Antitrust Chronicle

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Corporate Compliance

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

In this issue of the CPI Antitrust Chronicle, we explore the implications of the new U.S. Department of Justice incentives for corporate antitrust compliance programs.

On July 11 of this year, the Antitrust Division of the DOJ announced that it would consider the nature of a company's antitrust compliance efforts when bringing criminal charges or imposing sentences for antitrust violations. This, of course, provides a powerful incentive for companies to invest in such programs.

While the intention of the policy is clear, it remains to be seen how effective it will prove to be. Historically, corporate management has seen limited value in investing in robust compliance programs. Will reduced charges or penalties be enough to change that culture, especially when "adequate" compliance has yet to be tested, and so have the extent to the rewards?

This edition of the CPI Antitrust Chronicle includes comprehensive reviews of the new policy in the context of the history of antitrust compliance. Proposals on what robust compliance might look like are advanced, including screens as one of the tools, as are some policy suggestions linking compliance efforts with the time-tested policy of leniency.

Among the many questions raised is whether the DOJ's policy should be a model for other antitrust agencies. Understanding how the efficacy of compliance and leniency programs can vary in different economic systems provides important insight to policy makers globally.

A final consideration is how the success of this new initiative can be measured. While some might expect that more effective enforcement should lead to an increase in enforcement actions, the ability to deter illegal conduct might have the opposite implication. Perhaps, if the DOJ's policy is very effective, we might see fewer actions brought in the future.

As always, thank you to our great panel of authors.

Sincerely,

Rosa M. Abrantes-Metz

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Turn the Page: The Antitrust Division's New Approach to Incentivizing Antitrust Compliance Programs

By Richard A. Powers, Ann M. O'Brien & James W. Attridge

Corporate compliance programs are the first line of defense in preventing costly antitrust crimes before they corrupt our free markets and harm American consumers. As the enforcer of the federal criminal antitrust laws, the Antitrust Division is responsible for using its authority to deter, detect, and prosecute these violations. While as prosecutors we are often focused on detection and prosecution, the Division also wants to do all it can to deter and prevent criminal antitrust conduct before it occurs. With that in mind, on July 11, 2019, the Division announced multiple changes aimed at incentivizing companies to prioritize antitrust compliance. The Division will now consider compliance at the charging stage in criminal antitrust investigations. The Division also announced revisions to the Justice Manual reflecting this policy change, along with updates to the Antitrust Division Manual. And for the first time, the Division issued public guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations.

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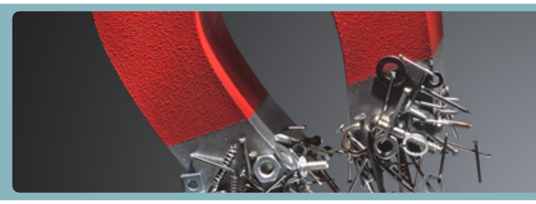

Why Screening is a "Must Have" Tool for Effective Antitrust Compliance Programs

By Rosa M. Abrantes-Metz & Albert D. Metz

Over the last decade screens have had a significant impact in the early stages of litigation, helping to shape complaints, motions to dismiss, court decisions, and agency investigations on collusion and manipulation matters. Yet, to date screens have played almost no role in corporate antitrust compliance programs, arguably because authorities did not offer any sort of dispensation to corporations for their compliance programs when violations were found. However, the U.S. Department of Justice's recent change in policy is likely to encourage meaningful investments in corporate compliance programs. The DOJ now offers formal incentives for "effective" compliance programs, directing prosecutors to evaluate in-place compliance programs as part of every corporate charge recommendation. Furthermore, when conducting its evaluation, the Antitrust Division explicitly considers whether screens and statistical analyses are elements of the corporation's antitrust compliance program. In this article we argue this change in the DOJ's policy is likely to push corporations to incorporate screens when enhancing their antitrust compliance programs, and put forward our views on why they should in fact do so. We also address some of the main questions corporate counsel is likely to have on the use of screens in antitrust compliance.

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Antitrust Compliance – Reluctance to Embrace and Recognize Corporate Compliance Efforts

By Anne Riley

This article postulates that while much has been done (and continues to be done) by antitrust agencies in the antitrust compliance arena (in particular the recent policy change by the U.S. Department of Justice Antitrust Division), there is still much work to be done internationally and greater progress to be achieved. The time truly has come to rethink compliance. The policy objective of antitrust enforcement is generally accepted to be to "have no need to impose fines at all," so the author argues that the goal of antitrust enforcement agencies should be to take every step to encourage business integrity, and to support good corporate cultures and sincere compliance efforts. The author contends that there are many pressures facing businesses today – and many compliance challenges, both in relation to antitrust and in relation to the myriad of other laws they need to comply with. Most businesses want to "do the right thing" – they want to act with integrity and protect their reputation – they just need to understand how to do that. Agencies, Academia, and Business Organizations need to work together to ensure the compliance message is fully understood.

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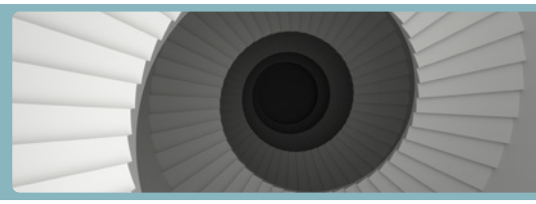

"It Didn't Work": Antitrust Compliance and the Role of the Senior Executive

By Donald C. Klawiter

For decades, the Antitrust Division refused to give corporate defendants credit for having an effective antitrust compliance program because if the company was being prosecuted, the compliance program did not work. In July, 2019, the Division announced a new policy and released a guidance statement that set out a comprehensive evaluation of the elements of an effective compliance program. The most difficult issue with the Division's guidance statement is the evaluation of the conduct of senior company executives in (A) establishing and supervising the compliance program, (B) monitoring and tolerating the conduct of employees and (C) participating personally in illegal conduct. While the new compliance initiative is an admirable initiative, the Antitrust Bar should remember that the Corporate Leniency Policy has much more value than the compliance initiative if a company qualifies for leniency, including no criminal prosecution or fine. The article concludes with another proposal – that an effective compliance program be a condition of qualifying for leniency.

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Navigating Antitrust Compliance Under the DOJ's New Guidance

By Renata Hesse, Benjamin Walker & Christopher Viapiano

On July 11, 2019, Assistant Attorney General Makan Delrahim announced that the Antitrust Division of the U.S. Department of Justice was reversing its longstanding policy of insisting on guilty pleas for companies involved in criminal violations of the antitrust laws that do not otherwise qualify for leniency under the Antitrust Division's Corporate Leniency Policy. This shift opens a new path to a potential deferred prosecution agreement for companies with "effective" antitrust compliance programs, measured under new guidance (the "Guidance") issued by the Antitrust Division for evaluating such programs. The Guidance provides a detailed set of factors that Antitrust Division attorneys are to consider in assessing, among other considerations, companies' pre-existing antitrust compliance programs in making charging decisions. The Guidance also clarifies the Antitrust Division's policy on evaluating the effectiveness of compliance programs in making sentencing recommendations. Companies should review the Guidance carefully to understand the Antitrust Division's expectations regarding antitrust compliance.

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Create Your Own: Bespoke Antitrust Compliance Programs For Effective Compliance

By Leonor Davila, Gabrielle Kohlmeier, Anjali B. Patel & John Seward

In July 2019, the Department of Justice's Antitrust Division announced an important and significant change to its treatment of corporate antitrust compliance programs. In a departure from precedent, the Division announced that it would begin giving credit to companies with robust antitrust compliance programs at both the investigation and sentencing phases and also announced that it would be publishing guidance on how it would investigate criminal antitrust violations. One clear message resounds: there is no one-size-fits-all solution. In this article, the authors discuss the history of the Division's views on corporate antitrust compliance programs and explore some of the multitude of considerations to take into account when creating and implementing corporate antitrust compliance programs, including size, industry, and other factors. The authors also discuss important components to developing an effective antitrust compliance program, such as fostering a culture of compliance at all levels of the company.

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Recruiting Companies in the Fight Against Antitrust Violations: Government Could do Better!

By Joe Murphy

Compliance and ethics programs are how organizations get their people to follow the law. When governments want organizations acting properly, they encourage effective programs. But government can also undermine programs or take ineffective approaches. There have been unfortunate instances where governments and legal systems have undermined company programs. Some enforcers have ignored programs. Governments that see value in programs may mistakenly mandate program details. Governments evaluating programs may wrongly give credit for paper and preaching, instead of real programs. They may also fail to publish examples and discuss cases. Enforcers may lack compliance and ethics expertise. In evaluating programs enforcers may take a pass/fail approach, instead of a more nuanced approach. Sometimes the mistakes defy explanation, such as where officials have tied their own hands, or rewarded companies for delaying program implementation. Finally, for those who do assessments, they may make unnecessary mistakes.

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Balancing Privacy Protections With Antitrust Compliance Efforts: Key Issues and Potential Solutions

By Fiona Schaeffer, Nathaniel Mattison & Jenna Weinblatt

This article examines the underappreciated tension between legislatures' efforts to strengthen privacy protections for personal information and antitrust enforcers' increasingly favorable attitude towards corporate self-policing. Privacy and antitrust have the potential to be strong legal complements, promoting free and fair markets for all market participants. In the United States, the reasonable expectations test historically has enabled a balancing of employer and employee interests related to the collection and use of employee personal information, as would allow businesses to institute all of the hallmarks of effective compliance identified by the Department of Justice's Antitrust Division. However, restrictions on personal data collection and analysis that have passed in recent years seem not to allow such a nuanced approach to employee privacy in the workplace, potentially undermining businesses' efforts to implement suitable antitrust compliance programs. Legislators should take greater note of antitrust policy goals (among others) when formulating privacy legislation, an effort that businesses can aid.

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Why isn't "Deterrence" Included in the Measurements of Antitrust "Enforcement"?

By Lawrence J. White

Enforcement of the antitrust laws is often associated with a simple count of the annual number of government-initiated cases – with fewer cases associated with weaker enforcement, and vice-versa. This position is largely inconsistent with a belief that more enforcement efforts can deter violations. The presence of deterrence yields an inverted parabola – a "Laffer Curve" – that relates cases brought to enforcement efforts. The right-hand side of this curve generates the opposite result from the simple count idea: More enforcement efforts can result in fewer cases that are brought – *because there are fewer underlying violations*. This article expands on these ideas.

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Enhancing the "Carrot": A Practical Perspective on DOJ Credit For Antitrust Compliance

By Robin D. Adelstein & Gerald A. Stein

In July 2019, the U.S. Department of Justice Antitrust Division published guidance entitled "Evaluation of Corporate Compliance Programs." Division prosecutors will now consider providing credit at the charging and sentencing stages of an antitrust criminal investigation to a company that maintains an antitrust compliance program that meets certain specified requirements and where the company self-reports potential violations to the Division. The availability of credit at the charging and sentencing stages will assist in-house counsel in encouraging corporate investment in internal antitrust compliance. However, in-house counsel and company management will also face tough decisions in determining whether the availability of credit (the "carrot") is worth the risks that flow from self-reporting to the Division.

