 2015), http://www.hugheshubbard.com/PublicationDocuments/FCPA%20Anti-Bribery%20Alert%20Winter%202015.pdf.

[22] European Commission, *Frequently Asked Questions: How corruption is tackled at EU level* (Feb. 12, 2012), http://europa.eu/rapid/press-release_MEMO-12-105_en.htm?locale=en.

[23] OECD, Report, *Collusion and Corruption in Public Procurement* (2010), *available online at* http://www.oecd.org/competition/cartels/46235884.pdf.

[24] Plea Agreement, *United States v. Bridgestone Corporation*, No. 4:11-cr-00651 ¶ 4(k)-(p) (S.D. Tex. Oct. 5, 2011) (No. 21).

contracts and was ultimately sentenced to serve 42 months in jail.[25] While Elgawhary was not charged by the DOJ with bid-rigging or a FCPA violation, these facts depict a typical mixture of corruption and collusion.

In a somewhat prototypical case involving kickbacks and bid-rigging prosecuted by the Antitrust Division, *United States v. McDonald*, a project manager for a prime contractor facilitated a bid-rigging conspiracy between subcontractors to create the false appearance that the competitive bidding process required for the government-funded projects was followed.[26] McDonald accomplished this by providing confidential information to the subcontractor paying him kickbacks to effectuate the bid-rigging scheme.

Still other examples and variations of this hybrid of corruption and collusion conduct exist and will be uncovered by enforcers or entities employing tools to detect the telltale patterns.

In situations where bribery appears in connection with a bid-rigging, whether as a violation of the FCPA or as commercial bribery, an overlap in U.S. enforcement efforts should be expected. Moreover, the rise of anti-corruption enforcement in other jurisdictions means that the long arm of U.S. law is not the only enforcement threat capable of reaching this conduct. We are seeing more and more countries adopt and aggressively enforce their own foreign corruption laws. In fact, TRACE International recently found that the number of non-U.S. enforcement actions involving the bribery of foreign officials nearly doubled between 2013 and 2014.[27]

Other jurisdictions are recognizing the connection between bid-rigging and corruption, and are directing their enforcement resources to examine procurements accordingly. For example, in an investigation of corruption and collusion relating to the procurement of combat boots for the German Armed Forces, it was discovered that an employee of the Armed Forces Procurement Agency passed on confidential information to facilitate collusion among bidders in return for kickbacks. The German state prosecutor's office pursued corruption charges while the German Competition Authority (Bundeskartellamt) issued fines after it found that six companies used the information from the official to submit their bids. Notably, this behavior was investigated after an internal procurement agency review found irregularities. Other enforcers are also adopting a coordinated approach to detect collusion and corruption.[28] It is in this context that screens are considered a means to uncover both forms of conduct. In fact, the Swedish Competition Authority (Konkurrensverket) issued a statement last month that it has begun employing a number of screens to analyze procurement data searching for tell-tales of cartel behavior with the goal of increasing the likelihood of detection, and specifically noted its

[25] DOJ, Press Release, *Former Bechtel Executive Sentenced to 42 Months in Prison and Ordered to Forfeit $5.2 Million in Connection with Kickback Scheme* (Mar. 23, 2015), http://www.justice.gov/opa/pr/former-bechtel-executive-sentenced-42-months-prison-and-ordered-forfeit-52-million-connection. He was sentenced to 42 months in prison, and to forfeit the $5.2 million he received, after pleading guilty to mail fraud, conspiracy to commit money laundering, obstruction, and tax offenses. *Id.*

[26] DOJ, Press Release, *Former Project Manager Sentenced to Serve Time in Prison for Role in Bid Rigging and Other Fraudulent Schemes Involving Two EPA Superfund Sites in New Jersey* (Mar. 3, 2014), http://www.justice.gov/atr/public/press_releases/2014/304133.htm.

[27] TRACE International, *Global Enforcement Report 2014*, Fig. 3 (June 2015).

[28] *See* MLex, *Canada's competition enforcers tapping police about links between bid-rigging, bribery* (June 9, 2015).

collaboration with the Swedish National Anti-Corruption Unit by exchanging anonymized information regarding suspected markets and pre-studies.[29]

Given the long list of competition and anti-corruption enforcement authorities turning the microscope on procurement processes, the risk of detection for both collusion and corruption has increased dramatically. A compliance audit that detects a bid-rigging scheme therefore offers the potential of detecting related corruption conduct in time to remediate or mitigate before being uncovered by others.[30] Systems for review of public procurement, however, are typically designed largely to make sure that the rules for bidding processes are followed, and detecting bid-rigging is often not the primary objective. The use of screens as part of a procurement review should be explored as a means to detect patterns consistent with collusion and corruption rather than competition.

C. The Use of Structural Analysis and Empirical Screens to Detect Collusion

There are essentially two different types of economic analyses that flag the possible existence of a conspiracy to rig bids.[31] The first can be classified as a "structural approach," which looks at the structure of the industry at hand, "scoring" the likelihood of collusion based on factors such as homogenous products, few competitors, stability of demand, and other commonly acknowledged markers of environment conducive to collusion.[32] The second is empirical and adopts a "behavioral," "outcomes," or "empirical" approach. Here economists look at markets' and participants' behaviors as translated into observable data and then apply screens for conspiracies and manipulations to address whether the observed behavior is more or less likely to have been produced under an explicit agreement. It is in connection with this approach that "screens," or sometimes "empirical screens," are used. These rely on time-series, cross-sectional data, and/or panel data sets with variables that measure market outcomes including prices, volumes, and market shares to detect potential anticompetitive behavior.

In brief, "screening" refers to the method for flagging collusive behavior through economic and statistical analyses. A screen uses statistical tests based on econometric models and a theory of the alleged collusion designed to: (1) identify whether collusion, manipulation, or any other type of cheating may exist in a particular market; (2) who may be involved; and (3) how long it may have lasted. Screens typically use available data such as prices, bids, quotes, spreads,

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[29] Konkurrensverkt Swedish Competition Authority, *Screening for Cartels in Procurement Procedures and the Importance of Inter-agency Cooperation* (May 7, 2015), *available online at* http://www.konkurrenverket.se/globalassets/press/tal-artiklar/150507 dan-sjobloms-anforande-ecd.pdf.

[30] Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, Remarks at the American Conference Institute 7th National Conference on Foreign Corrupt Practices Act, *International Cartels: the Intersection Between FCPA Violations and Antitrust Violations* (Dec. 9, 1999), *available online at* http://www.justice.gov/atr/public/speeches/3981.htm.

[31] Joseph Harrington, *Detecting Cartels*, HANDBOOK OF ANTITRUST ECONOMICS (P. Buccirossi, ed. 2008).

[32] A general list of these factors is further detailed in *Proof of Conspiracy under Antitrust Federal Law*, AMERICAN BAR ASSOCIATION EDS., Ch. VIII (April 2010). A non-exhaustive "check list" of characteristics that influence the susceptibility of a market to tacit or explicit collusion includes: number of firms and market concentration, differences among competitors, product heterogeneity, demand volatility, barriers to entry, benefits of cheating, transparency, and multi-market contact.

market shares, volumes, and other data to identify patterns that are anomalous or highly improbable other than as a product of collusion.

Over the last few years, economic analysis in general, and empirical screens in particular, have been increasingly relied upon to detect behavior consistent with collusion and manipulation.[33] Competition authorities and other agencies worldwide have begun using screens to detect possible market conspiracies and manipulation, and defendants and plaintiffs have begun adopting them as well.[34]

Focus and interest in this area have increased dramatically in recent years. For example, in October 2013 the OECD held a policy roundtable on "Ex Officio cartel investigations and the use of screens to detect cartels."[35] In this discussion we see how the adoption of screens has become increasingly popular with several countries but yet, at the same time, we have learned that other jurisdictions have not yet adopted screens, alleging these are "too resource" intensive, provide "too many false positions," or simply that "screens don't work." In a previous article summarizing her participation at the 2013 OECD Policy Roundtable, Abrantes-Metz (2014)[36] rebuts these and other arguments against screens and makes the case for their effectiveness.

III. HOW STRUCTURAL AND EMPIRICAL ANALYSES CAN HELP DETECT COLLUSION IN BIDDING

A. Applying Economic Analyses to Available Data—Using What You've Got

A lack of robust data is the greatest challenge to detecting collusion in bidding through economic analysis. This is particularly problematic for companies who are on the sales side, but yet seek to ensure that their employees are not engaged in anticompetitive conduct. Typically, their compliance programs canvas a company's organizational structure to identify which employees are likely to have contacts with competitors, and then train them on the "do's and don'ts."

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[33] A trend detailed, for example, in Rosa Abrantes-Metz & Patrick Bajari, *Screens for Conspiracies and their Multiple Applications*, 24(1) ANTITRUST MAG. (Fall, 2009); Rosa Abrantes-Metz & Patrick Bajari, *Screens for Conspiracies and their Multiple Applications*, 6(2) COMPETITION POL'Y INT'L, 129-144 (2010); and Kai Hüschelrath, *Economist's Note: How are Cartels Detected? The Increasing Use of Proactive Methods to Establish Antitrust Infringements*, J. EUR. COMPETITION L. & PRACTICE, 1-7 (September 2010).

[34] Surveys of screening methodologies and their multiple applications can be found in Harrington, *supra* note 2; Joe Harrington & Joe Chen, *Cartel Pricing Dynamics with Cost Variability and Endogenous Buyer Detection*, 24 INT'L J. INDUS. ORG. 1185-1212 (2006); and Abrantes-Metz & Bajari, *Id.* The use of these methods in antitrust litigation is detailed in the American Bar Association's *Proof of Conspiracy under Antitrust Federal Laws*, which specifically describes in Chapter VIII the role of the economic expert in proving a conspiracy and details the use of screens in this context. Rosa Abrantes-Metz & D. Daniel Sokol, *Antitrust Corporate Governance and Compliance*, HANDBOOK OF ANTITRUST ECONOMICS (forthcoming) and Rosa Abrantes-Metz, Patrick Bajari, & Joseph Murphy, *Enhancing Compliance Programs through Antitrust Screening*, 4(5) ANTITRUST COUNSELOR (September 2010) makes the case for the use of screens in corporate antitrust compliance programs.

[35] *See generally* OECD, *Ex officio cartel investigations and the use of screens to detect cartels* (2013), *available online at* http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf. The panel consisted of Rosa M. Abrantes-Metz, William E. Kovacic, and Maarten Pieter Schinkel.

[36] R. Abrantes-Metz submission, OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* 2-3 (2009), *available online at* http://www.oecd.org/daf/competition/cartels/42851044.pdf.

If audits are conducted, the focus is on available internal information, and such audits frequently involve reviewing documentation from trade association meetings or surrounding sales transactions with competitors, or even sampling emails for improper contacts with competitors. Little focus is placed on reviewing externally available information, which is often a fruitful avenue to assess risk.

Running background checks on individuals is one way to draw upon externally available data to help assess risk, and these types of audit are now more routinely conducted than previously in our current era of increased anti-corruption enforcement. But now we are also seeing such audits in connection with public procurement. For example, China's NDRC and Supreme People's Procuratorate announced this year that they would be running criminal background checks on the winners in any project that requires a bidding process.[37]

As noted earlier, there are numerous ways to assess the degree of risk of anti-competitive conduct by looking at the structure of an industry and its participants. Collusion among potential contracting firms can be facilitated where certain market characteristics prevail, and these "industry, product, and service characteristics" include:

- a small number of companies,
- little or no entry,
- market conditions,
- industry associations,
- repetitive bidding,
- identical or simple products or services,
- few if any substitutes, and
- little or no technological change.[38]

For this reason, structural patterns should be examined. And, as noted earlier, future enforcement efforts can sometimes be anticipated in jurisdictions that embrace leniency programs and have experienced aggressive enforcement in an industry. By analyzing these factors together, an entity is better equipped to assess its risk and what further measures can and should be taken.

In addition to examining structural patterns and the enforcement environment, entities procuring goods or services through bidding may have the requisite data readily available to help make the use of behavioral screens effective. Other entities may be able access that data externally, especially in connection with certain public procurements.

Bid-rigging in competitive tenders is a productive setting to apply screens for three reasons:

1. Competitive tenders account for a large volume of economic output. Public sector procurement, which often uses some form of competitive bidding, on average accounts

[37] PaRR Alert, *China imposes criminal bribery background checks on bidding and tendering activities* (June 9, 2015).

[38] OECD, *supra* note 35.

for about 10-15 percent of an economy's output.[39] In addition, competitive bidding is widely used in financial markets, privatization of public assets, real estate, and many other transactions.

2. Bid-rigging is a common antitrust offense. As noted above, bid-rigging has been alleged in nearly 60 percent of the criminal cases filed by the DOJ in the last year.
3. Markets that use competitive bidding are frequently rich in data, containing not just the final price but also the individual bids and, in many cases, information related to the components of the bids themselves. In many countries, statutes require the public disclosure of bids.

There is a large body of empirical literature on collusion in auctions that discusses the implementation of various types of screens.[40] While these papers span a wide variety of industries, researchers have identified common patterns that exist when collusion is known or suspected. One common analysis involves identifying bidding patterns that are very unlikely to be generated in a true competitive bidding process, and another compares the market suspected of bid-rigging against a comparable unsuspected benchmark. As discussed below, both methods should be considered.

B. Screening for Bids That are Highly Correlated Even After Controlling for Legitimate Market Conditions

This type of screening looks for specific improbable events that can only be rationally explained by the existence of collusion. In sealed-bid settings, firms usually submit their bids simultaneously to be later read at a fixed date. In the public sector, the contract is typically then awarded to the lowest bidder. If there is no collusion between firms, then the bidders have not formulated each of their bids in consideration of the others' bids. As a result, we should expect the bids to be independent across bidders after we control for information that is observed by all bidders, such as variables that influence cost or market power.

On the other hand, if firms collude, they are coordinating their bids. This coordination tends to destroy the independence of the bids and can be detected through the use of statistical

[39] World Trade Organization, *WTO and government procurement*, https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm.

[40] P. Bajari & G. Summers, *Detecting Collusion in Procurement Auctions*, 70 ANTITRUST L. J. 143 (2002). *See* Robert H. Porter & J. Douglas Zona, *Detection of Bid Rigging in Procurement Auctions*, 101 J. POL. ECON. 518 (1993) (examining auctions for highway construction projects in Long Island); Laura H. Baldwin, et al., *Bidder Collusion at Forest Service Timber Sales*, 105(4) J. POL. ECON. 657-699 (1997) (examining timber auctions in the Pacific Northwest); Robert H. Porter & J. Douglas Zona, *Ohio School Milk Markets: An Analysis of Bidding,* 30 RAND J. ECON. 263 (1999) (examining the procurement of school milk in Ohio); Martin Pesendorfer, *A Study of Collusion in First-Price Auctions*, 67 REV. ECON. STUD. 1 (2000)**;** Peter Crampton & Jesse Schwartz, *Collusive Bidding: Lessons from the FCC Spectrum Auctions*, 17 J. REG. ECON., 229-252 (2000); Patrick Bajari & Jungwon Yeo, *Auction Design and Tacit Collusion in FCC Spectrum Auctions*, forthcoming in INFORMATION ECON. & POL'Y; Patrick Bajari & Lixin Ye, *Deciding Between Competition and Collusion*, 85(4) REVIEW ECON. STAT., 971-989 (2003); John List, Daniel Millimet, & Michael Price, *Inferring Treatment Status when Treating Assignment is Unknown: with an Application to Collusive Bidding Behavior in Canadian Softwood Timber Auctions*, mimeo University of Chicago (2004); John Asker, *A Study of the Internal Organisation off a Bidding Cartel*, 100(3) AMER. ECON. REV., 724-762 (2010); Robert Marshall & Leslie Marx, *The Vulnerability of Auctions to Bidder Collusion*, forthcoming in Q. J. ECON (2007).

hypothesis testing. Collusion is suspected when bids are "too correlated" with each other to be the result of independent actions by bidders.

Clearly identical bids would be flagged through this sort of screen as being "too correlated." But, absent identical bids, how high should the correlation be among bids to raise suspicion? The answer is that "it depends" on typically several factors. But sometimes the correlation is so high, even perfect, that the likelihood of the correlation occurring without coordination is essentially zero. A famous example was seen in bids received by the Tennessee Valley Authority to install conductor cables in the 1950s. Seven firms submitted identical bids of $198,438.24. The chances of seven bidders, acting independently, arriving at bids that agree to eight significant digits is statistically zero and thus offered a very strong signal that firms had explicitly or implicitly arrived at a mechanism for coordinating bids.

Porter & Zona (1993)[41] utilized this type of screen in a case involving bids to supply school milk in Ohio between 1980 and 1990,[i] although producing a less striking pattern than seen in the Tennessee Valley Authority case. In Ohio, firms submitted sealed bids for contracts to supply schools with pint-size portions of milk. The bidders were typically processors or distributors of milk with school milk typically representing less than 10 percent of their annual revenues. Based on evidence presented in court, Robert Porter and Douglas Zona argued that a bidder's costs are easily explained by only a small number of variables, which are readily observed, and include the price of raw milk and transportation costs, which represent 7 percent of total costs. Competition in the school milk market is localized due to transportation costs, so firms that are close to a particular school have a cost advantage because of shorter delivery routes.

Porter and Zona constructed econometric models of submitting a bid and bid levels. Economic theory suggests that both decisions should depend on two factors. The first is costs, which the authors measured using data on the distance between a public school, the bidder's location, and the number of deliveries made by the bidder. The second is local market power, which the authors controlled for by variables measuring the locations of competing firms. The first screen proposed by Porter and Zona examined the correlation in bidders' entry decisions. After controlling for information that was publicly observed at the time of bidding, the authors found that the bidding decisions of some firms in the sample was too high to be explained by pure randomness, which supported the hypothesis that many accused colluders in fact coordinated their decisions to submit bids.

Next, Porter and Zona constructed econometric models that expressed bids as a function of costs (controlled for by the distance between a public school, the bidder's location, and the number of deliveries made by the bidder) and local market power (controlled for by variables measuring the locations of competing firms). Porter and Zona found that bids for the non-colluding firms were explained using these regression models while, in comparison, the bids of the alleged cartel members were too highly and persistently correlated to be explained by the data. The authors concluded that it was difficult to reconcile this high and persistent correlation

[41] Robert H. Porter & J. Douglas Zona, *Ohio School Milk Markets: An Analysis of Bidding* (NBER Working Paper No. 6037 (1997).

in bids with the hypothesis that firms were bidding independently. This high degree of correlation is similar to a gambler in a casino who has "correctly guessed" which bet to place in roulette twenty times in a row. These events appear to be too improbable to have occurred at random.[42]

C. Screening for Bid Prices That Are Disconnected from Costs or Other Market Factors

A key prediction of economic theory is that bids should closely reflect costs in reasonably competitive markets. The act of collusion, on the other hand, attenuates the relationship between bids and costs so that conspirators can earn profits above a normal competitive rate and prices do not tend to decrease when costs are reduced. Therefore, a second screen proposed in the literature is to determine how well bids reflect costs.

One example of such an attenuation between costs and bid prices as a marker of collusion was found in a concrete cartel operating under the direction of organized crime in New York City in the 1980s that rigged bids on contracts of over $2 million. The distance between prices and costs for concrete in New York City was over 70 percent. This was compared to other large cities but the difference could not be explained by local market conditions. This marker, taken together with other structural factors facilitating collusion in this market, was highly suggestive that a cartel was in place.

In contrast with the example above, Bajari & Ye (2003)[43] examined bids by highway contractors in the upper Midwest during the 1990s and their findings indicated the data was inconsistent with collusion. This finding supported the belief from market observers in general that the industry was generally free of bid-rigging, despite that three firms had been previously convicted of collusion.

Bajari & Ye used bids for a type of road repair known as seal coating where the standard job in their data was fairly small—the winning bids were approximately $175,000. State highway departments prepared cost estimates before bidding occurred and these estimates were largely based on bids made in other geographic markets. The study found that the ratio of the winning bid to cost estimate was almost equal to one with a fairly small standard deviation. The authors found that this suggested that bids were comparable to properly deflated bids from other markets and took this as evidence that most bids in the market were competitive.

In this market, distance and backlog were both important determinants of prices. When studying their relationships with bids, the authors found that bids increased with both these

[42] Other studies have performed similar tests with similar results in markets where collusion is strongly suspected. This includes Porter & Zona's (1993) analysis of paving contacts on Long Island in the 1980s, List et. al.'s (2004) examination of bids for Canadian timber, and Marshall & Marx's (2008) study of bidding decisions for Russian Oil and Gas leases. Taken together, these papers demonstrate the usefulness of a screen that tests for the independence of bid submissions and bid levels. In the introduction, we argued that a good screen should have few false positives. Bajari & Ye (*infra*) demonstrate that this screen appears to have this property in their study of bidding by contractors in Minnesota, North Dakota, and South Dakota during the late 1990s.

[43] Patrick Bajari & Lixin Ye, *Deciding Between Competition and Collusion*, 85(4) REV. ECON. STAT., 971-989 (2003).

measures, which they considered to be consistent with competition. Next, the authors modeled firms' bids using regression analysis, using control variables such as the engineer's cost estimate, distance from the project, and backlog. The regression also controlled for competitive factors, such as the distance of the closest rival to the project. The models were separately estimated for each of the 11 largest firms in the market, which allowed the analysis of whether bids were determined differently across the firms. The authors then screened for collusion by comparing the regressions described above for pairs of firms.