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Rewarding Positive Behavior: Improving Antitrust Compliance in Developing Countries

By Carlos Mena Labarthe & Édgar Martín Padilla

The potential impact of the implementation of corporate compliance programs is more significant in developing countries with a weaker rule of law, lower awareness of antitrust rules, and complex political economy contexts. Regulation authorities in developing countries should take the chance to unlock the potential of soft enforcement and self-regulation through establishing clear incentives for compliance programs. We use the Mexican case to explore how antitrust agencies in developing countries still lag behind in using compliance programs as a tool for enhancing competition promotion, cooperation and awareness. By increasing benefits for businesses of having effective and measurable compliance programs, antitrust agencies in developing countries may reach exponentially bigger impact in creating a culture of law abidance, ultimately improving the competition landscape in such complex jurisdictions.

WHAT'S NEXT?

For December 2019, we will feature Chronicles focused on issues related to (1) **Inequality**; and (2) **Global Digital Reports**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

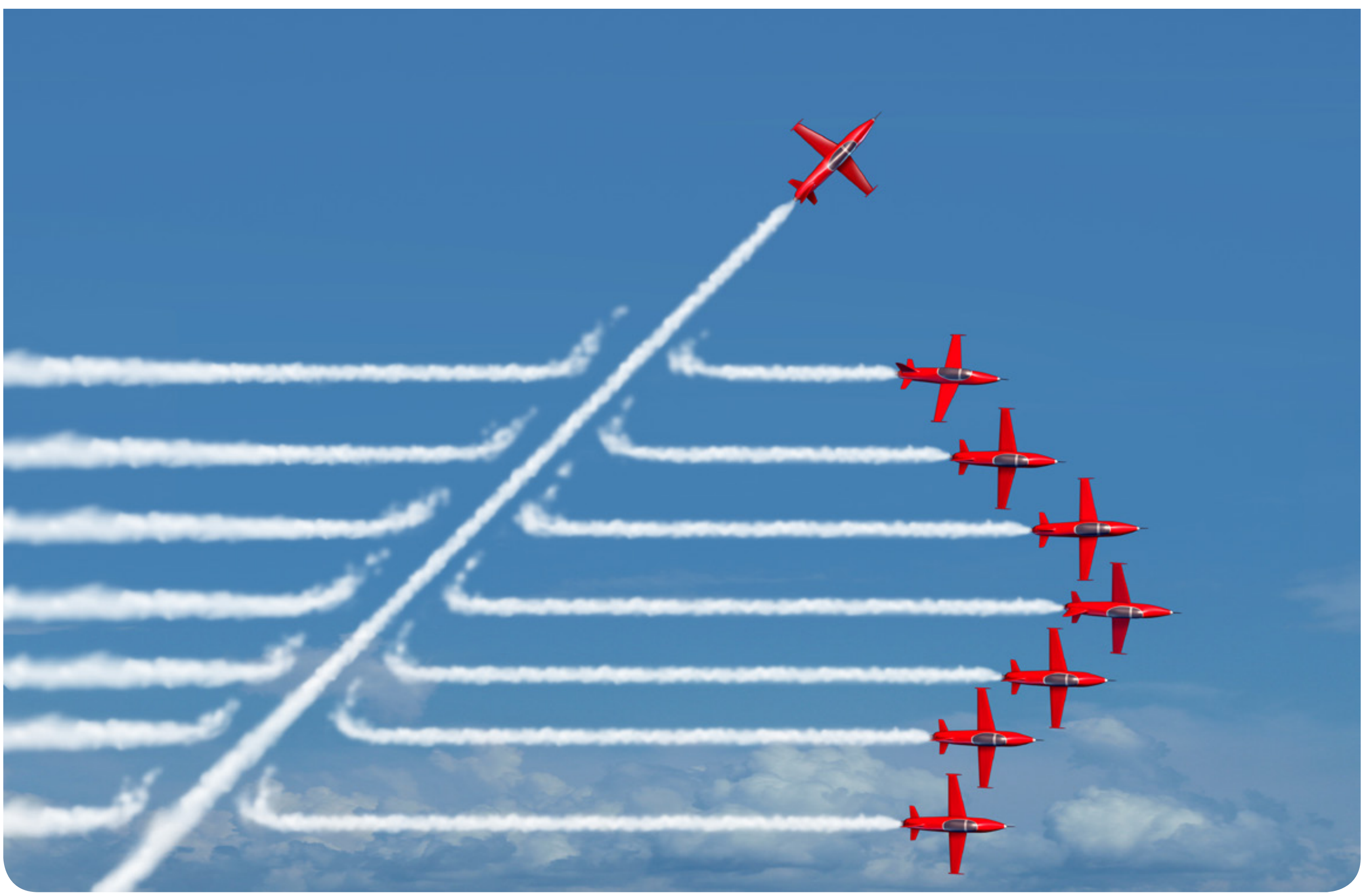
CPI ANTITRUST CHRONICLE JANUARY 2020

For January 2020, we will feature Chronicles focused on issues related to (1) **Agriculture**; and (2) **Labor Markets**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

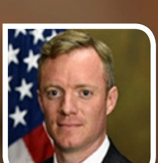
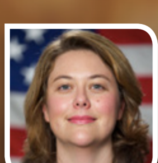
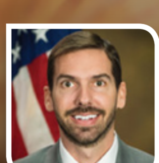
Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.



TURN THE PAGE: THE ANTITRUST DIVISION'S NEW APPROACH TO INCENTIVIZING ANTITRUST COMPLIANCE PROGRAMS

BY RICHARD A. POWERS, ANN M. O'BRIEN & JAMES W. ATTRIDGE[1]

1 Richard Powers is Deputy Assistant Attorney General for Criminal Enforcement, Ann O'Brien is Special Counsel for Criminal Policy & Assistant Chief, Competition Policy & Advocacy Section, and James Attridge is Counsel to the Assistant Attorney General at the Antitrust Division of the U.S. Department of Justice.

I. INTRODUCTION: A NEW MODEL FOR INCENTIVIZING ANTITRUST COMPLIANCE PROGRAMS

Corporate compliance programs are the first line of defense in preventing costly antitrust crimes before they corrupt our free markets and harm American consumers. As the enforcer of the federal criminal antitrust laws, the Antitrust Division is responsible for using its authority to deter, detect, and prosecute these violations. While as prosecutors we are often focused on detection and prosecution, the Division also wants to do all it can to deter and prevent criminal antitrust conduct before it occurs. With that in mind, on July 11, 2019, the Division announced multiple changes aimed at incentivizing companies to prioritize antitrust compliance.[2] The Division will now consider compliance at the charging stage in criminal antitrust investigations. The Division also announced revisions to the Justice Manual reflecting this policy change, along with updates to the Antitrust Division Manual. And for the first time, the Division issued public guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations. This announcement reflects the culmination of recent changes to how the Division views compliance programs and the important role they play in deterring antitrust violations and promoting good corporate citizenship.

II. THE ANTITRUST DIVISION'S HISTORICAL VIEWS ON CREDITING CORPORATE COMPLIANCE

Before the recent announcement, it was widely known that the Division did not give credit at the charging stage for corporate compliance programs. Indeed, the Justice Manual stated that "the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program."[3] Instead, since the early 1990s, the Division's view was that the benefits of an antitrust compliance program were twofold: the ability to prevent antitrust crimes in the first instance, or, if that failed, detecting them early enough to qualify for leniency under the Corporate Leniency Policy.[4] This approach helped underscore the importance of winning the race for leniency at a time when that policy was establishing itself.

At sentencing, the Division has never recommended a reduction under the Sentencing Guidelines for a pre-existing compliance program. The Division has always followed the Sentencing Guidelines when deciding whether to recommend a potential reduction in a company's fine for an effective compliance and ethics program.[5] Under the Sentencing Guidelines, however, the involvement of high-level or substantial authority personnel — almost always found in an antitrust violation — disqualifies a company from receiving credit. The Division's record here is not anomalous. According to Sentencing Commission data, the Sentencing Guidelines' compliance reduction is rarely given.[6] While the Division did not historically credit compliance programs at charging and has yet to encounter a situation at sentencing that meets the Guidelines' requirements, the Division's leniency policy has long provided the ultimate credit for good corporate citizens who detect and promptly self-report violations.

2 Makan Delrahim, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks as Prepared for Delivery at New York University School of Law Program on Corporate Compliance and Enforcement, at 3 (Jul. 11, 2019), https://www.justice.gov/opa/speech/file/1182006/download.

3 Justice Manual § 9-28.400 (new Aug. 2008).

4 See Gary R. Spratling, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Experience and Views of the Antitrust Division, Remarks as Prepared for Corporate Crime in America: Strengthening the "Good Citizen" Corporation, a National Symposium Sponsored by the U.S. Sentencing Commission (Sept. 8, 1995), https://www.justice.gov/atr/file/519136/download.

5 See U.S.S.G. § 8C2.5(f); U.S.S.G. app. C §§ 673 (2004), 744 (2010).

6 See Kathleen Grilli, General Counsel for the U.S. Sentencing Commission, Remarks Delivered at the Public Roundtable on Antitrust Criminal Compliance, at 7 (Apr. 9, 2018), https://www.justice.gov/atr/page/file/1064291/download (Only 10 organizations have received Guidelines reduction for having an effective ethics and compliance program out of the 4,558 organizational sentencings tracked by the U.S. Sentencing Commission since 1993).

III. ENCOURAGING GOOD CORPORATE CITIZENSHIP

The Division's leniency policy, one of the most noteworthy developments in white collar enforcement in the last 25 years, has pushed companies to consider the risks associated with committing antitrust crimes and created a strong incentive for companies to report these crimes to the Division. The Division's vigorous enforcement efforts have raised antitrust awareness and encouraged companies to invest in antitrust compliance. The leniency policy has been the Division's most important investigative tool. Only the first-in reporting company can obtain leniency and incentivizing compliance for those companies who do not win the race for leniency is also important. By changing how it evaluates compliance, the Division is taking another step in its criminal enforcement efforts toward incentivizing, recognizing, and, where appropriate, rewarding corporations who share four common traits of good corporate citizenship. Good corporate citizens: (i) commit themselves to a culture of compliance, but if misconduct occurs, they (ii) promptly self-report, (iii) provide full and timely cooperation, and (iv) undertake timely and thorough remediation.

Moreover, years of experience have taught us that a well-designed compliance program will not catch all wrongdoing and that one lapse, albeit a significant one, does not conclusively make the program a failure.[7] Instead, the better course is to evaluate the failure and place it in the broader context of other factors. Division prosecutors can and will do a fact-based assessment of a company's compliance program to determine its effectiveness and provide credit where, consistent with the Principles of Federal Prosecution of Business Organizations, a good corporate citizen with an effective compliance program nevertheless finds itself implicated in a cartel investigation. The potential credit at the charging stage is resolution by deferred prosecution agreement ("DPA"), instead of guilty plea.

IV. FIRST CHANGES TO THE DIVISION'S VIEWS ON CREDITING CORPORATE COMPLIANCE

The Division's approach to evaluating and crediting effective compliance programs began to change several years ago.[8] In 2014, the Division announced that it was actively considering ways to credit companies that proactively adopt or strengthen compliance programs after coming under investigation.[9] Shortly thereafter, the Division credited "forward looking" compliance efforts at sentencing by advocating for a fine reduction pursuant to 18 U.S.C. § 3572(a)(8) for extraordinary efforts to improve compliance and prevent the recurrence of a violation undertaken after the Division opened an investigation.[10]

The Division also continued to study compliance. On April 9, 2018, the Division held a public roundtable discussion of corporate antitrust compliance and its implications for criminal antitrust enforcement policy.[11] The roundtable provided a forum for the Division to engage with in-house and outside corporate counsel, foreign antitrust enforcers, international organization representatives, and other interested parties on the topic of antitrust compliance. Participants discussed the role that antitrust compliance programs play in preventing and detecting criminal antitrust violations, and ways to further promote corporate antitrust compliance. The Division considered what it heard at the Compliance Roundtable and began internally evaluating what could be done to further promote corporate antitrust compliance programs.[12] As part of this review, the Division considered the approaches followed by other components within the Department of Justice and other jurisdictions around the world. At the end of this internal assessment, the Division announced comprehensive changes to the way it evaluates and credits corporate compliance programs.

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7 Justice Manual § 9-28.800 ("While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.").

8 See Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Compliance Is A Culture, Not Just A Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download [hereinafter Snyder, Compliance Is A Culture]; Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?, Remarks as Prepared for the Sixth Annual Chicago Forum on International Antitrust (Jun. 8, 2015), https://www.justice.gov/sites/default/files/atr/legacy/2015/06/30/315474.pdf [Leniency in Multi-Jurisdictional Investigations]; Andrew Finch, Principal Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust in the Financial Sector, Remarks as Prepared for Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 2, 2018), https://www.justice.gov/opa/speech/file/1060981/download.

9 Snyder, Compliance Is A Culture, *supra* note 8, at 9.

10 See 18 U.S.C. § 3572(a)(8); *United States v. Kayaba Indus. Co.,* No. 1:15-cr-00098 (S.D. Ohio 2015); *United States v. Barclays PLC*, No. 3:15-cr-00077 (D. Conn. 2015); *United States v. Inoac Corp.*, No. 2:15-cr-00052 (E.D. Ky. 2017); see also Snyder, Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?, *supra* note 8, at 4.

11 Public Roundtable on Criminal Antitrust Compliance materials are available at https://www.justice.gov/atr/public-roundtable-antitrust-criminal-compliance.

12 Finch, *supra* note 8, at 8.

V. CHANGES TO JUSTICE MANUAL AND ANTITRUST DIVISION MANUAL

The Justice Manual previously recognized the Division's longstanding policy "that credit should not be given at the charging stage for a compliance program" in a Division investigation.[13] The Justice Manual further recognized that the nature of "antitrust violations" may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.[14] After Assistant Attorney General Delrahim's July 11, 2019 announcement, these two provisions were deleted from the Justice Manual, at the Division's request, to reflect the new policy and make clear that the Division will now consider compliance at the charging stage in criminal antitrust investigations. In practical terms, this means that a company has the opportunity to earn a DPA and avoid criminal conviction. Under the DPA, the company will be charged via criminal information, but the prosecution of the case is deferred for the pendency of the agreement, usually three years. If the company abides by the agreement then the Division will move to dismiss the information with prejudice and the company avoids criminal conviction.

In addition to removing the specific antitrust considerations regarding compliance from the Justice Manual, the Antitrust Division Manual has also been updated to make clear that Division prosecutors are to evaluate all of the factors contained in the Principles of Federal Prosecution of Business Organizations, including pre-existing compliance programs, in corporate charging recommendations.[15] The Division Manual was also revised to provide guidance on evaluating compliance programs at sentencing and the selection of compliance monitors. Consistent with our longstanding belief in predictability and transparency, the Division Manual is publicly available.

VI. GUIDANCE ON EVALUATION OF CORPORATE COMPLIANCE PROGRAMS

At the Compliance Roundtable, the Division heard from both in-house and outside counsel that public guidance from the Division regarding antitrust-specific compliance programs would be helpful to both incentivize corporate expenditure on antitrust compliance and to provide transparency to support counseling corporate clients on the development and enhancement of antitrust-specific compliance programs. Also in July, the Division responded to these comments and for the first time issued public guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations.[16] The guidance draws on a variety of sources, including the Justice Manual, the Division's prior experience in evaluating antitrust compliance programs, other resources within the Department concerning the evaluation of corporate compliance programs, including the Criminal Division Guidance on the Evaluation of Corporate Compliance Programs,[17] and the Sentencing Guidelines. This detailed, antitrust-specific guidance attempts to assist Division prosecutors in their evaluation of compliance programs at both the charging and sentencing stages, and to provide greater transparency regarding the Division's compliance analysis.

Like other Department guidance, the charging section is framed around the three fundamental compliance questions found in the Justice Manual: Is the program well-designed? Is it being applied earnestly and in good faith? Does it actually work?[18]

The guidance elaborates on these questions by identifying factors the Division will consider when evaluating an effective antitrust compliance program, including: (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.[19] For each of these elements, the guidance also provides additional antitrust-specific questions for prosecutors to consider depending on the facts. For example, in assessing the compliance program's design and risk assessment the guidance suggests asking, "as employees utilize new methods of electronic communication, what is the company doing to evaluate and manage the antitrust risk associated with these new forms of communication?"[20] Similarly, is the compli-

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13 Justice Manual § 9-28.400 (new Aug. 2008).

14 *Id.* § 9-28.800 (revised Nov. 2015).

15 U.S. Dep't of Justice, Antitrust Division Manual, ch. 3, pt. G.2(c) (updated Jul. 2019), https://www.justice.gov/atr/division-manual.

16 U.S. Dep't of Justice, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (Jul. 2019), https://www.justice.gov/atr/page/file/1182001/download ("Guidance").

17 U.S. Dep't of Justice, Criminal Div., Evaluation of Corporate Compliance Programs (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

18 Justice Manual § 9-28.800 (revised Jul. 2019).

19 Guidance, *supra* note 16, at 3-4.

20 *Id.* at 7.

ance program appropriately tailored to antitrust risk, such as risks associated with "human resources personnel and executives responsible for overseeing recruitment and hiring?"[21]

The guidance also addresses how Division prosecutors should evaluate compliance programs for sentencing purposes, including whether to recommend corporate probation. For example, among other factors that may counsel in favor of probation, whether the company's compliance program does not meet the Sentencing Guidelines' requirements[22] and whether the company leaves culpable executives in positions of authority.[23]

The guidance is a detailed document that should be read in its entirety. However, the guidance is not a checklist, and the Division's compliance analysis will not be formulaic. Not all factors will be relevant in every case, and the Division recognizes that a company's size may affect the resources allocated to its compliance program.

VII. COMPLIANCE GOING FORWARD

Counsel should familiarize themselves with the guidance and expect that Division prosecutors will ask the applicable questions as part of their evaluation of a company's antitrust compliance program. Division prosecutors will ask these questions throughout their investigation, including when questioning witnesses. Witnesses can be key to assessing many of the questions in the guidance, especially the company's commitment to compliance.[24] Indeed, the Division has long recognized that "[i]f senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one."[25]

At the outset of any investigation, counsel should be prepared to address the following three preliminary antitrust-specific questions about a company's compliance efforts:

1) Does the company's compliance program address and prohibit criminal antitrust violations?

2) Did the antitrust compliance program detect and facilitate prompt reporting of the violation?

3) To what extent was a company's senior management involved in the violation?

These questions will focus our analysis of a company's compliance program for purposes of charging decisions or sentencing recommendations.

VIII. EARNING A DEFERRED PROSECUTION AGREEMENT

The existence of a compliance program does not guarantee a DPA. As the Justice Manual specifically states, "the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents."[26] Instead, Department prosecutors are directed to conduct a fact-specific inquiry into "whether the program [at issue] is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees."[27] An effective compliance program is one of ten Justice Manual factors prosecutors consider when assessing corporate wrongdoing. In making a charging recommendation, Division prosecutors will evaluate the compliance program's effectiveness, or lack thereof, and consider it together with all of the other relevant factors. Compliance goes hand in hand with the three other hallmarks of good corporate citizenship: prompt self-reporting, cooperation in the Division's

21 *Id.*; see also U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

22 U.S.S.G. § 8B2.1.

23 Guidance, *supra* note 16, at 12.

24 *Id.* at 5 (quoting Justice Manual § 9-28.800 (revised Jul. 2019)) ("[E]mployees should be 'convinced of the corporation's commitment to [the compliance program].'").

25 *Id.* (quoting Snyder, Compliance Is A Culture, *supra* note 8, at 4-5).

26 Justice Manual § 9-28.800 (revised Jul. 2019).

27 *Id.*

investigation, and remediation.[28] The Justice Manual "counsel[s] against crediting compliance programs when the other three hallmarks of good corporate citizenship are absent."[29]

IX. NON-PROSECUTION AGREEMENTS

The Division will continue to *disfavor* non-prosecution agreements ("NPAs") with companies that do not receive leniency because complete protection from prosecution for antitrust crimes is available *only* to the first company to self-report and meet the Corporate Leniency Policy's requirements.[30]

X. STATUS OF INDIVIDUALS

The Division will address the non-prosecution protections for individuals in DPAs in the same manner it has done in its plea agreements. Certain individuals will be included in the non-prosecution protections contained in the DPA while other culpable individuals may be carved-out of those non-prosecution protections and identified in a sealed addendum to the agreement.

XI. THE ASSESSMENT AND IMPORTANCE OF TIMELINESS IN CRIMINAL INVESTIGATIONS

Under the Principles of Federal Prosecution of Business Organizations, prosecutors consider the "corporation's timely and voluntary disclosure of wrongdoing" when making corporate charging decisions.[31] Timely self-reporting and an effective compliance program go hand in hand. The Justice Manual directs prosecutors to "consider the promptness of any disclosure of wrongdoing to the government," when evaluating the compliance program itself.[32]

While the Principles do not define timely or prompt, the Division's assessment of "prompt" self-reporting[33] will be informed by our guidance and Department Policy. For instance, the guidance includes questions such as, "How long after becoming aware of the conduct did the company report it to the government?" and "Did the company report the antitrust violation before learning of a government investigation?"[34]

The Principles make clear that time is generally of the essence in criminal investigations. Just as timely self-reporting and effective compliance go hand in hand, timely self-reporting is also linked to our assessment of cooperation. Prosecutors may consider a corporation's "timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation."[35] Time is also of the essence when it comes to remediation.[36] Finally, the Division shares the view of other components that the "burden" is on the company "to demonstrate timeliness."[37]

Timing has always been critical in criminal antitrust investigations because receiving leniency requires winning the race to our doorstep. Under the new policy, if a company loses the race for leniency, despite having an otherwise effective compliance program, it still has an opportunity to avoid criminal conviction through prompt self-reporting. Both the Principles and our guidance direct prosecutors to assess whether the company's response to the misconduct, whether in the form of action or inaction, was consistent with good corporate citizenship. Companies that demonstrate a commitment to a culture of compliance, as evidenced in part by prompt self-reporting, can earn a DPA.