The intuition behind the screen was simple; if firms A and B were not colluding, then their bids would only depend on cost and competitive factors; but, on the other hand, if firms A and B colluded, these (legitimate) factors alone could not explain their bids to a large extent. The authors found evidence consistent with collusion only for 2 out of the 11 firms studied; the same firms that were among the group previously sanctioned for bid-rigging.

Thus, if market factors such as costs are capable of explaining the levels of the bids for many of the bidders, but they seem to be unable to do so for a subgroup of the bidders, then this empirical evidence is indicative of possible bid-rigging. But it is important to control for other legitimate factors that may be common to that subgroup of firms and not to the remaining bidders, and which could potentially justify the empirical finding.

More generally, when analyzing whether bidding patterns are likely to be due to collusive behavior, one must realize that the failure to control for relevant components of costs or competitive factors may provide misleading empirical evidence in support of collusion.

D. Screening for Changes in Bidding Patterns That Are Unexplained by Market Conditions

When sudden changes in bidding patterns cannot be justified by legitimate changes in market conditions this may be indicative of bid rigging. A recent case pursued by the Mexican Competition Authority ("Commission") is an example of the success of this type of screening of bidding patterns. As discussed in Labarthe (2012),[44] the Commission has seen screens as an excellent tool to focus resources in particular investigations, but also to help provide evidence in cases.

This bid-rigging investigation started from an informal 2006 complaint by the Mexican Social Security Institute, which is Mexico's largest public medicine procurer. The screens employed by the Commission were based on improbable events as well as on control groups (among other interesting approaches) that were consistent with theoretical models of cartels. Data covered 2003 through 2007, and some of the patterns that emerged were highly suggestive of a cartel, especially in two groups of medicines: insulin and serum.

It was determined that the structural design of the process through which the IMSS acquired the medicines created incentives among pharmaceutical companies to collude in the sale of such products. These design elements included:

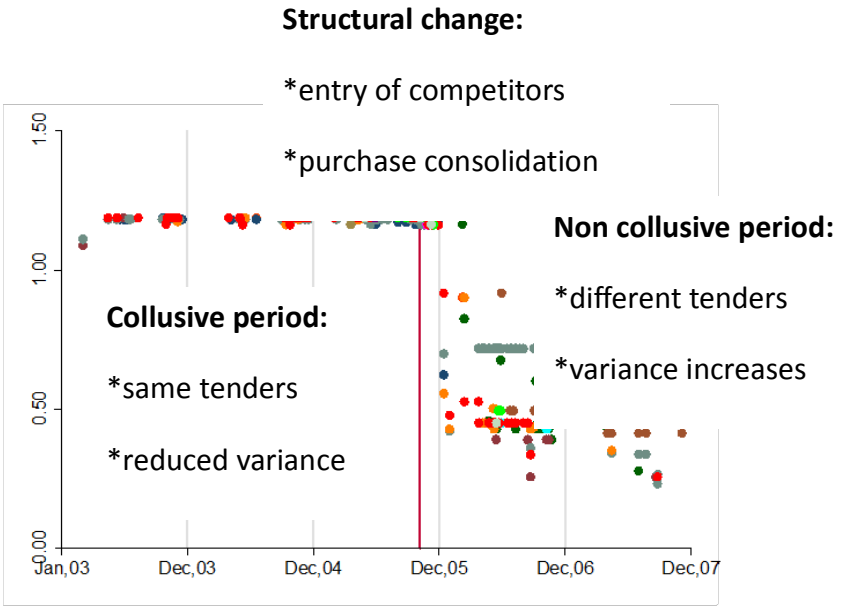
[44] Carlos Mena-Labarthe, 2012, "Mexican Experience in Screens for Bid-Rigging," Antitrust Chronicle March (2).

1. product homogeneity;
2. contract allocations to diverse bidders, which permitted the cartel members to divide the contract and designate certain cartel members as winners within a specific bid, allowing for the distribution of collusive earnings;
3. information exchange among bidders, which led to the cartel's ability to verify any variations in the agreed bids so that the cartel could punish aberrant cartel members in future bids;
4. permanent bid rules maintained through time, which stabilized the cartel agreements to set forth, agree, or coordinate tenders, so that the cartel members did not have to periodically redesign their agreement conducts; and
5. entry barriers which inhibited new bidders from taking part in the auctions.

Jointly with these structural factors, the Commission identified certain behavioral patterns through the time line directly related to the tenders of pharmaceutical companies. These patterns were deemed as preliminary evidence of the existence of cartels in public bids. The referred patterns included:

1. annual average of the winning and losing bids presented by the pharmaceutical cartel members was extremely similar and only changed with the entrance of a new winner or upon the consolidation of bids some years later;
2. average price was much higher during the years identified as the collusion period, sometimes 72 percent higher (see figure 1);
3. the bids were too similar to each other during the collusive period, while presenting significant variations during the non-collusive period;
4. a clear structural break occurred in the bidding process which could not be justified by legitimate conditions and which occurred at the end of the cartel (figure 1);
5. prices of winning and losing bids were always the same, with the only variations in the identity of the winner—which, after winning, kept participating but with losing bids, waiting for their turn to win again (bid rotation); and
6. the amount of the allocated contracts for each of the identified medicines was concentrated in the pharmaceutical companies involved in the cartel and, in some cases, the achieved portion for each was practically the same. Likewise, such participation rapidly converged in time, at the same level.

Figure 1. Medicine 1 average price 1[45]



In a decision dated April 8, 2015,[46] the Mexican Supreme Court of Justice confirmed that Baxter, Fresenius, Eli Lilly, and Pisa laboratories engaged in monopolistic practices between 2003 and 2006 with regard to the public procurement of human insulin and intravenous solutions carried out by the Mexican Institute of Social Security ("IMSS"). Furthermore, the Supreme Court Ruling acknowledged the Commissions' economic analysis as valid indirect proof in detecting cases of collusion, which is an important recognition of the value of screens in assisting in the proof of collusion. The screens were considered powerful evidence in court when the Commission defended its case. As Labarthe explains, "[w]hen we showed some graphics to our judges they were amazed and saw the whole picture clearly."

Another example of break of a bid-rigging cartel causing a drastic price drop which was unexplainable by legitimate market conditions is discussed in Abrantes-Metz, Froeb, Geweke and Taylor (2006).[47]

Similarly, looking for bids that do not react in an expected way to changing market conditions is another way of screening for bid-rigging.

[45] Extracted from Labarthe (2012).

[46] COFECE 009-2015, "The Supreme Court of Justice Decides on Bid Rigging in Social Security Public Tenders Case," April 2015.

[47] Abrantes-Metz, R., Luke M. Froeb, John F. Geweke and Chris T. Taylor "A Variance Screen for Collusion," *International Journal of Industrial Organization*, 24, 467-486, 2006,

IV. THE USE OF STRUCTURAL ANALYSIS AND EMPIRICAL SCREENS AS PART OF AN "EFFECTIVE" COMPLIANCE PROGRAM

The Sentencing Guidelines state that an entity needs periodically evaluate the effectiveness of its compliance and ethics program.[48] There have been a number of Antitrust Division speeches specifically referencing this requirement, noting that a "company should regularly evaluate the compliance program itself to understand what it can improve."[49] Deputy Assistant Attorney General Brent Snyder has elaborated that a company "should ensure that it has a proactive compliance program," meaning that "in addition to providing training and a forum for feedback, a company should make sure that at risk activities are regularly monitored and audited."[50] The United States Sentencing Guidelines also call for companies to conduct risk assessments.[51] The concept here is that organizations have limited resources and need to focus those resources where the risk is greatest. This means that companies are expected to be proactive, determining both which risks are most likely to occur and which have the greatest potential impact and modify their compliance programs accordingly on a periodic basis.

Though there are several possible avenues to address these risks, as discussed in Abrantes-Metz, Bajari, & Murphy,[52] screens are a key option to be considered. Screens identify the areas of a business that are high-risk and therefore allow for efficient and strategic targeting of those areas, allowing for a more efficient allocation of resources. Specifically, screens employ techniques designed to highlight which parts of the company merit closer scrutiny, where there should be intensive reviews, and which units may call for intensive monitoring of internal communications and the like. Empirical screens fulfill this role by looking at certain quantifiable red flags and applying statistical analysis to determine the priority areas for further focus. While screens cost money, in the end they can potentially save the corporation a whole lot more than their cost.

Going forward, the effectiveness of compliance programs will be judged according to a higher standard than they have been previously. As companies become increasingly able to amass and mine data, it soon could be expected that such capabilities are utilized to monitor and test the effectiveness of compliance programs. Therefore, a failure to set up an effective screen may be seen as falling below this standard, especially for sophisticated corporate entities. In fact, the OECD has already noted the benefits of economic screening as a means of strengthening a compliance program, particularly in high-risk industries.[53]

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[48] Federal Sentencing Guidelines Manual § 8B2.1(b)(5)(B) (2014) ("The organization shall take reasonable steps . . . to evaluate periodically the effectiveness of the organization's compliance and ethics program.").

[49] Brent Snyder, Deputy Assistant Attorney General, Antitrust Division, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop, *Compliance is a Culture, Not Just a Policy* 6 (Sept. 9, 2014), http://www.justice.gov/atr/public/speeches/308494.pdf.

[50] Id.

[51] U.S. Sentencing Guidelines Section 8B2.1(c).

[52] Abrantes-Metz, Bajari, & Murphy, *supra* note 33.

[53] OECD, Background Note by the Secretariate, in *Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels* 19, DAF/COMP(2013)27 (citations omitted) (citing various Abrantes-Mentz papers, among others) (noting that the "implementation of screens as part of compliance programmes can be especially effective because

There is another immediate and practical reason for adopting screens as part of a compliance program. A compliance program, with the use of screening, helps position a company to win a race for leniency. A leniency program offers tremendous benefits to implicated companies, potentially permitting them to avoid liability altogether if certain requirements are met. Even if a company fails to qualify for leniency because it is not the first in the door, the DOJ considers "early acceptance of responsibility and meaningful cooperation" in determining the appropriate consequences.[54] Given the scores of enforcement regimes who have similarly adopted leniency programs, or who otherwise heavily credit early cooperation, such detection offers tremendous benefits. And, as noted earlier, in the course of uncovering a bid-rigging scheme, a company may also be able to uncover bribery conduct. Such early detection may allow them to remediate or seek mitigation from the relevant anti-corruption enforcer(s) in a timely manner. The ability to be the first to detect the conduct offers tremendous advantages to both companies and enforcers.

Beyond their utility to detect anti-competitive or corrupt schemes, screens can serve as a powerful tool for deterrence. Once knowledge of their implementation spreads, the existence screens alone can have a chilling effect on would-be offenders. And, in the words Benjamin Franklin, "an ounce of prevention is worth a pound of cure."