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28 Delrahim, *supra* note 2, at 5.

29 *Id.*

30 Justice Manual § 9-28.400 (updated Jul. 2019); Antitrust Division Manual, ch. 3, pt. G.2(c) (updated Jul. 2019).

31 Justice Manual § 9-28.300 (updated Nov. 2018).

32 *Id.* § 9-28.800 (revised Jul. 2019).

33 Guidance, *supra* note 16, at 3, 14.

34 *Id.* at 14.

35 Justice Manual § 9-28.900 (new Nov. 2015); see also *id.* § 9-28.700 (updated Nov. 2018) ("[T]he timeliness of the cooperation" can also impact its value).

36 See *id.* § 9-28.1000 (renumbered Nov. 2015) (The "corporation's quick recognition of the flaws in [its compliance] program and its efforts to improve the program are also factors to consider as to the appropriate disposition of a case.").

37 *Id.* § 9-47.120(3)(a) (updated Mar. 2019).

While all situations are fact-specific, a company that promptly self-reported and sought a marker will be better situated than one that sat on its hands after becoming aware of wrongdoing.[38] Indeed, a company that receives a subpoena and does not promptly begin cooperation is going to be hard-pressed to argue that its existing compliance program had any part in detecting and facilitating prompt reporting of the violation that the Division is already investigating. Likewise, the company would not qualify for a 2-point Guidelines culpability score reduction for "*fully*" cooperating in the Division's investigation, which requires thorough and timely cooperation that "begin[s] essentially at the same time as the organization is officially notified of a criminal investigation."[39]

XII. SENTENCING

The Division's new guidance delineates what Division prosecutors should evaluate when determining whether to recommend a Guidelines-based sentencing reduction for a company's effective antitrust compliance program.[40] "The Sentencing Guidelines' criteria are minimum requirements."[41] Nevertheless, the criteria are rarely met because the reduction does not apply if the company "unreasonably delayed reporting the offense."[42]

In addition, there is a rebuttable presumption in the Sentencing Guidelines that a compliance program is not effective when certain "high-level personnel" or "substantial authority personnel" "participated in, condoned, or [were] willfully ignorant of the offense."[43] Under the Sentencing Guidelines, high-level personnel and substantial authority personnel include individuals in charge of sales units, plant managers, sales managers, or those who have the authority to negotiate or set prices or negotiate or approve significant contracts.[44] High-level or substantial authority personnel are often involved in antitrust offenses. The guidance directs Division prosecutors to assess the applicability of the rebuttable presumption on a case-by-case basis. While it may be difficult for a second or subsequent cooperator to satisfy the Sentencing Guidelines' requirements to obtain credit for a pre-existing compliance program, the new guidance provides direction to prosecutors and transparency to the bar on the relevant analysis when applying the compliance Sentencing Guideline to criminal antitrust matters.

The guidance also discusses compliance considerations relevant to recommending probation[45] and statutory-based fine reduction,[46] both of which are consistent with the Division's recent speeches and positions on these matters. A company that is charged and does not receive a Sentencing Guidelines reduction for an effective compliance program, but makes extraordinary remediation and improved compliance efforts after the Division opens an investigation, may still be eligible to obtain "*forward looking*" credit for those efforts pursuant to 18 U.S.C. § 3572(a)(8).

XIII. CONCLUSION

For years, many have urged the Division to move beyond its leniency-or-nothing view of pre-existing compliance programs and to provide written, transparent guidance on its views of an effective compliance program. The Division's policy change, along with revisions to the Manuals and the publication of a guidance document, are intended to make our assessment of compliance predictable and transparent. The Division's hope is that potential charging credit will deter antitrust violations by incentivizing the antitrust compliance efforts of good corporate citizens.

38 Under the Corporate Leniency Policy, the Division has developed a marker system to allow a company that uncovers wrongdoing to seek a marker to hold its place as first in line while it conducts an internal investigation. The Division similarly recognizes that a company that fails to win the race for leniency, but promptly self-reports and begins cooperating, will need time to conduct an internal investigation. See Antitrust Division Manual, ch. 3, pt. F.9(c)(i) (updated Jul. 2019).

39 U.S.S.G. § 8C2.5(g)(2) & cmt. 13.

40 Guidance, *supra* note 16, at 14-15.

41 *Id.* at 14.

42 U.S.S.G. § 8C2.5(f)(2); see Guidance, *supra* note 16, at 14.

43 U.S.S.G. § 8C2.5(f)(3)(A)–(C).

44 See U.S.S.G. § 8A1.2 n.3(B)–(C).

45 See Guidance, *supra* note 16, at 15-16.

46 See *id.* at 16-17.

WHY SCREENING IS A "MUST HAVE" TOOL FOR EFFECTIVE ANTITRUST COMPLIANCE PROGRAMS

BY ROSA M. ABRANTES-METZ & ALBERT D. METZ[1]

1 Rosa M. Abrantes-Metz is Managing Director in the Antitrust, Financial Regulation, and Securities Practices at Global Economics Group, and an Adjunct Associate Professor of Economics at New York University's Stern School of Business; RAbrantes-Metz@GlobalEconomicsGroup.com. Albert D. Metz is Managing Director in the Antitrust, Financial Regulation, Securities, and Data Mining Practices at Global Economics Group, and former Group Managing Director at Moody's Investor Services; AMetz@globaleconomicsgroup.com. The views expressed in this article are our own and do not represent the views of the organizations with which we are affiliated or their clients. We thank Joseph Murphy for comments on this article and for many discussions over the years.

I. INTRODUCTION

Over the last decade, screens have had a significant impact on the early stages of litigation. Empirical evidence has helped shape complaints, motions to dismiss, court decisions, and agency investigations on collusion and manipulation matters. Yet to date they have played almost no role in corporate antitrust compliance programs. Why might this have been the case? Arguably the primary reason is that authorities did not, until very recently, offer meaningful consideration to corporations' compliance programs when violations were found. Specifically with respect to screens, corporations were unwilling to spend any money to implement them, whether because they did not believe screens could be effective or whether it was just part of a general unwillingness to invest in compliance tools.

We have long expected that the high penalties for cartels, the expansion of leniency programs, and the increased use of screening methods by competition authorities and private litigants would motivate corporations to enhance their antitrust compliance programs and incorporate screens as part of such improvements. Leniency is extended to the first to report a violation, so it naturally follows that it would be advantageous to be the first to detect violations. Antitrust compliance programs should play very important roles in detection and self-reporting, and also in deterrence, and screens should have had a major role within such programs, but to date this has not been the case.

However, we expect this is about to change. The U.S. Department of Justice's ("DOJ") recent change in policy towards compliance programs is likely to encourage meaningful investments in this area. The DOJ now offers formal incentives for "effective" compliance programs, directing prosecutors to evaluate in-place compliance programs as part of every corporate charge recommendation. Furthermore, throughout its evaluation, the Antitrust Division explicitly considers whether screens and statistical analyses are elements of the corporation's antitrust compliance program.

II. SCREENING BASICS

The ability to flag unlawful behavior through economic and statistical analyses is commonly known as screening. A screen is an empirical analysis based on a statistical model or hypothesis and a theory of the alleged illegal behavior. It is designed to (i) identify whether collusion, manipulation, or any other type of cheating may exist in a particular market; (ii) who may be involved; and (iii) how long it may have lasted. Screens use commonly available data such as prices, bids, quotes, spreads, market shares, volumes, and other data to identify patterns that are anomalous or highly improbable under a theory of competition.[2]

There are essentially two different types of economic analyses used to flag the possibility of a conspiracy or other types of market abuse.[3] The first can be classified as a "structural approach" which looks at the structure of the industry at hand and scores the likelihood of collusion based on factors such as the homogeneity of the product, number of competitors, stability of demand, and other commonly used collusive markers.[4] The second is empirical and uses what have become commonly known as "screens," or sometimes called "empirical screens." These analyses use data on variables that measure market outcomes - including prices, volumes, and market shares - to detect potential anticompetitive behavior. This is called a "behavioral" or "outcomes" approach in which economists look at market and participant behavior as translated into observable data and apply screens to address whether the observed behavior is more or less likely to have been produced under an explicit agreement. A proposed market-monitoring program combining both structural and empirical components is that outlined in Friederiszick & Maier-Rigaud (2008).[5]

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2 Rosa Abrantes-Metz & Patrick Bajari, "Screens for Conspiracies and their Multiple Applications," *The Antitrust Magazine*, 24(1), Fall 2009, ("Abrantes-Metz & Bajari (2009)").

3 Joseph Harrington, "Detecting Cartels," in *Handbook of Antitrust Economics*, (P. Buccirossi, ed. 2008), ("Harrington (2008)"); Michael Doane, Luke Froeb, Brijesh Pinto & David Sibley, "Screening for Collusion as a Problem of Inference," in *Oxford Handbook of International Antitrust Economics*, edited by Roger Blair & D. Daniel Sokol, Oxford University Press: Kettering, U.K., 2015, ("Doane, Froeb, Pinto & Sibley (2015)").

4 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. See Rosa Abrantes-Metz (Guidelines 2013) "Antitrust Guidelines for Horizontal Collaborations among Competitors for Central and South American Countries," Regional Center for Competition in Latin America, First Conference, Santo Domingo, Dominican Republic, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3291659; see also Proof of Conspiracy under Antitrust Federal Law, American Bar Association Editions, Ch. VIII (April 2010, Chapter VIII); and Harrington (2008), among others.

5 Hans Friederiszick & Frank Maier-Rigaud, "Trigging Inspections *Ex Officio:* Moving Beyond a Passive EU Cartel Policy," *Journal of Competition Law and Economics*, 4(1), 89-113, 2007.

As an example of an empirical screen, Abrantes-Metz, Froeb, Geweke & Taylor (2006) argue that typical price-fixing cartels are not only likely to increase average prices, but also to make them less responsive to cost changes, resulting in lower price variance (or more stable prices).[6] They first propose using low price variance as a screen for traditional price fixing and apply it to retail gasoline stations in Louisville, KY. In 2006, The U.S Federal Trade Commission ("FTC") also applied this screen to observed gasoline price increases when investigating possible price manipulation post-Katrina.[7]

We and other economists, lawyers and reporters have been advocating for the use of screens by all sides involved in litigation and pre-litigation for over a decade (see, for example, Harrington (2008), Klawiter (2012), Ragazzo (2012), Mena-Labarthe (2012), Abrantes-Metz & Froeb (2008), Abrantes-Metz & Bajari (2009), Abrantes-Metz OECD Submission (2013) OECD submission, Kovacic OECD Submission (2013), Schinkel OECD Submission (2013), Doane, Froeb, Pinto & Sibley (2015), Abrantes-Metz FT (2016), among others.[8]

As a consequence, economic analyses in general, and empirical screens in particular, have become increasingly important in uncovering some of the largest collusion and conspiracy cases of modern times, as we will briefly discuss in the next section.[9] Competition authorities and other agencies worldwide are using screens to detect possible market conspiracies and manipulations. This was already true by 2013, as detailed in member countries' submissions to the 2013 OECD's "Ex officio cartel investigations and the use of screens to detect cartels" ("2013 OECD Roundtable on Screens") in which Abrantes-Metz and Professors Bill Kovacic and Martin P. Schinkel were the three invited panelists.[10]

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6 Rosa Abrantes-Metz, Luke Froeb, John Geweke & Chris Taylor, "A Variance Screen for Collusion," *International Journal of Industrial Organization*, 24, 467-486, 2006, ("Abrantes-Metz, Froeb, Geweke & Taylor (2006)"). Curiously, this 2006 paper (as a 2004 FTC working paper) was the first to use the word "screen" with the meaning that has since then become known in the antitrust community.

7 U.S. Federal Trade Commission, "Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases," Spring 2006, available at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf.

8 Donald Klawiter, "Conspiracy Screens: Practical Defense Perspectives, *CPI Antitrust Chronicle*, March 2012(1); Carlos Ragazzo, "Screens in the Gas Retail Market: The Brazilian Experience," *CPI Antitrust Chronicle*, March 2012(1), ("Ragazzo (2012)"); Carlos Mena-Labarthe, "Mexican Experience in Screens for Bid Rigging," *CPI Antitrust Chronicle*, March 2012(1) ("Mena-Labarthe (2012)"); Submissions by Invited Panelists Rosa Abrantes-Metz, Bill Kovacic and M. Peter Schinkel, are contained in OECD's "Ex officio cartel investigations and the use of screens to detect cartels," 2013 available at http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf; Rosa Abrantes-Metz & Luke Froeb, "Competition Authorities are Screening for Conspiracies: What are they Likely to Find?" *The American Bar Association Section of Antitrust Law Economics Committee Newsletter*, 8(1), 10-16, Spring 2008 ("Abrantes-Metz & Froeb (2008)"); Rosa Abrantes-Metz, "Time to rethink deficient market structures," Opinion article, *Financial Times*, April 11, 2016, ("Abrantes-Metz (FT 2016)"), available at https://www.ft.com/content/f95648f8-d499-11e5-829b-8564e7528e54.

9 See generally Testimony of Rosa Abrantes-Metz on behalf of the Office of Enforcement Staff, Fed. Energy Reg. Commission (Sept. 22, 2014), available at http://elibrary.ferc.gov/idmws/doc_info.asp?document_id=14274590; Testimony of Margaret Levenstein, University of Michigan, To Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights On "Cartel Prosecution: Stopping Price Fixers and Protecting Consumers" (Nov. 14, 2013), available at https://www.judiciary.senate.gov/imo/media/doc/11-14-13LevensteinTestimony.pdf; Abrantes-Metz & Froeb (2008); Abrantes-Metz & Bajari (2009); Kai Hüschelrath, "Economist's Note: How are Cartel Detected? The Increasing Use of Proactive Methods to Establish Antitrust Infringements," *Journal of European Competition Law and Practice*, 2010, 1-7; Doane, Froeb, Pinto & Sibley (2015).

10 OECD Roundtable on Screens available at http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf.

III. EXAMPLES OF SCREENING SUCCESSES

A veritable "who's who" of high-profile financial benchmarks have been under investigation. The first was USD LIBOR. In 2008 two *Wall Street Journal* articles used an empirical screen to report possible manipulation intended to artificially depress the LIBOR rate.[11] These reports were quickly followed by our own research presenting evidence of possible collusion among many of the participating banks well before the financial crisis,[12] as explained in Abrantes-Metz's Bloomberg Opinion Article in Bloomberg in February 2013.[13] Investigations then extended to other "Ibors" including Euribor, Yen LIBOR, and TIBOR, and banks have been fined several billion dollars, with several civil cases still ongoing.[14]

After LIBOR came foreign exchange ("FX"), when in mid-2013 Bloomberg presented evidence of a possible manipulation based on screening of price movements.[15] Worldwide investigations followed, and banks have subsequently been fined many billions of dollars in the United States and abroad related to this market.

The London Gold and Silver Fixings were next. In a Bloomberg Opinion Article from December 2013, Abrantes-Metz first argued that the large price declines observed around the time of the London pm and Silver fixings — when the "price of gold and silver" for the day are determined for the purposes of many derivative contracts — were consistent with collusion to manipulate these benchmarks.[16] A *Bloomberg* article by Liam Vaughan followed on February 28, 2014 outlining additional results from Abrantes-Metz's & Metz's research on gold,[17] which was promptly followed by approximately 30 lawsuits in the United States alone,[18] with additional complaints filed abroad, and investigations by competition authorities around the world on these metals, including the DOJ. Investigations continue and have extended beyond the London fixings to the metals' futures markets, namely conduct involving alleged spoofing in metals markets.[19]

Economic analysis and empirical screening also assisted in the flagging of an Italian cartel in baby milk and a Dutch cartel in the shrimp industry. Screens have for almost two decades been used to identify potential anticompetitive behavior in gasoline markets by the U.S. Federal Trade Commission, and to prioritize complaints in the Brazilian gasoline retail market, leading to raids and the ultimate finding of direct evidence of collusion.[20] In Mexico, the competition authority also successfully flagged a conspiracy in pharmaceutical markets through the use of bid-rig-

11 C. Mollenkamp & L. Norman, "British bankers group steps up review of widely used Libor," Wall St. J. C7, April 17, 2008; C. Mollenkamp & M. Whitehouse, *Study casts doubt on key rate; WSJ analysis suggests banks may have reported flawed interest data for Libor*, Wall St. J. A1, May 29, 2008.

12 Rosa Abrantes-Metz, Michael Kraten, Albert Metz & Gim Seow, "LIBOR Manipulation?" *Journal of Banking and Finance,* 36, 136-150, 2012, first draft dated August 4, 2008 and available at http://papers.ss n.com/sol3/papers.cfm?abstract_id=1201389, ("Abrantes-Metz, Kraten, Metz & Seow (2008-12)"); Rosa Abrantes-Metz, George Judge Sofia Villas-Boas "Tracking the Libor Rate," *Applied Economics Letters,* 18, 893-899, 2011; Rosa Abrantes-Metz & Albert Metz, "How Far Can Screens Go in Detecting Explicit Collusion? New Evidence From the Libor Setting," *CPI Antitrust Chronicle*, March (1) 2012, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021515; and Rosa Abrantes-Metz & D. Daniel Sokol, "Lessons from Libor for Detection and Deterrence of Cartel Wrongdoing," *Harvard Business Law Review Online*, vol 3, pp 10-16, available at http://www.hblr.org/2012/10/the-lessons-from-libor-for-detection-and-deterrence-of-cartel-wrongdoing/.

13 Rosa Abrantes-Metz, "How to Use Statistics to Seek Out Criminals," Opinion article, *Bloomberg*, February 26, 2013, available at http://www.bloomberg.com/news/2013-02-26/how-to-use-statistics-to-seek-out-criminals.html.

14 See also C. Snider & T. Youle, "Diagnosing the Libor: Strategic Manipulation Member Portfolio Positions," Working Paper, 2009; C. Snider & T. Youle, "Does the Libor Reflect Banks' Borrowing Costs?" Working Paper, 2010.

15 Liam Vaughan & Gavin Finch, "Currency Spikes at 4 P.M. in London Provide Rigging Clues," *Bloomberg* , August 27, 2013, available at http://www.bloomberg.com/news/2013-08-27/currency-spikes-at-4-p-m-in-london-provide-rigging-clues.html. Abrantes-Metz's work on FX was contained in a December 2013 complaint filed in New York, which extended Bloomberg's analysis and showed further evidence of highly anomalous price spikes at key times of the day when certain benchmarks are set. See the CPI Cartel Column on the Uncovering of the FX Rigging, 2014, available at https://www.competitionpolicyinternational.com/from-collusion-to-competition-15th-issue/.

16 Rosa Abrantes-Metz, "How to Keep Banks from Rigging Gold Prices," Opinion article, *Bloomberg*, December 19, 2013, available at http://www.bloomberg.com/news/2013-12-19/how-to-keep-banks-from-rigging-gold-prices.html.

17 Liam Vaughan "Gold Fix Study Shows Signs of Decade of Bank Manipulation," *Bloomberg*, February 28, 2014, , available at http://www.bloomberg.com/news/2014-02-28/gold-fix-study-shows-signs-of-decade-of-bank-manipulation.html.

18 Nicholas Larkin "London Gold Broker Says Swings in Prices No Sign of Manipulation," *Bloomberg*, March 5, 2014, available at http://www.bloomberg.com/news/2014-03-05/london-gold-broker-says-swings-in-prices-no-sign-of-manipulation.html; See also "Gold lawsuit sparks concerns of market manipulation, collusion," *Fortune*, March 8, 2014, available at https://fortune.com/2014/03/07/gold-lawsuit-sparks-concerns-of-market-manipulation-collusion/; among other similar news.

19 Another example is the ISDAfix benchmark for swaps, for which Abrantes-Metz's screens played an important role in supporting plausible evidence of manipulation and in uncovering previously unknown evidence consistent with collusion. See, for example, CPI Cartel Column on the ISDAfix Decision from June 15, 2016, available at https://www.competitionpolicyinternational.com/isdafix-decision/.

20 Ragazzo (2012).

ging screens,[21] while in India screens were applied to detect a cement cartel. Market monitoring and screening programs have been adopted by several other competition authorities, as reported by OECD members and their submissions during the 2013 OECD Roundtable on Screens,[22] in addition to others such as the South African Competition Authority.[23]

Other regulatory agencies worldwide routinely use screens to help detect illegal conduct such as various types of manipulations and fraud, including the U.S. Securities and Exchange Commission and the U.S. Commodities Futures Trading Commission. Other examples of the power of these screens to flag anticompetitive behavior in financial markets include the stock options backdating and spring loading cases from the mid 2000's, and the 1994 break of an alleged conspiracy by NASDAQ dealers in which odd-eighths quotes were avoided.[24] Both of these were triggered by the application of screens by academics and consultants to financial data and generated large-scale public investigations as well as private litigation.

These are only some examples of the successful applications of screens to assist in the initial detection of rigging of financial benchmarks, but certainly not the only ones. There should be little doubt that monitoring the data through appropriately developed and implemented screens is powerful and effective in identifying potential illegal conduct.

IV. THE CASE FOR SCREENING IN ANTITRUST COMPLIANCE

Corporate antitrust compliance programs largely revolve around training. While compliance training is a necessary tool, the history of major cartels suggests that it is not sufficient, and training alone would not be considered an acceptable program. There are additional tools to enhance a compliance program which are more objective and less dependent on people's good faith.[25] These include audits, direct monitoring, and reviews.

While record reviews and personnel interviews may identify conduct that was otherwise hidden, these tools have limitations: they are somewhat disruptive, and are typically very expensive. Moreover, if they are not focused on the highest risk areas, their resource-intensive nature can generate management hostility.

Luckily, other options are also available which can focus on targeted risk areas and which can be both effective and less resource intensive: screens. The value added of screens for antitrust compliance was first recognized in Abrantes-Metz & Bajari (2009), in more detail in Abrantes-Metz, Bajari & Murphy (2010), and has continued since then.[26]

Early on, in 2012, in its document titled "Competition Compliance Programs: Complying with Competition Law," the Chilean Competition Authority ("FNE") also recognized the value of screens for the purpose of antitrust compliance.[27] Specifically, the FNE stated that:

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21 Mena-Labarthe (2012).