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the screening exercise can rely on internal company data which is not necessarily always available to competition agencies"), *available online at* http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf.

[54] Bill Baer, Assistant Attorney General, Antitrust Division, DOJ, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium 5-6 (Sept. 10, 2014), *available online at* http://www.justice.gov/atr/public/speeches/308499.pdf.

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Antitrust v. Anti-Corruption Policy Approaches to Compliance: Why Such A Gap?

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Antitrust v. Anti-Corruption Policy Approaches to Compliance: Why Such A Gap?

Florence Thépot [1]

I. INTRODUCTION

One of the striking differences between competition law and anti-corruption is the manner in which agencies take into account the compliance efforts of companies in the context of their investigations. The European Commission and the U.S. Department of Justice Antitrust Division ("DOJ") refuse to consider compliance programs as mitigating factors in antitrust infringements. The French and U.K. competition authorities may grant a maximum of 10 percent reduction in fines for having effective compliance measures.

In contrast, in the area of anti-corruption, companies in some of the same jurisdictions can escape liability completely for having implemented "adequate procedures." This paper explores possible reasons for such a gap in policy approaches.

II. REGIONAL VARIATIONS RE CONSIDERING COMPLIANCE PROGRAMS

In a speech in 2011, Joaquin Almunia, Vice President of the Commission responsible for Competition Policy at that time, reaffirmed that compliance programs implemented in companies that infringe EU competition law have "failed" and therefore cannot constitute a mitigating factor in the assessment of the level of fine to be imposed.[2] Consistent with that policy, compliance programs have never been taken into account in the context of investigations of collusive practices in the European Union.[3]

In the United States, the Sentencing Guidelines foresees a possible reduction in a fine if a convicted corporation had in place, at the time of the infringement, an "effective compliance and ethics program." There is, however, a rebuttable presumption that a compliance program is not effective when the offense involves "high-level" or "substantial authority" personnel.[4] Antitrust

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[1] PhD (UCL); Fellow of the UCL Centre for Law, Economics and Society; Max Planck Institute for Innovation and Competition (postdoctoral scholarship holder).

[2] "A successful compliance programme brings its own reward. The main reward for a successful compliance programme is not getting involved in unlawful behaviour. Instead, a company involved in a cartel should not expect a reward from us for setting up a compliance programme, because that would be a failed programme by definition." SPEECH/11/268, 14 April 2011

[3] Although in the 1980s and 1990s the Commission granted some fine reductions in export ban and abuse of dominance cases, e.g. *National Panasonic* (Case COMP IV/30.070) Commission Decision 82/853/EEC [1982] OJ *L354/28,* ¶68; Napier Brown—British Sugar (Case COMP IV/30.178) Commission decision 88/518/EEC [1988] OJ L284/41, ¶86. However, British Sugar was later involved in a cartel, and its compliance program was considered to be an aggravating factor: British Sugar plc (Case COMP IV/F-3/33.708), Tate & Lyle plc (Case COMP IV/F-3/33.709), Napier Brown & Company Ltd (Case COMP IV/F-3/33.710), James Budgett Sugars Ltd (Case COMP IV/F-3/33.711) Commission Decision 1999/210/EC [1998] OJ L076/01 ¶ 208.

[4] U.S. Sentencing Guidelines Manual (2012) §8C2.5 Culpability Score, (f) Effective Compliance and Ethics Program.

infringement always involves individuals who are able to exercise substantial authority within the scope of their responsibility, such as setting prices, negotiating and approving commercial contracts, etc.[5]

Moreover, the DOJ clearly excludes the consideration of compliance programs in the context of antitrust, having "established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program"[6]—one of the reasons being that "antitrust violations, by definition, go to the heart of the corporation's business."[7]

Therefore, although in principle U.S. federal courts may consider compliance programs as a mitigating factor in the context of corporate crimes, the conditions described above almost always exclude this possibility for antitrust violations. In addition, most criminal cases against companies do not go to court but settle. This further limits the possibility of compliance efforts to be taken into consideration in antitrust cases.[8]

Only a few other authorities give credit to compliance programs: the French and U.K. competition authorities may grant up to a 10 percent reduction in fines for having effective compliance measures, under certain conditions.[9] In 2014, Italy introduced fining guidelines confirming that a compliance program may constitute a mitigating factor, with a possible reduction of up to 15 percent of the amount of the fine.[10]

By contrast, anti-corruption laws in some of the same jurisdictions adopt a very different approach.[11] The U.S. anti-corruption policy foresees the possibility of not prosecuting the company at all if it has an effective compliance program.[12] In the case of prosecution, companies can receive a reduction in their fine for having an effective compliance program, according to the

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[5] U.S. Sentencing Guidelines Manual (2012) §8A1.2 Narrow circumstances under which the involvement of senior executives does not rule out the possibility of being credited for an effective compliance program, §8, (f)(3)(C)(i) and §11.

[6] J. E. Murphy, *Making the Sentencing Guidelines Message Complete* (2013), *available at* <http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_Murphy_Proposed_Priorities.pdf>.

[7] United States Attorney's Manual, 9-28.400, Special Policy Concerns (2008), *available at* <http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm>.

[8] It seems, however, that the FTC takes a more flexible approach towards compliance programs, having listed specific corporate compliance elements in a settlement procedure. Federal Trade Commission: National Association of Music Merchants, Inc, Docket No. C-4255 FTC File No. 001 0203; 2009.

[9] The OFT, *OFT's guidance as to the appropriate amount of a penalty*, ¶2.15 (2012); Autorité de la Concurrence, *Document-cadre du 10 février 2012 sur les programmes de conformité aux règles de concurrence* ¶31 (2012).

[10] *Italy: Competition Compliance programs a mitigating factor for fines imposed by the Italian Antitrust Authority* (4 November 2014), *available at* http://globalcompliancenews.com/italy-competition-compliance-20141104/.

[11] Anti-corruption legislation is defined at the EU level by a framework decision of the Council: Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, [2003] OJ L192/54, art 5-6. Member States are free to implement measures in order to achieve the required goals set out in the decision.

[12] The Criminal Division of the DOJ and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act* 53 (2012).

Sentencing Guidelines provisions. The Morgan Stanley case, in which the company avoided charges despite corrupt acts committed by a managing director, exemplifies this contrasting approach.[13]

In the United Kingdom, Section 7 of the Bribery Act 2010 provides that companies can defend themselves from being liable for an employee's illegal conduct if "adequate procedures' are put in place by companies."[14] In Italy, the company can avoid liability by adopting an effective organizational, management, and control model.[15]

III. THE NATURE OF THE INFRINGEMENT

Is there anything specific to cartel practices that explains why companies' compliance efforts ought to be treated differently by agencies? Do cartel practices benefit the company more than corruption practices? Are cartels typically decided at a much higher level than anti-corruption, hence the reluctance of authorities to exempt companies involved in cartels? Are cartels inherently parts of business processes more than corruption?

Cartel practices typically involve senior executives of companies.[16] This is one of the reasons why the DOJ refuses to give credit for a compliance program in antitrust.[17] However, sales people—not necessarily at a high level within the hierarchy—are also typically those who initiate collusive practices. Also, the complex corporate structure of some companies implies that a subsidiary's senior executives may take part in a cartel, without the senior executives of the whole undertaking being involved.

In addition, senior management involvement is not an exclusive characteristic of antitrust infringements. In the Siemens corruption scandal, senior managers, up to the board level, were

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[13] DOJ, *Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA*, press release *available at* <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>:

> Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. […]After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct.

[14] Evidence brought by the company in its defense will be analyzed on a case-by-case basis, in light of matters such as the level of control over the activities of the responsible employee and the level of corruption that requires prevention. Ministry of Justice, *Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing* ¶43 (2010).

[15] Decreto Legge no. 231/2001.

[16] A. Stephan, *See no Evil: Cartels and the Limits of Antitrust Compliance Programs,* 31 COMPANY LAWYER 231, 236 (2010). In some cases the top level of management was personally involved, and in other cases the top managers were permitting the collusion while not being directly involved.

[17] J. E. Murphy, *Making The Sentencing Guidelines Message Complete*, Letter to the Department of Justice: Proposed Revision to the Sentencing Guide, *available at* <http://www.compliance-network.com/wp-content/uploads/2012/08/4-5-13-filing-.pdf>; M. Volkov, *Antitrust Compliance and Credit for an Effective Compliance Program*, *available at* <http://corruptioncrimecompliance.com/2013/09/antitrust-compliance-and-credit-for-an-effective-compliance-program/>.

directly involved in the policy of making corrupt payments.[18] While Siemens was heavily fined both in Germany and in the United States, a defense based on compliance efforts still remained a possibility: the involvement of an employee in a position of authority, in cases other than antitrust, does not preclude the consideration of a company's compliance efforts.[19]

And, as mentioned above, despite corruption acts being committed by one of Morgan Stanley's managing directors, the company avoided liability for violating anti-corruption regulations due to compliance procedures being in place. Therefore, although in general cartel practices seem to involve a higher level of employees than corruption, this is not necessarily always the case.

Another possibly unique aspect of antitrust infringement is that it goes to the "heart of businesses."[20] Cartels that constitute the operational mode used in the whole industry certainly define the business mode.[21] However, price-fixing practices can also originate from isolated actions of sales employees who are departing from accepted business standards.

And once more, the example of the Siemens corruption scandal shows that a violation of a business operation standard is not exclusively an antitrust infringement. [22] Cash desks were located within the company so that employees could withdraw large sums of cash up to one million euros at a time. In addition, Post-it notes were used to sign payment authorizations so that the identity of the subscriber could be concealed in case of payment control.[23] While most corruption cases do not seem to be as organized as the Siemens case, the widespread use of corruption in some countries may suggest that companies take into account such reality in their standard business practices.[24]

Finally, competition authorities may be reluctant to consider compliance programs because the company seems largely to benefit from the colluded prices. The profitability of an undetected and sustained cartel is not questioned here; however, a breach of anti-corruption law can also bring considerable economic advantages. Bribing an official with money can serve the purpose of getting favored treatment in contracts, concessions, or licensing processes, or of obtaining some relevant information or influencing the terms of contracts.

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[18] Statement of Siemens Aktiengesellschaft, *Investigation and Summary of Findings with respect to the Proceedings in Munich and the US*, 11-12, *available at* <http://www.siemens.com/press/pool/de/events/2008-12-PK/summary-e.pdf>.

[19] U.S. Sentencing Guidelines Manual, §8, (f)(3)(C)(i) and §11 (2012).

[20] United States Attorney's Manual 9-28.400, Special Policy Concerns (2008).

[21] J. Sonnenfeld & P.R. Lawrence, *supra*, re examples of industries where price-fixing was widespread in the industry.