22 *Ex officio* cartel investigations and the use of screens to detect cartels 2013, OECD, available at http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf.

23 *"Beyond Leniency: Empirical Methods of Cartel Detection," American Bar Association Brown Bag Series*, December 15, 2011. Presentations, slides, and audio available at www.americanbar.org.

24 A summary of these studies is presented in Rosa Abrantes-Metz, "The Power of Screens to Trigger Investigations," *Securities Litigation Report*, 10(10), 2010.

25 Joseph Murphy & William Kolasky, "The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior," 26 *Antitrust* 61, Spring 2012.

26 Rosa Abrantes-Metz, Pat Bajari & Joe Murphy, "Enhancing Compliance Programs Through Antitrust Screening," *Antitrust Counselor* 4(5), 2010. This recognition continued through the last decade in various other articles including, among others, Abrantes-Metz (2012); Abrantes-Metz "Why and How to Use Empirical Screens in Antitrust Compliance?" *CPI Antitrust Chronicle*, February (1) 2012, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006576; Rosa Abrantes-Metz & D. Daniel Sokol, "Antitrust Corporate Governance and Compliance," with Daniel Sokol, *The Oxford Handbook of International Antitrust Economics*, Edited by Sokol & Blair, Chapter 23, 2015, 586-618, working paper version available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2246564; Rosa Abrantes-Metz & Elizabeth Prewitt "Antitrust Compliance 2.0: The Use of Structural Analysis and Empirical Screens to Detect Collusion and Corruption in Bidding Procurement Processes," *CPI Antitrust Chronicle,* June 2015 (2), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3291651; Stefan Frübing & Kai Hüschelrath, "Competition Law Compliance Programmes: A Law and Economics Perspective" in *Competition Law and Compliance Programmes*, edited by Johannes Paha, Chapter 2, 2016; Ulrich Schwalbe, "Antitrust Compliance and Abusive Behavior," in *Competition Law and Compliance Programmes*, edited by Johannes Paha, Chapter 6, 2016; and Florence Thépot (2016), "Can Compliance Programmes Contribute to Effective Antitrust Enforcement?" in *Competition Law and Compliance Programmes*, edited by Johannes Paha, Chapter 9, 2016.

27 See "Competition, Compliance Programs: Complying with Competition Law," FNE, Chile, June 2012, www.fne.gob.cl.

> Both monitoring and auditing can even incorporate techniques referred to as "screening," which consists of the use of econometric tools that detect the existence of possible harmful practices that threaten competition. It is advisable, in principle, to hire specialized outside personnel for its implementation.[28]

So why use screens in antitrust compliance?

- ***Screens are Proven Effective Tools When Using Only Public Data, and They are Expected to Be Even More Powerful when Using Detailed Internal Data to the Corporation***

Screens and empirical analyses have become almost *de rigueur* in cartel and manipulation cases, and they have also been used in fraud matters. They have proven to be effective in flagging potentially illegal behavior.[29]

Given their record of success, there should be little doubt that screens can, and should, be actively employed by companies as part of their antitrust compliance programs. Furthermore, while screens have flagged illegal conduct using only publicly available data, their power will be enhanced when used with richer internal data and information. Furthermore, the implementation of screens can act as a deterrent to potential violators.

- ***Screens are Proactive Tools and Complementary to Other Compliance Tools, and They Are also Likely to Strengthen Leniency Applications***

Before authorities investigate any sort of crime, the crime must be identified. The police will investigate every missing person report, but they do not knock on every door every day to make sure everyone is accounted for. Instead, they wait ("passively") until someone *informs* them that a person is missing.

In general, most crime is reported by the victim. The challenge with many cartels is that the victims of the cartel are diffuse, and the victims may not *know* they are victims. As a practical matter, who else but a member of the conspiracy is likely to report the crime, if even the victims do not know? Shouldn't such incentives be provided to corporations to monitor themselves in an effective manner, namely through internal screening?

Screens are more likely than other detection tools to flag cases where the market impact from the illegal conduct is the largest, where colluders are being most effective in terms of, for example, raising prices. Those are the cases more likely to be observed in the data, the most profitable to the colluders, and the ones causing the most consumer harm. They are also the cases less likely to self-report, all else equal: if colluders are so happy enjoying their fat illegal profits, it is less likely they will be in a rush to self-report, for example, through the filing of a leniency application.

This complementary feature of screens to other detection tools can place the corporation in an advantage if it is the first to flag potential collusive behavior, the first to self-report, and the first to apply to leniency, with all of the benefits that provides.[30] This is what happened with the uncovering of at least LIBOR and FX rigging, initially flagged through screening used by reporters and economists, leading years later[31] to leniency applications and many billions of dollars in settlements. It is possible that had screens not been used to flag rigging in these markets, wrongdoers would never have self-reported – what incentive would they have had? They were potentially making many hundreds of millions of dollars of extra illegal profits and did not seem at risk of being otherwise caught, but-for screening.

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28 *Id.* at pp. 14.

29 See Rosa Abrantes-Metz's submission to OECD's Roundtable on Screens for conspiracies, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343465.

30 As discussed in Abrantes-Metz (2013) and Abrantes-Metz & Metz (2019), for example; Rosa Abrantes-Metz, "Proactive vs Reactive Anti-Cartel Policy: The Role of Empirical Screens," Working Paper, June 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284740; Rosa Abrantes-Metz & Albert Metz, "The Future of Cartel Deterrence and Detection," *CPI Antitrust Journal,* January 2019, also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3360615.

31 In the case of LIBOR, while only a few months later in FX.

- ***Direct Evidence of Collusion Is Becoming Harder to Find, Increasing the Need for Active Screening***

Direct evidence in the form of communications and explicit agreements is ever harder to find. Once collusion is identified, whether through leniency or through screens, the successful prosecution of a cartel often relies on the paper trail left by its members such as e-mails, notes, and other records documenting the intent to collude and the existence of an explicit agreement. Everyone – including the guilty – knows this. And everyone – especially the guilty – have learned their lessons from LIBOR and Foreign Exchange: that their incriminatory emails and chat messages may hang them.[32] Therefore, everyone, including the corporation, should expect cartel members to adopt new communication technologies which do not keep records, at least not as easily, and to be more cautious about leaving traces of their explicit agreements. But if their collusion is in fact effective from their point of view, it will distort market outcomes and it will, in principle, be detectable in the data through the appropriate screens.

- ***Screens Help Corporations in Their Risk Assessments and in Better Complying with the Requirements of the U.S. Sentencing Guidelines for Organizations***

Our view is that screening will help corporations in their risk assessments and in better complying with the requirements of the U.S. Sentencing Guidelines for Organizations ("Sentencing Guidelines"), which have become the benchmark for compliance programs in all areas, including antitrust. These guidelines provide an inventory of steps for companies if they are to get credit in sentencing in federal court, and effectively represent the starting point when prosecutors assess company programs to decide whether and how to proceed against it.[33]

It is required by the Sentencing Guidelines for companies to "exercise due diligence to prevent and detect criminal conduct." These standards require that "…[t]he organization shall take reasonable steps…to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct…"[34] Thus, companies are advised to engage in purposeful and focused efforts, to be proactive in seeking out potential violations, and to not simply rely on training and manuals to prevent them.

Additionally, the Sentencing Guidelines also call on companies to conduct risk assessments,[35] as organizations have limited resources and need to focus them where the risk is greatest. This means that companies need to determine which risks are most likely to occur, and then which ones have the greatest impact. Of course, for any competitive company, antitrust risk should always be among the top risks. But even within the broader antitrust category, a company needs to identify which are the more significant risks. Though there are several possible avenues to address these risks, screens are a key option as they will identify the high-risk areas of a business and allow for better targeting of audits to those areas and to assist in monitoring these in a more efficient way. 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 other direct actions. Empirical screens can fulfill this role by looking at certain quantifiable red flags and applying statistical analysis to determine the priority areas for further focus, allowing for a more efficient allocation of resources. Screens aren't free, but the potential for their benefits to be greater than their costs is very high.

- ***The U.S. Department of Justice's "Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs"***[36]

We have long argued for the value and enhancement of antitrust compliance programs in the fight against collusion and their most needed encouragement by competition authorities. Incentives such as reduced fines or criminal prosecution need to be in place which are strong enough for corporations who have developed reliable compliance programs. After all, such programs may lead to the internal self-identification of collusion, and isn't that exactly what we want, for corporations to have a larger incentive to self-monitor and self-report? This is where deterrence starts. Furthermore, the stronger such a program is, the more resources may end up being saved by authorities. Everything else the same, high deterrence within the corporations and high likelihood of internal detection would reduce the need for as many resources to be put in place by authorities for deterrence and detection.[37]

32 Abrantes-Metz (FT (2016)).

33 See Abrantes-Metz, Bajari & Murphy (2010).

34 U.S. Sentencing Guidelines Section 8B2.1(b)(5)(A).

35 U.S. Sentencing Guidelines Section 8B2.1(c).

36 Assistant Attorney General Makan Delrahim's remarks at the New York University School of Law Program on Corporate Compliance and Enforcement ("Delrahim's Speech"), July 11, 2019, available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

37 Abrantes-Metz & Metz (2019).

Until very recently, despite the incentives explicit in the Sentencing Guidelines, the U.S. Department of Justice did not provide clear incentive to corporations to engage in effective compliance programs. This likely discouraged companies from enhancing and investing in such programs. We have certainly heard that from several corporate counsel over the years.

But that has changed. In his speech at New York University Law School on July 11, 2019, Assistant Attorney General Makan Delrahim explained that:[38]

> I believe the time has now come to improve the Antitrust Division's approach and recognize the efforts of companies that invest significantly in robust compliance programs. In the words of our former Deputy Attorney General Rod Rosenstein, "[t]he fact that some misconduct occurs shows that a program was not foolproof, but that does not necessarily mean that it was worthless. We can make objective assessments about whether programs were implemented in good faith." [39]

From now on, the Division will take into consideration compliance programs at the charging stage of criminal antitrust investigations, just as has been true for the rest of the Department of Justice in all other areas except antitrust. Specifically, Division prosecutors will consider "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision."[40]

Furthermore, and for the first time, public guidelines have been issued on how corporate compliance in criminal antitrust investigations will be evaluated. As stated in the Antitrust Division Manual updated in July 2019, prosecutors are directed to "evaluate all the Factors including pre-existing compliance programs in every corporate charge recommendation."[41]

The additional clear incentives for enhanced antitrust compliance programs provided by the DOJ is a most welcome evolution. As explained in Antitrust Division's Guidelines on the "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations," ("Antitrust Division Manual") from July 2019, "a truly effective antitrust compliance program gives a company the best chance to obtain the significant benefits available under the Division's Corporate Leniency program."[42] Furthermore, under section 6 of the Antitrust Division Manual covering "Periodic Review, Monitoring and Auditing," the Division asks as follows:

> What monitoring or auditing mechanisms does the company have in place to detect antitrust violations? See U.S.S.G. § 8B2.1(b)(5)(A). For example, are there routine or unannounced audits (e.g. a periodic review of documents/communications from specific employees; performance evaluations and employee self-assessments for specific employees; interviews of specific employees)? Does the company use any type of screen, communications monitoring tool, or statistical testing designed to identify potential antitrust violations?"[43] [emphasis added]

The recognition of the value of screens and statistical analyses more generally to assist in the identification of potential antitrust violations, is long due. Our expectation is that this will help convince many of the remaining "corporate counsel skeptics" that screening is something their corporations should be doing. With that in mind, in the next section we address some of the key questions they may have.

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38 See Delrahim's Speech.

39 *Id.*

40 U.S. Department of Justice "Principles of Federal Prosecution of Business Organizations," ("Justice Manual") at 9-28-300 (updated November 2018) available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

41 Delrahim's Speech

42 Antitrust Division, U.S. Department of Justice, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations," July 2019, available at https://www.justice.gov/atr/page/file/1182001/download.

43 *Id.* at pp. 10.

V. WHAT CORPORATE COUNSEL NEEDS TO KNOW ABOUT IMPLEMENTING SCREENS FOR ANTITRUST COMPLIANCE

It should be clear by now that screens can detect wrongdoing even when created by those outside the corporations who do not benefit from the richer data and other important information typically available internally. In this section we briefly explore some of the practical questions that corporate counsel may have on the use of screens in antitrust compliance.

- ***What are Some of the Key Factors That a Company Should Consider in Determining the Feasibility of Screens as Part of Its Compliance Program?***

The first consideration on whether screens are feasible is data availability: what types of data are available, for what time periods, and of what quality? Can data start being collected now to enable future screens? What public data are available, perhaps at a price? In this era of big data, particularly data to support pricing algorithms, we expect data restrictions to be less binding than even a few years ago, but certainly some limits will still exist.

Industry considerations are also important. Is this an industry where antitrust concerns tend to exist, i.e. an industry with a history of violations or an industry with characteristics associated with anticompetitive behavior? Are there opportunities to rig bids or reach collusive agreements with competitors, such as frequent trade association meetings and other industry gatherings? Is the use of pricing algorithms prevalent which might more easily lead to a coordination of prices? More fundamentally: is this an industry for which public data are sufficiently available which could allow a screening expert to independently detect wrongdoing? If information and data are publicly available that are good enough for "public screening," then adding internal data could only enhance the power of a screening program. If external experts can do it, why cannot the corporation also do it and even better? This does not mean that only when these characteristics are met, screens must be applied, but certainly in these cases they are highly recommended.

In our opinion, screens should always be applied when data are available and there is a non-negligible likelihood that wrongdoing may have occurred or may occur sometime in the future. After all, deterrence should also be another goal. A robust screening program can not only deter anticompetitive behavior in the first place, but with the DOJ's new policy, the fact that such a program is in place may help pave the way to reduce charges or penalties if there ever is a violation.

- ***How Should Screens Be Used?***

When it comes to deciding how to use screens, that depends on several factors including the size of the company, the features of the industry in which it operates, the company's budget, and the frequency of alleged illegal conduct typically occurring in the industry, among others. But in all cases one thing remains true: screens require expertise and need to be properly developed and implemented. Two golden rules to remember: (i) one size does not fit all; and (ii) if you put garbage in, you get garbage out. Developing screens requires expertise; without it, the attempts at screening will likely fail, meaning the company risks complacency from false negatives or overreacting to false positives.[44]

There are six key requirements to appropriately develop and implement a screen: (i) an understanding of the market at hand, including its key drivers, the nature of competition, and the potential incentives to cheat — both internally and externally — for the corporation; (ii) a theory on the nature of the cheating; (iii) a theory on how such cheating will affect market outcomes and the data available; (iv) the design of a statistic capable of capturing the key factors of the theory of collusion, fraud, or the relevant type of cheating; (v) empirical or theoretical support for the screen; and (vi) the identification of an appropriate non-tainted benchmark against which the evidence of collusion or relevant cheating can be compared.[45]

44 Rosa Abrantes-Metz, "Design and Implementation of Screens and Their Use by Defendants," *CPI Antitrust Chronicle*, September (2) 2011, also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943223 ("Abrantes-Metz (2011)").

45 *Id.*

- ***Is There an Example Where a Screen was Used Successfully and Proactively to Help Detect Potential Illegal Conduct?***

Yes. As explained in section 3 we, co-authors, reporters, and other economists first flagged the possibility of collusion and manipulation in LIBOR, Foreign Exchange Markets, Gold and Silver Fixings, and others. These have already led to many billions of dollars in government and private settlements, and more may still be to come. Other examples include those of the Mexican and Brazilian competition authorities. They used screens to proactively detect bid-rigging in the pharmaceutical industry and price-fixing in gasoline markets, and so have various other agencies worldwide, leading to convictions.

In addition, in July 2013 in a Bloomberg Opinion Article titled "Banks' Role in Metal Trading Deserves Scrutiny,"[46] Abrantes-Metz explains that a number of large users of aluminum in the U.S., including Coca-Cola Co. and MillerCoors LLC, alleged that big banks – some of which own aluminum warehouses and play a central role in the market – intentionally created bottlenecks, with the end effect of driving up prices and boosting their profits. She shows that the empirical evidence suggested the possibility that big U.S. banks colluded to drive up the price of aluminum and that it is worthy of authorities' attention. At the time, there were Congressional Hearings on the possibility of aluminum warehousing rigging, followed by competition authority investigations and numerous private lawsuits, some of which are still ongoing. (See also Abrantes-Metz (2013, September).[47]

Importantly, in the case of aluminum the red flags were spotted by *aluminum users themselves*. While these may not have been generated by internal screening of the type we are here discussing, they could easily have been. They were flagged by the companies themselves through their realization that aluminum was not being released from warehouses as quickly as it used to be, thus creating a shortage of aluminum and an increase in prices which did not seem consistent with fundamental market conditions at the time.

In terms of detection purely through internal screening programs, while we are not aware of any example, to date the incentives may have been too weak for companies to seriously embark on these efforts. Over the years we have been repeatedly asked by several corporate counsel, "why should we screen?" Companies saw little to no benefit from implementing screens for antitrust compliance, and in fact were more concerned with what they had to lose if something was in fact detected. Hopefully the new guidance and consideration on screens by the DOJ will assist in tilting the scale favorably to antitrust compliance screening, as well as set a new standard to be followed by many more antitrust agencies around the world.

The successful external screens described in section 3 of this article could have, in every case, been developed internally first. In other words, there is no *a priori* reason why a corporate compliance screening program would not be successful. That said, the real benefit of such programs might lie in their deterrence effect; if so, cases where a compliance program truly identifies anticompetitive behavior may remain rare.

- ***Can a Helpful Screening Tool be Developed with a Small Budget?***

There is the risk that a corporation not using any sort of screening will be placed at a disadvantage with respect to ones which do, especially in industries prone to anticompetitive conduct and for which appropriate data are available. There is also the risk that authorities will judge the company's compliance efforts as inadequate in the event that penalties are ultimately assessed.

While "more and better" programs can always be implemented with more and better budgets, any program should be cost-effective, and good programs can still be developed with smaller budgets. Having an expert take a look at the data, suggest how to organize it and study it, and train employees on the very basics of screening can represent an important but fairly inexpensive one-time investment.

That said, all ongoing screening efforts should be periodically reviewed by a qualified expert, but in many cases that review may be infrequent – an annual or bi-annual touch may suffice – and be fairly cursory, yet useful. At the other extreme, we know of some cases where models are updated virtually in real time. It would likely be unwise to let too much time pass before an expert reviewed the status of such intensive screening programs.

46 Rosa Abrantes-Metz, "Banks' Role in Metal Trade Deserves Scrutiny," Opinion article, *Bloomberg*, July 31, 2013, available at http://www.bloomberg.com/news/2013-07-31/banks-role-in-metal-trade-deserves-scrutiny.html.

47 Abrantes-Metz, Rosa M., 2013, September. "Aluminum Market Dislocation: Evidence, Incentives and Reform," working paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328902&download=yes.

While screens *can* be resource intensive, they *do not have* to be. As an example, our first preliminary screens on the alleged Libor conspiracy and manipulation took just a few days to develop. Of course, not all screens are so efficient, nor can all situations be flagged so promptly.

When screens are more resource intensive, a cost-benefit analysis becomes more important, which in the context of antitrust compliance can only be undertaken on a case-by-case basis. That analysis should recognize that, while screens have a cost, if successful they will permit resources to be more efficiently directed against suspicious behavior. As with medical screens, not all patients are subject to the most extensive and expensive testing, only those who first screened positively. For example, Ragazzo (2012) explains that, for the Brazilian Competition Authority, the first application of the basic screens flagged 30 possible locations that should be given a closer look. Of those 30, more advanced screens were applied selecting the final set of 10 locations. For those, dawn raids were undertaken and direct proof of collusion was found for 6 out of the 10 cases flagged. We would call this a very successful application of screens!

The complexity of the markets and the availability of data are the major determinants of how expensive a robust program will be.

- ***Are Advances in Technology Going to Make the Use of Screens Easier and More Affordable? Is There an "App" for That?***

Advances in technology coupled with more and better data have already allowed for more and better screens to be available. Many corporations are now using pricing algorithms to set their prices; implementing a screen to detect possible anticompetitive behavior is a closely related problem.[48]

Of course, there is no all-purpose "app" for screens, nor do we think there could be. Screens cannot work as black boxes, and no screen is applicable to all cases. There are of course general theories on how particular behaviors are likely to be translated into observable data. Almost a decade ago, Abrantes-Metz (2011) described the dangers of improperly designed and implemented screens.[49] Corporations should not take this risk - there is too much to lose.

- ***How Does the Use of Pricing Algorithms by the Company Affect the Design and/or Implementation of Internal Screening?***

Pricing algorithms offer a number of private advantages to firms, and they have great potential to introduce procompetitive benefits to the market at large. However, they also have the potential to produce real or perceived anti-competitive results. The simplest example is the phenomenon of *price convergence*, where all market prices for a given product are exactly the same. Such price convergence is a prediction of both "perfect competition" and many models of price collusion.

This introduces some complexities into the screening process. A common form of price screening is to look for price convergence and price stability. Where pricing algorithms are employed, the former is likely less informative; the latter may still be. But the real issue is whether prices closely track input costs. That price should equal marginal cost is a unique implication of competitive markets. The ideal screen would be built around this observation: are profit margins narrow, relative to an appropriate benchmark.

Additional tests on the algorithm itself are likely warranted. How does the algorithm respond to different competitor pricing scenarios? Does it appear that the algorithm has adapted or "learned" to collude? Is the algorithm still operating within its intended parameters? Arguably such tests are not screens *per se*, but these are other questions which would seem reasonable to ask periodically of any pricing algorithm.

- ***What Does a Screen-Supported Compliance Program Look Like? How Often are Screens to be Used?***

The screening expert familiar with the antitrust field needs to diagnose where the largest risk areas are with the potential antitrust violations to occur, what type of behavior is feasible to be detected with the available data, how best to prepare the data, and what additional data or other information needs to be collected. Just as importantly, such an expert needs to develop theories on how potential violations may occur and the way in which they would be translated into the observable data, as well as set up econometric models capable of identifying suspicious behavior when compared to appropriate benchmarks.