[22] Press Release, Department of Justice, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines*: "bribery was nothing less than standard operating procedure for Siemens."

[23] K. Sidhu, *Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal,* 10 GERMAN L.J. 1343, 1346 (2009).

[24] *Id.* However, this does not seem to be the case in the jurisdictions of interest in this paper.

These economic benefits stem from the substantial competitive advantage over other companies, acquired outside the scope of the fair competitive process.[25] Therefore, a breach of either antitrust or anti-corruption law by an employee can bring considerable economic advantage to their company.

To sum up, cartels and corruption corporate crimes are not systematically different in nature. Another justification needs to be found to understand the contrasting regulatory approaches to companies' efforts to comply.

IV. DIFFERENT APPROACH TO DETERRENCE

Another possible explanation of the contrast in approach between antitrust and anti-corruption is the emphasis antitrust agencies give to leniency schemes. Authorities want to make leniency as attractive as possible, as this is seen as being the most powerful device for deterring and detecting cartels. And, granted, some reduction in fines due to compliance programs may be seen as undermining the attractiveness of leniency policies.

In addition, the U.K. approach to compliance has also centered on the issue of deterrence, with the expressed concern of not providing an incentive for businesses to find a "scapegoat" within the company and presenting him as a "rogue" in order to get credit for a compliance program, instead of complying in the first place.[26] However, although leniency policy is quite specific to antitrust, this latter concern should also exist in anti-corruption.

V. DIFFERENT LIABILITY REGIMES

Another explanation, more satisfying to my mind, is the existence of different liability regimes in both areas of the law. In particular in the European Union, cartel sanctions and provisions are of an administrative nature and addressed against companies, not against individuals.[27] In addition, notwithstanding the fact that a fair proportion of EU Member States have sanctions against individuals (of a criminal, civil, or administrative nature), there is currently a very low enforcement level of such provisions.[28]

In anti-corruption legislations, sanctions are typically of a criminal nature, targeting responsible individuals in the first place. All of the 26 countries covered by the *CMS Guide to Anti-Bribery and Corruption Laws* impose criminal sanctions on individuals for corruption

[25] R. Calderón Cuadrado & J.L. Alvarez Arce, *The Complexity of Corruption: Nature and Ethical Suggestions*, Working Paper, Facultad de Ciencias Económicas y Empresariales Universidad de Navarra 26-27 (May, 2006).

[26] Drivers of Compliance and Non-Compliance with Competition Law (OFT1227).

[27] The undertaking is the subject of antitrust law provisions in the EU: Article 101(1) TFEU: Prohibition of anti-competitive agreements "between undertakings, decisions by associations of undertakings." Article 102 TFEU: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. […]"

[28] K. Jones & F. Harrison, *Criminal Sanctions: An overview of EU and national case law*, E-COMPETITIONS N° 64713 (2014).

activities.[29] In addition, criminal liability of individuals doesn't necessarily extend to corporations in some jurisdictions.

First, the legislation in some jurisdictions, such as Bulgaria or Ukraine, simply does not hold companies liable for corruption committed by their employees. Some other countries have only recently introduced corporate liability, as is the case in Italy.[30] In Germany liability for companies do exist, but it is not of criminal nature.[31]

Second, in some jurisdictions, company liability rests on specific circumstances. In Hungary, company liability is established if the act benefited the company (or aimed to do so) and was committed intentionally by certain individuals within the company, or by any employee of which an officer or a manager had knowledge.[32] Similarly in Italy, corporate liability is extended if the crime is committed in the interest or for the advantage of the company.[33] In the Netherlands, liability for criminal acts is established if the director (or a member of senior management) had the authority and responsibility to take measures to prevent the offense, but failed to do so.[34]

Therefore, a logical conclusion is that the existence of effective compliance measures is crucial in establishing liability in the first place. While the default rule is that undertakings are liable for competition law infringements, liability is primarily of criminal and individual nature in anti-corruption. The extension of liability to companies has not always been, and is still not automatic, in many jurisdictions. This explains that the company's role in fostering, detecting or preventing the occurrence of such action currently receives more attention for the purpose of the attribution of liability in anti-corruption.

In the fight against anti-corruption, the OECD provides recommendations to countries to introduce corporate liability, in addition to individual liability, within a company.[35] In the area of competition law, discussions concern the adoption of sanctions targeted at individuals, to complement corporate liability.[36] It is important to point out that competition law and corruption laws, in spite of both targeting corporate crimes, have evolved in different directions due to a different approach to liability in the first place.

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[29] *CMS Guide to Anti-Bribery and Corruption Laws* (September 2014), *available at* http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/b459b95d-5ba4-4e20-9f95-2df3f32d8849/Presentation/PublicationAttachment/a5ee0c6d-a377-4ac7-b575-a4ca09eb05e8/CMS-Guide-to-Anti-Bribery-and-Corruption-Laws.pdf. The countries covered are mostly European countries but also include China, India, and Brazil.

[30] Corporate liability introduced in 2012.

[31] Although administrative liability seems to be of criminal nature in effect, *supra* note 29 at 28.

[32] Section 2 of the Corporate Sanctions Act.

[33] Legislative Decree No.231 / 2001.

[34] Dutch Criminal Code, Art. 177 and Art. 328 ¶2.

[35] OECD, *Working Group on Bribery in International Business Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2009).

[36] OECD, *Cartel Sanctions Against Individuals* (2003).

VI. DIFFERENT PERCEPTION OF CORRUPTION AND ANTITRUST VIOLATIONS

Some jurisdictions have a similar liability regime in both areas, as is the case in the United States.[37] However, in these jurisdictions, different approaches to compliance can also exist, and may echo a very different public perception of the gravity of corruption and cartel corporate crimes.[38]

Nowadays, the seriousness and immorality of corruption is widely perceived by the public. In contrast, the harm of cartels is still mostly based on economic concepts that have a much more reduced emotional impact among citizens. In the anti-corruption area there are very vocal and vibrant NGOs that have pushed the fight forward. As an example, Transparency International has strong influence worldwide, contributing with its Corruption Perception Index.[39] No such NGO is active in the fight against cartels.[40]

Interestingly, though, in the 1960s and 1970s there seemed to be a more general understanding that price-fixing was immoral and deserved serious punishment.[41] In contrast, during this period, corruption was seen as business as usual in a large part of the world, as a result of which there was logically a very low perception of immorality. However the situation seems to have reversed, as cartel cases no longer make the same amount of headlines as other white-collar crimes make.[42]

VII. CONCLUSION

Different liability regimes may explain why, in some jurisdictions, competition law and anti-corruption agencies have very contrasted approaches to compliance programs. However, this explanation may not hold in some other regimes, but may relate to a different perception of cartels as a crime, and a different emphasis on deterrence instruments.

Important questions to ask are: In competition law, do companies have strong incentives to implement effective compliance programs? Is the incentive stronger in the area of anti-corruption? How may incentives provided by agencies contribute to greater internal prevention and detection of corporate wrongdoing?

In my view, competition authorities should learn, from the anti-corruption agencies, the manner in which they encourage and reward a strong culture of compliance supported by effective internal measures.

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[37] E.g., both cartels and corruption are criminalized in the United States, and cartel criminalization is enforced (unlike many EU Member States).

[38] This is based on a discussion with Joe Murphy, Director of Public Policy for the Society of Corporate Compliance and Ethics.

[39] http://www.transparency.org/research/cpi/overview.

[40] In the United States the American Antitrust Institute primarily focuses on legal advocacy.

[41] E.g., the electrical equipment case, in which seven executives of top U.S. companies served jail sentences was mediatized in 1961. The docudrama, *The Price,* dealing with compliance with price-fixing prohibitions, has been widely used in legal practice, http://www.commonwealthfilms.com/s/1_2_40.asp.

[42] D. Daniel Sokol, *Cartels, corporate compliance, and what practitioners really think about enforcement*, 78 ANTITRUST L.J. (2012).

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Enforcers' Consideration of Compliance Programs in Europe: A Long and Winding—but Increasingly Interesting—Road

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Nathalie Jalabert-Doury, David Harrison, & Jens-Peter Schmidt[1]

I. INTRODUCTION

It is, by now, established practice for companies throughout Europe to have in place a range of compliance programs designed to ensure that, so far as is possible, the company and its employees conduct their activities lawfully. In 2011, the U.K., French, and EU competition authorities all published guidance on how businesses should approach competition law compliance. Many ideas on what an effective compliance regime should entail were common to all three texts, but there was a marked difference in the extent to which—if any—each regulator might be prepared to take these efforts into consideration in enforcement decisions against offenders.[2]

The European Commission's stance on the issue was clear: Rigorous competition law compliance policies should form part of the normal order, and accordingly it would afford offenders no reward whatsoever for merely having such measures in place.[3] By contrast, the U.K. and French competition authorities adopted a more flexible approach, recognizing that, in some instances, genuine attempts at effective compliance should be rewarded by way of reduced penalties.

This article discusses how various EU Member States have attempted to embed compliance principles within their corporate culture by treating less severely those who have made or commit to make an observable effort to comply with applicable competition laws. This approach remains in contrast to the current position of the European Commission, which, reflecting its belief that such measures should be adopted as a matter of course, has so far been unwilling to grant credit to companies that do so.

How have things evolved since 2011? What is the position three years after the initiatives referred to above, and have companies in the meantime been increasingly incentivized to enter into such programs?

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[2] Nathalie Jalabert-Doury & Gillian Sproul, *Enforcers' Consideration of Compliance Programs in Europe: Are 2011 Initiatives Raising Their Profile or Reducing It to the Lowest Common Denominator*?, 2(2) CPI ANTITRUST CHRON. (February 2012).

[3] Compliance Matters, 24 November 2011.

We outline below the latest initiatives adopted in this context by several of the growing number of Member States that recognize the value of compliance programs in their fining policy; by contrast, the European Commission has so far remained largely silent in response to the calls by business organizations for increased recognition of these programs.

II. THE UNITED KINGDOM: THE CMA, AS IN THE CASE OF ITS PREDECESSOR THE OFT, MAY IMPOSE LESS STRINGENT PENALTIES ON COMPANIES WITH ROBUST COMPLIANCE PROGRAMS

The Competition and Markets Authority ("CMA") recognizes that strong enforcement powers are needed in order to deter breaches of competition law, and encourages companies to take pre-emptive action by adopting robust compliance programs. As part of its efforts to cultivate a culture of compliance among companies operating in the United Kingdom, the CMA, together with the Institute of Risk Management ("IRM"), has published a short guide which advocates the need for an organization's culture, from board room to shop floor, to support ethical and legal behavior.[4] The joint CMA and IRM guidance promotes a top-down approach across the entire organization, to reduce the likelihood of breaches of competition law arising.

Consistent with the policy of its predecessor (the Office of Fair Trading ("OFT")) in determining the penalties to be imposed in respect of a breach of competition law, the CMA may take account of steps that have been taken by a company to ensure compliance with competition law.[5] The CMA's guidance detailing the methods by which it determines penalties for breach of the Competition Act 1998 makes clear that it will take into account evidence of an undertaking's compliance activities in a given case, and assess whether these merit a discounted penalty; such a discount may be of up to 10 percent of the total fine that would otherwise be payable. However, the CMA emphasizes that it is the substance, not the mere existence, of such activities that dictate whether they will be viewed as a mitigating factor.

A company seeking a discounted penalty should submit evidence to the CMA of a clear and unambiguous commitment to competition law compliance, together with examples of the steps it takes to manage competition law risk. The undertaking should also demonstrate that the steps taken are proportionate relative to the size of the business and the overall level of competition risk faced by it. Further, it must produce evidence documenting the steps it has taken to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation.

Corporations that build a risk management process as advocated by the CMA, and follow an intelligent, pro-active, and tailored risk management approach, are more likely to be more successful when seeking a reduced penalty than those that adopt a superficial "tick box" method. To illustrate, in May 2015 the CMA issued a decision following its probe into the advertising of estate agents' fees. In recognition of the compliance activities of two of the estate agents involved, the CMA decreased the penalty imposed on each estate agent by five percent. The decision indicates that the CMA will likely treat as a mitigating factor attempts by an undertaking's senior management to take adequate steps to achieve a clear and unambiguous commitment to

[4] Short guide on competition law risk published jointly by the CMA and the Institute of Risk Management.
[5] CMA Guidance - Appropriate CA98 penalty calculation, OFT 423.

competition law compliance throughout the business. Senior management can display such unambiguous commitment by doing the following things:

1. introducing, or reviewing and changing, compliance activities as appropriate in light of the events that led to the investigation in question;
2. appropriate competition law risk identification, assessment, mitigation, and review; and
3. board-level (or other senior management) commitment to, and accountability for, the resulting compliance program.[6]

The compliance process listed under (2) is part of the CMA's four-step risk-based approach to compliance, which revolves around having the requisite training, policies, and procedures in place to prevent competition law risks from occurring in the first place, but which also enables any issues to be identified and dealt with swiftly should they arise.

In another investigation, this time relating to the supply of prescription medicines to care homes, the OFT found that a company, Hamsard Limited ("Hamsard"), had entered into a market-sharing agreement in flagrant contravention of the competition rules. In spite of this, and in recognition of its other compliance efforts, the OFT initially considered that a reduction of five percent from the penalty that would otherwise have been imposed was appropriate. However, the OFT reconsidered this following the provision by Hamsard of further evidence illustrating its efforts to improve upon its existing compliance program. That evidence showed that: (i) Hamsard's competition law compliance across the whole group would be overseen and regularly assessed by one of its board members; (ii) comprehensive competition law training provided by specialists was being undertaken by all relevant staff; and (iii) all relevant contracts with trading partners and compliance policies were to be reviewed. In the light of these elements, the OFT increased the penalty discount to 10 percent.[7]

It is clear from both decisions that the CMA (like its predecessor the OFT) is inclined to react favorably towards pro-active efforts, led by senior management, to strengthen compliance arrangements. There is evidence to suggest that the CMA is becoming more adept at detecting wrongdoing—over half of new cartel cases opened since 2010 having been "intelligence led."[8] With the risks of infringements being identified therefore arguably higher than ever before, businesses have every reason to heed the guidance on compliance set forth by the CMA.

The CMA has stated that it expects to issue competition disqualification orders ("CDOs") against individual directors where appropriate.[9] However, even in such instances, where a director can show that he has helped to ensure that a company takes practical steps to remedy a breach when brought to his attention, the CMA will treat this as a mitigating factor when assessing whether a CDO is justified.[10]

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[6] Case CE/9827/13 - Property sales and lettings investigation, Decision dated 8 May 2015.

[7] Case CE/9627/12 - Investigation into the supply of healthcare products, Decision dated 20 March 2014.

[8] Speech dated 4 November 2014 by Sonya Branch, Executive Director, CMA to the Westminster Business Forum.

[9] Speech dated 16 May 2014 by CMA Chief Executive Alex Chisholm to the Law Society Competition Section.

III. FRANCE: UPCOMING REFORM OF THE SETTLEMENT PROCEDURE UNDER WHICH COMPLIANCE COMMITMENTS CAN BE REWARDED

Under article L 464-2 III of the French Commerce Code, where an infringing company commits not to challenge objections made by the French competition authority at the end of an investigation, the immediate rewards are clear. The *Autorité de la concurrence* ("AC") is normally empowered to fine an infringing company up to 10 percent of its annual worldwide turnover; however, where the undertaking concerned acquiesces to its objections, the maximum fine that can be imposed is automatically halved, meaning that, at most, the offending company will be subject to a fine totaling five percent of its yearly global revenue. The *Rapporteur Général* may also suggest that the regulator apply a further reduction to the fine in view of such a commitment, and also in recognition of any undertakings proposed by the infringing company to amend its behavior in the future.

The AC can therefore grant fine reductions for *ex-post* adoption or improvement of compliance programs. In cases where leniency rules do not apply (e.g. in non-cartel cases), the Framework Document on Antitrust Compliance Guidelines also makes it possible to treat as a mitigating circumstance instances where a company discovered a violation, but put an early end to it as a result of an existing compliance program.[11]

The AC has published guidelines detailing the conditions and applicable range of penalty reductions. As part of its fine calculation methodology, after verifying that the basic amount does not exceed five percent of the total worldwide turnover of the company, the AC applies a further reduction of 10 percent to companies that do not dispute its statement of objections. If, in addition, a company undertakes to amend its behavior in the future by undertaking to institute satisfactory compliance programs, the fine is further reduced up to a limit of 10 percent, and a possible further five percent for any other relevant undertakings made. [12]

In practice, in France as in the United Kingdom, the highest part of the reduction range is rarely applied. In past years, reductions granted specifically for compliance programs have rarely exceeded eight percent and the overall reduction in view of all undertakings given has not exceeded 12 percent.

However, past cases illustrate that a commitment to improving compliance regimes can result in very significant penalty reductions—indeed, more significant than the reductions awarded to companies that apply for leniency. As a result, many question why the authority appears to treat more kindly those businesses that merely waive their right to challenge the objections, than it does those that come early and actively cooperate in the investigation. Given that the procedural value of the latter is higher due to the speed with which cases can be resolved, it could be said that the most favorable penalty reductions should be reserved for these instances.

This can be illustrated by the example of a company with a total worldwide turnover of EUR 100 million. Assume the basic amount of the fine (duration multiplied by yearly turnover

[11] *Document cadre sur les programmes de conformité* dated 10 February 2012, at ¶ 27.
[12] *Communiqué de procédure relatif à la non contestation des griefs* dated 10 February 2012.

achieved on the market concerned) is higher than five percent of its worldwide turnover and for example reaches EUR 9 million.

If that company applies for leniency, but is not the first, and brings in value added evidence upstream in the procedure and actively cooperates in the investigation, the Authority will ascertain that the theoretical maximum is not met (10 percent of the worldwide turnover) before applying a reduction of, say, 40 percent, resulting in a total fine of EUR 5.4 million.

If, on the other hand, the same company were to try a different tack and wait until the investigation is concluded and the statement of objections is issued, and then simply waive its right to challenge this and, in response, propose a compliance program, then the fine will automatically be brought to the level of the capped amount of five percent—the fine therefore now stands at EUR 5 million. The regulator would then likely apply a further reduction of, say, 18 percent for (a) not challenging the statement of objections, and (b) the company's commitment to introduce a satisfactory compliance program. The final penalty for this company will, therefore, be lower than if it had opted for leniency: EUR 4.1 million.

A draft law recently passed by the French Parliament's Lower Chamber, expected to enter into force this summer, is aimed at tackling this issue by introducing significant changes to the way penalties are determined.[13] The law would put an end to the automatic cap on the amount of the penalty falling from 10 percent to 5 percent of worldwide turnover for those that do not challenge the authority's objections, and would instead grant the authority a wide margin of discretion when negotiating the fine in this settlement context.

Once the law is amended, the AC is likely to review its guidelines accordingly. Given the trend of competition authorities across EU Member States increasingly to reward compliance efforts, the consensus is that this tweak to the French system does not mark a radical departure from the existing approach. Rather, it can be seen as an effort to ensure consistency and fairness in the administration of sanctions, while remaining sensitive to the benefits of rewarding compliance where appropriate.

IV. GERMANY: FIRST (LIMITED) SIGNS OF INTEREST

Unlike the CMA in the United Kingdom and the AC in France, the German Federal Cartel Office ("FCO") does not consider the existence or quality of internal compliance programs to be a mitigating factor in determining penalties. Indeed, it has made clear that this will not make any difference to the fine awarded.

In 2013, the FCO published guidelines on how it calculates fines for infringement of competition law.[14] Among the most decisive factors are (i) the size of the company and (ii) the seriousness and duration of the infringement. Interestingly, compliance programs play no part in its consideration. This is not to say, however, that the FCO does not believe that the implementation of an effective compliance program is an important tool to prevent competition

[13] *Projet de loi n°539 pour la croissance, l'activité et l'égalité des chances économiques* transmitted to the Senate on 19 June 2015.

[14] Bundeskartellamt, Leitlinien für die Bußgeldzumessung in Kartellordnungswidrigkeitenverfahren, 25 June 2013.

law infringements.[15] It claims that, as well as helping to prevent future infringements, compliance programs may assist a company to uncover competition law infringements more quickly than its competitors, which may in turn enable it to take advantage of the German regime's leniency program.

The German leniency program provides that the first member of a cartel to whistle-blow and apply for leniency prior to a dawn raid may benefit from a 100 percent reduction in any eventual fine.[16] Even after a dawn raid, a good compliance program may make it easier for a company to apply successfully for leniency if its program enables it to gather all necessary information and submit it to the FCO more quickly than its competitors. In such a case, the submission of relevant information might lead to a fine reduction of up to 50 percent. Moreover, the FCO may not initiate a fine procedure at all if, in non-hardcore cartels cases, it holds the view that, as a result of an effective compliance program, the risk of recidivism is sufficiently low. A rigorous compliance program may also prevent the imposition of fines on the companies' managers if there is no violation of their supervisory duties.[17]

However, the FCO is clear in its emphasis that compliance is a legal obligation, which of itself does not merit a reduction in the amount of a fine.[18] Andreas Mundt, President of the FCO, recently reiterated this view, stating that false incentives might be created should companies whose compliance structures might be inefficient or improperly applied be rewarded.[19]

V. ITALY: COMPLIANCE PROGRAMS EXPLICITLY CONSIDERED AS POTENTIALLY MITIGATING FACTORS IN NEW FINING GUIDELINES

On October 31, 2014, the Italian competition authority, the Autorità Garante della Concorrenza e del Mercato ("AGCM") confirmed in its fining guidelines that the adoption and implementation of robust *ex-post* compliance programs can be considered a mitigating circumstance, thereby making it possible for fines to be reduced by up to 15 percent.

The AGCM however stressed that such a reduction will only be granted to

> programs evidencing a real compliance commitment notably through the involvement of the top management, the precise identification of persons in charge, the identification and assessment of risks in the precise context, the organization of training adapted to the size of the company, incentives to comply with the program as well as sanctions, follow-up and audit mechanisms.[20]

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[15] Bundeskartellamt, Tätigkeitsbericht 2011/2012, page 31.

[16] Bundeskartellamt, Bekanntmachung Nr. 9/2006 über den Erlass und die Reduktion von Geldbußen in Kartellsachen – Bonusregelung –, 7 March 2006.

[17] Cf. Oberlandesgericht Düsseldorf of 5 April 2006 – VI-2 Kart 5+6/05 (OWi), ¶ 46.

[18] Bundeskartellamt, Tätigkeitsbericht 2011/2012, page 32.

[19] Andreas Mundt, Die Bedeutung der Wettbewerbs-Compliance, Compliance Praxis, Service Guide 2014; Andreas Mundt, Worüber sprechen die Kartellbehörden und Staatsanwälte in ihrem‚Netzwerk Submissionsabsprachen"?, 18 February 2015.

[20] Linee Guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorità in applicazione dell'articolo 15, comma 1, della legge n. 287/90, 31 October 2014, § 24.

To date, no such reduction has been applied in the decisions of the authority since the publication of the guidelines. However, given that this approach is still in its infancy, it is not yet possible to determine what bearing the guidelines will have on the long-term practice of the AGCM.

It is interesting to note, in relation to Spain below, that this new mitigating circumstance was introduced into Italian law after the adoption of a 2001 criminal law protecting legal entities having compliance programs from criminal liability in the event that an offense is committed by a representative or an employee in violation of a structured and robust compliance program.

VI. SPAIN: EXPECTATIONS BASED ON A CRIMINAL LAW REFORM EFFECTIVELY TAKING INTO CONSIDERATION COMPLIANCE PROGRAMS

Spain introduced a law in March 2015 amending its criminal code to reinforce existing provisions under which exemption from corporate criminal liability may be granted if the offending entity had adopted a compliance program before a crime was committed by any of its directors or employees, and the program in question meets the requirements set out by law, namely that:

a) the crime was committed by company representatives or executives after the company had implemented an effective compliance program;

b) the monitoring of the program is entrusted to a compliance officer(s) with autonomous powers of initiative and control;

c) the directors or employees committed the crime by willfully circumventing the compliance program; and

d) the compliance officer(s) was/were not negligent.[21]

The law now also sets forth the essential components of any successful compliance regime. These are that it should:

a) be based on a risk assessment of possible crimes in the context at hand;

b) establish a decision-making process to limit the risk of violation;

c) include financial management systems to prevent crimes;

d) impose an obligation on all employees to report to the compliance officer any risk of violation;

e) enforce penalties in case of violation; and

f) be subject to periodic review, including whenever a change is made to the company structure.

Naturally, these provisions do not directly apply to the fines set by the Spanish competition authority, which are of a totally different nature.

[21] Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.

So far, the Spanish competition authority has not granted reductions in fines in the light of competition compliance programs, but this reform of the criminal regime perhaps illustrates a growing appreciation of the value of such programs. In addition, it is an established principle of administrative law that the sanctioning activity of the Administration is to be inspired by the principles of criminal law. This will surely be a basis on which infringing parties (who have adequately implemented competition compliance programs) will claim before the courts that administrative decisions imposing fines on them are to be annulled.

In any case, this reform would nicely pave the way for the recognition by the Spanish competition authority of a mitigating circumstance in enforcement cases, as was the case in Italy.

VII. EUROPE-WIDE: A MIXED MOOD

Numerous business organizations across the continent have called upon authorities to recognize more fully the value of compliance programs. Perhaps most notably, the International Chamber of Commerce has published an *Antitrust Compliance Toolkit* and an *SME Antitrust Compliance Toolkit*.[22] Although these toolkits are primarily intended to assist companies in structuring their compliance efforts, they provide a valuable starting point for efforts to devise and implement robust compliance measures that may be taken into account in the context of enforcement proceedings by competition authorities.

Although the European Commission's position remains that compliance programs are beneficial in assisting companies to avoid breaches of competition law, the increasing willingness of other competition authorities in Europe to take compliance measures into account in decisions relating to liability provides a further compelling reason to implement rigorous, bespoke compliance arrangements, in case the worst should happen.

[22] ICC Antitrust Compliance Toolkit http://www.iccwbo.org/Data/Policies/2013/ICC-Antitrust-Compliance-Toolkit-ENGLISH/ and ICC SME Toolkit : why complying with competition law is good for your business http://www.iccgermany.de/fileadmin/icc/ICC_2015/SME_Toolkit_Flipbook_online.pdf

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The Need for Compliance & Ethics in Latin America

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Chilean Competition Tribunal

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Javier Tapia[1]

I. INTRODUCTION

A breath of fresh air is coming to Latin America competition law and policy. Compliance seems to have started booming—at last! In 2015 alone there have been at least three international conferences, held in different countries, with long sections dedicated to the subject. There is also an international academia ("SCCE") providing courses once a year in an important Latin American city (Sao Paulo, Brazil). These are the most recent steps in the path of increasing knowledge and importance of compliance and ethics programs in the field. Authorities, academics, practitioners, and firms—of any size—now talk about antitrust compliance. Only five years or so ago, this would have been something unexpected.

Most importantly, the talk has turned into action. At governmental level, several agencies are adopting real methods of recognizing compliance. Some of them have issued—or are about to launch—guidelines on the topic. For instance, the Chilean competition agency ("FNE") issued a document entitled *Competition Compliance Programs: Complying with Competition Law* (hereinafter, "the FNE Guidelines"), which definitive version was launched on June 11, 2012. Likewise, the Colombian authority ("SEC") is undertaking interesting projects in the area, with the aim of issuing an official document. In other countries, guidelines used in other areas may have a significant impact on competition. This is the case of the Brazilian Decree No. 8,420/2015, issued within the framework of the Clean Company Act, which aims at implementing effective anticorruption compliance programs.

These guidelines represent a landmark step for competition regimes, because of their double value as policy declarations (setting out the approach the agency will adopt regarding compliance programs) as well as guidance for business conduct.

All of this is welcome news. So far, besides big multinational firms, compliance programs have remained a novelty among Latin American business communities and public servants. However—as I argue here—they are utterly needed.

As Section II shows, Latin American markets are highly prone to cartels. Several reasons may explain the phenomenon. There is a mixture of cultural, historical, and institutional factors supporting this assertion. The answer to this reality, as Section III exposes, has been to deal with collusive behavior using an *ex post* approach—what in the regulatory literature is called "dissuasion." Under this, prosecution, detection, and deterrence are explicitly favored.

[1] Judge, Chilean Competition Tribunal (TDLC); PhD, University College London; MSc. in Regulation, London School of Economics and Political Sciences. The opinions expressed here are those of the author and do not necessarily represent the official position of the TDLC.

However, dissuasion is not without its shortcomings. As Section IV argues, such an approach has proved insufficient to tackle anticompetitive conduct; arguably because it does not completely match the very same features that explain misbehavior in first place. An *ex ante* approach, based mainly on compliance and ethics programs, should at least serve as a necessary complement.

There is a need for placing more emphasis on the compliance and ethics field. However, the success of such an enterprise depends on a profound understanding of the true nature of compliance. Do we really know what we talk about when we talk about compliance? That is the question advanced in Section V.

II. LATAM COUNTRIES ARE PRONE TO CARTELS

Generalizations apart, one could state (with a great level of confidence) that most Latin American markets are, *prima facie*, highly prone to cartelization. This claim is based on a number of distinctive social, historical, political, and economic characteristics most Latin American countries share.

At least three features stand out:

1. Despite important progress, social inequity still haunts. This evil, which is even more pervasive in non-industrialized economies, provides a welcome environment for the next two features.
2. The degree of concentration in most industries remains high. Oligopolies are (or have been until fairly recently) largely dominant in many markets; these as a result of a long tradition of state-controlled economies combined with social conflicts and resentments and/or various concerns about "too much competition" (!).
3. There are powerful interests with strong political power. It is extremely difficult to go against these ruling elites. While in some sectors the threat of entry may come from imports (especially in countries with more open economies), such a menace is fairly limited in both tradable and non-tradable sectors. Particularly in the latter, there is no credible threat of entry whatsoever, since financing is usually not readily available for new entrepreneurs outside these concentrated groups.

The aforementioned characteristics are entrenched in the general Latin American economic structure. Most countries are of medium- or small-size. Considering gross domestic product ("GDP"), only two of them—Brazil and Mexico—are among the top 20 of the world's largest economies. Furthermore, no Latin American country ranks in the upper-third part of the world ranking in terms of GDP *per capita*; and most of them are still considered to be "middle-income" in terms of gross national income ("GNI") *per capita* at purchasing power parity ("PPP"). Despite some notable exceptions, for the most part Latin American countries have a shameful place in the bottom half of most cross-country indicators.

In addition, support for competition as a "value" is weak, particularly among many governments and business or political leaders. Despite the fact that most countries (excepting Guatemala) have competition statutes in place, support for competition policy depends largely on the political background of the ruling coalition. Argentina and Bolivia are two well-known examples of this. To a lesser extent, Ecuador has also suffered this misfortune.

The notable exception is a group of countries where competition policy has become an important part of the rules of the game. Brazil, Mexico, Chile, Colombia, and Peru are taking the lead. Even in these jurisdictions, however, for large parts of the ruling elites competition is not seen as the best path to enhance productivity and achieve prosperity and economic progress. Conversely, ideology and historical anti-market traditions still play a role, making industrial policy and control over the wider economy still a favorite approach among several governments or businessmen. Furthermore, to many people, competition only applies to "big firms."

Overall, the real influence of competition in Latin America remains at least dubious; and at most completely ineffective. Along with the other features, this provides a fertile soil for cartels.

III. THE TRADITIONAL APPROACH AGAINST CARTELS AND ITS SHORTCOMINGS

Within this context (and despite the weak support), most Latin American jurisdictions have developed institutions to protect and promote competition. Institutional designs vary as much as their degrees of "success." However, they all share a common approach to the field—an approach the regulatory literature identifies as "dissuasion." This means, in a nutshell, that the emphasis is put on protection (*ex post*) rather than on promotion (*ex ante*).

Dissuasion implies that detection and prosecution of collusive behavior are the keys to protecting competition, and therefore they are of increasing importance in most jurisdictions. Alongside this approach, different ideas on how to deter misbehavior have also flourished. Accordingly, competition policy aims either to increase the rate of detection or the magnitude of the sanction, following the generally accepted approach known as "optimal deterrence."

This means that the theory and practice of competition enforcement in Latin America normally cover two main aspects. On one hand, it encourages the provision of more resources to agencies. On the other, it promotes a general expansion of the range and level of competition law sanctions—foremost, an increase in the level of fines and the introduction of criminal convictions (incarceration).

However, dissuasion has many shortcomings. And contrary to the common perception, for the most part these shortcomings may not be related to a lack of financial resources. Certainly, this is a genuine concern in most regional jurisdictions, for budgetary resources allow agencies to tackle only a few infringements. Nonetheless, problems seem to be more linked to other factors, particularly the local environment and the types of error agencies are more willing to accept.

Some of the shortcomings are related to the specific local environment. First, due to the highly legalistic culture prevailing in Latin America, the dissuasion model places a disproportionate weight on dealing with anticompetitive conduct through legislative improvements. Since improvement of sanctions and the provision of resources are substantial reforms, they normally need (some level of) changes to statutes. This, however, may take more time than expected. If any statutory reform is already difficult to undertake in civil law regimes, the burden is heightened by the lack of awareness of competition concerns among congressmen and the public. In such a situation, simple policy measures (such as boosting compliance, as I

argue later) could be even more effective than substantive reforms, but they tend to be left behind due to cultural reasons.

Second, given that dissuasion is based on tough sanctions, there is a real danger that high(er) penalties are used with unfettered discretion by competition agencies, some of them being prone to capture. In fact, in some countries (such as Argentina and Colombia) the very institutional design of the agency somewhat enhances the interference of non-technical actors.

Also, actors may not readily respond to the proposed changes as expected. For instance, it is unlikely that criminal sanctions have a high impact in a context where civil law judges, with a lack of a sound knowledge of competition law, are not willing to convict for what they deem to be "mere" economic infringements, in that these would be morally less blameworthy. (Indeed, there is also the most basic problem of judges who do not understand complex economic law.) This was actually the case in Chile, where incarceration was repealed due to its practical ineffectiveness in 2004, although its re-introduction is now being discussed.

The third shortcoming of dissuasion related to the local environment is that human capital remains generally under-developed in Latin America. There is still an educational gap for agency officials, lawyers, economists, and competition scholars alike, because neither industrial organization nor competition law is widely taught in universities. The effects of this lack of human resources are potentially serious for welfare and the agencies' long-term policies. First, there is the risk of erroneous decisions, for the application of competition law requires complex analysis of market conditions and their effects on welfare. Second, decisions are linked to reputational considerations for the agency. Bad decisions may lead to a poor reputation, which is particularly harmful for competition regimes where political support for agencies is already weak. Finally, enforcement is likely to be limited because of the lack of readily available means to both identify offending practices and deal with complex matters.

Besides these shortcomings, too much emphasis on dissuasion is linked to the type of errors agencies are willing to tolerate. Errors can never be avoided. The problem arises because, notwithstanding how much fines are increased in the statutes, the fear of over-enforcement (Type I errors) or under-enforcement (Type II errors) may lead competition authorities to avoid setting the level of fines too high. The reason is that if the level of a sanction is calculated incorrectly, it may deter activity that does not result in any social cost.

Moreover, Latin American agencies seem more tolerant to errors of the second type. This is wrong. The reality is that, with regard to cartels, the risk of Type I errors is (very) low: If rival firms agree to fix prices, reduce quantities, or allocate territories, the existence of pro-competitive reasons to justify such conduct is highly unlikely. Conversely, the risk of incurring Type II errors is significant: If the cartel is successful, the damage to competition is certain to be severe. Therefore, agencies should not be afraid to lead a policy of cartel prosecution that is carefully biased, to some extent, towards Type I errors.

There may be two (alternative) reasons for the bias toward Type II errors. The first is prioritization. It is commonly argued that, considering the lack of resources and experience, agencies should be selective and focus their efforts on fewer cases with high social impact in order to achieve credibility in the community. However, while this is sensible in some cases, prioritization should not imply a sort of "selection" of collusion cases. Despite the fact that

enforcement policies are usually focused more on some sectors than others (meaning that there is no uniformity across cartels in terms of the likelihood of being detected), the truth is that all collusive agreements should be equally enforced. There is a need to send a strong signal that all cartels, regardless of their size or the motives of their members, produce great social harm and hence must always be sanctioned.

The second reason for there being more tolerance with Type II errors is (again) under-developed human resources. Inexperienced or untrained officials might erroneously judge the particular circumstances of firms—such as their size, lack of knowledge of the infraction, or unintentional behavior. In fact, this produces a "vicious cycle" where the lack of detection translates into limited opportunities for "learning by doing."

IV. THE FAILURE OF DISSUASION AND THE NEED FOR COMPLIANCE & ETHICS

The almost exclusive emphasis on the dissuasive strategy may explain why Latin American competition regimes have not reflected great success. Despite most countries having now enacted competition statutes, enforcement remains limited. On the one hand, prosecution has been far from vigorous. Priorities seem not always to be driven by the aim of tackling anticompetitive conduct where they are rooted, but simply to get rewards for catching "big fishes." Moreover, even though agencies have applied structural and behavioral remedies, historically fines have been rare and low. On the other hand, probability of detection is low, impacting negatively on deterrence. Many markets that could—and should—be competitive receive limited attention from competition officials due to lack of resources or misguided prioritization.

Overall, none of the tools of a traditional approach have proven especially useful. Still today, in many countries, collusion cases represent a meager percentage of the total number of cases of anticompetitive conduct. Standard tools based upon dissuasion—mainly, higher penalties, incarceration, and providing more resources for the agencies—have to a large extent failed.

This is not an argument to totally deny the crucial importance of increasing detection, prosecution, and deterrence. The question is how to improve the regimes in a context in which the institutional setting does not provide the most ideal scenario for the development of competition policy. The failure of dissuasion is a forceful reason to look for a more suitable and balanced approach—an approach where compliance and dissuasion are placed at least on equal levels of importance.

But my argument goes even beyond. Indeed, where reforms to increase enforcement and deterrence are deemed necessary, they should carefully consider institutional endowments and behavioral characteristics. It is my contention that Latin American competition regimes would gain a lot by taking compliance programs more seriously and recruiting the private sector to the fight against cartels. I think there are compelling reasons for paying more attention to compliance programs, even over fundamental reforms to the statutes. It is time to make a profound paradigm-shift.

One of these reasons is the changing reality of regulatory authorities around the world. They are increasingly fostering compliance programs and taking them into account in their

regular activities. Canada has just updated the guidelines on the topic. Compliance programs are now considered in decisions in the United States, such as in the *Optronics* and Apple eBooks cases. And even the U.S. Department of Justice's Antitrust Division ("DOJ") seems to be looking at compliance programs more favorably (one cannot stop thinking of the words of Winston Churchill, who famously said that "You can always count on Americans to do the right thing—after they've tried everything else"). These and other important developments in major jurisdictions are sure to influence local developments.

V. WHAT WE TALK ABOUT WHEN WE TALK ABOUT COMPLIANCE (AND THE WAY AHEAD)

So, what is the best way to go forward, beyond merely talking about the subject? The main risk that Latin American companies and authorities face when trying to implement compliance is to understand the real meaning of the term. Given the highly legalistic culture and adversarial procedures that tend to dominate in the antitrust field, I think compliance seriously risks being understood as no more than paper and preaching. And even if there is some paper in place, these are normally mere generalizations of compliance with the law.

Furthermore, there are three pervasive beliefs that should be overcome. First, compliance programs are not a "sanction." Given the cultural features described above, it is hardly surprising that this is dominant thinking in many circles. Second, compliance programs are not only for multinationals and other big firms (i.e., they are not necessarily expensive). Finally, programs are not a "thing for lawyers."

This is far from what real compliance is. As other authors have stated (see the other articles in this CPI special issue), compliance programs consist of management committing to doing the right thing, and taking steps to make this happen. This means compliance is essentially related to business management. Programs are—above all—internal efforts of firms to foster an internal compliance and ethics culture, from top to bottom.

Having said that, governments have also an important—crucial—role to play. They should boost the creation of corporate compliance programs with their own actions. Particularly, I envision three main steps that governments in general, and competition agencies in particular, could take to change the current state of the art:

The first one is no different to the current approach: be tougher on cartel enforcement. Notwithstanding the shortcomings of dissuasion, it remains true that strong enforcement is one key to success.

Second, agencies should set clear guidelines on the topic. One example is the aforementioned FNE Guidelines. This is a state-of-the-art document that has been built to mirror the best comparative practices in the field—it even recognizes the possibility to use screens internally to detect cartels. Among its other sections, the FNE Guidelines define (i) compliance programs, (ii) their essential requirements and elements, and (iii) the benefits of having such programs (including reducing fines requested to the Chilean Competition Tribunal, "TDLC").

The FNE Guidelines set four essential requirements that are well-known features in the field:

1. commitment to comply,
2. risk assessment (classifying the risks according to their importance and reassessing them from time to time),
3. implementation of internal structures and procedures (including incentives and communication channels) in accordance with competition law, and
4. (last but not least) continuous involvement of the economic agent's managers and/or directors in the program.

Overall, a program must be created in response to the specific needs and characteristics of each business (including its size) and be based on its situation within the market. Using this base, the program must "meet the requirements of seriousness and comprehensiveness." Hopefully, other countries will follow (and improve on) the FNE Guidelines example soon.

Finally, agencies should be clear that they seriously consider compliance programs when dealing with businesses. This general statement should be backed by practical actions. In particular, one of the main challenges ahead will be to prove the applicability of any written statement in practice. For instance, in recent cases the Chilean TDLC has started imposing compliance programs on firms in its judgments (*Ginecologos*, 2015) and has explicitly endorsed the FNE Guidelines. The TDLC has also analyzed whether a compliance program adopted by a firm can be considered to be complete and serious enough to decrease a potential fine (*CCT II*, 2010). The FNE has performed similar tasks in recent settlements. Recognition of the programs is vital.

Another way for agencies to show commitment is to hire a specialist on compliance—someone trained in the field and with cutting-edge knowledge, who can help and guide companies in their private compliance efforts. To my knowledge, no Latin American agency has such a person within their staff.

These are only a handful of examples that can show governmental commitment with compliance. Surely, there are many more. The challenge is to demonstrate that any advance in the area means a true belief in that "doing things right" and attacking anticompetitive conducts at their roots, is at least as critical as—if not more than—prosecuting and punishing wrongdoers. Unlike dissuasion, compliance allows the public and private sector to walk hand-in-hand in the fight against anticompetitive behavior. Let's give this approach a warm welcome.