48 Rosa Abrantes-Metz & Albert Metz, "Can Machine Learning Aid in Cartel Detection?" *CPI Antitrust Chronicle,* July 2018, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3291633 ("Abrantes-Metz & Metz (2018)"); and Rosa Abrantes-Metz "Pricing Algorithms and Implications for Competition," *CPI Cartel Column,* May 2019.

49 Abrantes-Metz (2011).

The appropriate screens need to be developed and applied to the situations at hand, and staff must be trained to run and interpret the screening results. In addition, data need to be frequently updated, and models should also be frequently re-estimated. In the event a screen raises a flag, a subsequent review, which would include searching for legitimate explanations for whatever tripped the screen, are also critical steps of the screening process.

Corporations cannot and should not be screening every situation at every moment in time. A screening program should be set in place to regularly screen outcomes where potential problems are more likely to occur, and more likely to be detected. The frequency of the screening depends on a variety of factors including the frequency of the data and its volume, the complexity of the method, the behavior being screened for, the industry, and the budget available. A company's compliance risk assessment will also help drive the direction of any screens, so that they are focused on the highest-risk areas. Updated documentation needs to be kept on the design and implementation of the screen, changes made over time, screen results, flags identified, and what was done to address them.

- ***What Can Screens Do and What Can't They Do?***

Screens are not a panacea. They can provide extremely valuable circumstantial evidence for or against a possible antitrust violation, when appropriately developed and implemented. But just as with any other statistical test, screens have a margin of error: they may wrongly flag alleged wrongdoing, or fail to flag actual wrongdoing.

It is important to emphasize that screens merely isolate outcomes that are improbable under the assumption of competition (or no cheating) and thus merit closer scrutiny. Standing alone, they cannot serve as the ultimate proof of the existence or absence of a cartel, though they can provide valuable assistance when combined with other such evidence. No purely empirical or statistical approach can be used as the *single* proof of collusion.

- ***How Can the Company Know that its Compliance Program Will Be Considered Reliable by the DOJ?***

In the absence of guidelines addressing this point specifically, our best advice is to (i) base the screens on a coherent theory of competition and collusion for the industry; (ii) document that rationale; (iii) conduct and document a thorough review of available internal and external data; (iv) follow best-practices to audit the implementation of the screen; (v) periodically review the screens and document the results; (vi) establish clear controls for proposing and approving changes to the screen; and (vii) establish a clear process for addressing any red flags raised by the screens. Engaging a reputable third party with significant screening experience to periodically review the screens and the associated controls is highly recommended.

VI. FINAL REMARKS

We have always argued that there was both the room and the incentive to enhance antitrust compliance programs, and the use of screens internally to corporations. The DOJ's most recent recognition of the value and importance of antitrust compliance programs in general, and of screening methods in particular, provides the latest impetus.

Screens are an important tool for the enhancement of antitrust compliance. With respect to cartels, leniency programs reward the first in a conspiracy to come forward; therefore, a company has the incentive to do everything at its disposal to be the first in line. Competition authorities are making increased use of these techniques; companies might want to do the same to minimize the risk of a surprise. Finally, incorporating screens not only offers substantive benefits, but may also help convince authorities that all available compliance tools are being used proactively; this can have real benefits if the company finds itself involved in an enforcement action.

When properly designed and implemented, screens can be very powerful, but they do require expertise. Screens can provide valuable circumstantial evidence but are not a final proof of either the presence or absence of wrongdoing. Given the vast amount of data now routinely collected, organized, and stored, and the evident power of screens to flag suspicious behavior, the role of screens in corporate compliance programs can only be expected to increase over time. Can any corporation afford to stay behind this trend?

ANTITRUST COMPLIANCE – RELUCTANCE TO EMBRACE AND RECOGNIZE CORPORATE COMPLIANCE EFFORTS

BY ANNE RILEY[1]

1 Chair of the International Chamber of Commerce Task Force on Antitrust Compliance and Advocacy. The author was also for many years (until her recent retirement) Head of Shell's global Antitrust Team and a member of Shell's global Ethics and Compliance Leadership Team. The views in this article are personal to the author, and do not necessarily represent the views either of Shell or of the International Chamber of Commerce.

I. INTRODUCTION

It is widely believed – certainly by antitrust agencies, but also by antitrust practitioners and well-informed companies – that cartels are pernicious and must be eradicated. No-one need ask "why comply?" – the benefits of competition are well understood in terms of fostering innovation, promoting consumer welfare and choice, ensuring allocative efficiency and stimulating economic growth. Genuine antitrust compliance efforts help to protect and promote a level playing field, where companies compete "on the merits" and consumers benefit from that competition.

While the winds of change are in the air (see Section 2 below), the focus of antitrust agencies has been on enforcement, ever increasing penalties and the use of leniency programs to "encourage" compliance. These all have an important place – but do not by themselves encourage a compliance culture, rather a fear of "getting it wrong" – or perhaps (in a very small percentage of cases) a fear of "being caught." Yet antitrust infringements still occur, so it is time to rethink the approach to "encouraging" compliance, and see whether (to use a colloquial expression) results would best be obtained only by using the stick, or whether better results for society might be achieved by using both a "carrot and stick" approach.

In considering the optimal approach, it is important to recall that EU Competition Commissioner Almunia famously (and rightly) observed in 2010[2] that the purpose of antitrust enforcement is not in itself to impose high fines and other penalties – rather the ultimate policy goal of antitrust is to have no need to impose penalties at all. While Mr. Almunia was undoubtedly thinking about the benefits of imposing fines and encouraging the European Commission's ("EC's") leniency / immunity program in uncovering covert cartels, Mr. Almunia (almost certainly unintentionally) highlighted a fundamental truth which antitrust agencies should consider and take to heart: the ultimate (and the proper) policy goal of antitrust enforcement is to encourage and to achieve genuine compliance by changing behaviors and culture. Behavioral research into organizational ethics demonstrates that culture can be used as a tool to improve compliance as a law-abiding culture creates norms that push for more effective compliance.[3]

While enforcement will remain an important tool, focusing only on penalties and not on behavioral expectations will do little to change societal norms. This involves antitrust agencies, academia and business organizations such as the International Chamber of Commerce ("ICC") working together to change compliance values, so that businesses "doing the right thing" when it comes to fair competition becomes normal and accepted – and even expected – by society at large.

This article will argue that while much has been done (and continues to be done) by antitrust agencies in the antitrust compliance arena, there is still much work to be done and greater progress to be achieved. The time truly has come to rethink compliance.

II. ATTITUDE OF ANTITRUST AGENCIES TO COMPLIANCE EFFORTS

The attitude of many (but not all) antitrust agencies to corporate antitrust compliance efforts has developed considerably over the last two decades. However, there is still a significant degree of skepticism (and even positive distrust) among even some of the sophisticated antitrust agencies about the true purpose of antitrust compliance efforts. The purpose of this article is not to trace the history of the development of agency thinking (or what has molded agency thinking) towards compliance. One need only look at the language used in the past to describe antitrust compliance programs to see that some antitrust agencies may be reluctant to recognize the true policy objective of real compliance as an enforcement goal.

The U.S. Department of Justice ("DOJ") Antitrust Division and the European Commission ("EC") were historically among the most skeptical of the leading antitrust agencies on the benefits of encouraging compliance (or, to their minds, "rewarding compliance failure").[4] Possibly this view was driven in part on a reliance on amnesty and leniency as the primary enforcement incentive (and perhaps an underlying belief that antitrust compliance efforts were "self-serving" and not likely to be genuine).

2 See https://europa.eu/rapid/press-release_SPEECH-10-586_en.htm Business Europe & U.S. Chamber of Commerce Competition conference October 25,2010.

3 Lynn Sharp Paine, Managing for Organizational Integrity, HARV. BUS. REV., Mar.–Apr. 1994, at 106.

4 "… *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.*" J. Almunia, SPEECH/11/268, April 14, 2011.

Times, however, are changing. In April 2018 the DOJ Antitrust Division held a public Roundtable[5] to consider antitrust compliance programs – and, specifically, how the Division's (then) policy of giving no credit to credible compliance programs "sat" with the U.S. Federal Sentencing Guidelines and with the rest of the DOJ's policy (outside the Antitrust Division) of recognizing and crediting robust compliance programs.

Following this roundtable, on July 11, 2019, Makan Delrahim, the Assistant Attorney General in the Antitrust Division announced a new policy to incentivize corporate antitrust compliance.[6] The Antitrust Division will in future consider genuine and robust compliance efforts at the charging stage in criminal antitrust investigations, and the Division published a guide to prosecutors[7] to assist them in evaluating corporate compliance programs at both the charging and sentencing stages. This guidance document will provide a useful "roadmap" to companies of the Division's expectations of antitrust compliance programs.

The DOJ's policy change is very much to be welcomed (and long wished for), as is AAG Delrahim's statement that "*the Antitrust Division is committed to rewarding corporate efforts to invest in and instil a culture of compliance.*" It is to be hoped that this policy change – which is a dramatic shift for the Antitrust Division – will be followed in other jurisdictions, including those that only have a system of administrative rather than criminal enforcement (such as the EU).

Some other jurisdictions give some sort of credit (or at least incentives) for antitrust compliance programs,[8] notable among them is Canada, where an antitrust compliance program can be a mitigating factor, and the implementation of compliance measures may be imposed as part of alternative forms of resolution. The Canadian Competition Bureau also gives detailed and useful guidance on the necessary elements of an effective (or robust) antitrust compliance program.[9]

Most recently, in September 2019 the Peruvian Competition Authority ("Indecopi") issued a public consultation on antitrust compliance programs (including detailed guidelines similar to the Canadian Competition Bureau guidelines) indicating that it may be prepared to take into account genuine compliance efforts when considering an infringement that has already occurred.[10]

III. IS ANTITRUST THE "POOR RELATION" IN THE COMPLIANCE WORLD?

Antitrust has been described as an "outlier" when it comes to how antitrust agencies treat compliance compared with other enforcement agencies.[11]

Antitrust compliance cannot be viewed in isolation or exist in a vacuum. In today's world, companies must comply with a vast array of compliance topics, including laws relating to Anti-Bribery and Corruption ("ABC"), Anti-Money Laundering, Data Privacy, Trade Controls and Sanctions and Health and Safety to name but a few.

Companies and their internal advisers can feel overwhelmed at the sheer range of compliance requirements and confused at the (very) different approaches some enforcement agencies take in terms of positively encouraging and rewarding genuine compliance efforts.

In relation to Foreign Corrupt Practices Act ("FCPA") enforcement, the DOJ has a long history of taking account of ABC compliance programs.[12] This constructive approach by the DOJ's FCPA enforcers has been at least partly driven by the policy objective that a key goal of enforcement is to achieve a compliance culture in practice.

5 See https://www.justice.gov/atr/public-roundtable-antitrust-criminal-compliance.

6 See https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

7 See https://www.justice.gov/atr/page/file/1182001/download.

8 See F. Thepot, "The Interaction Between Competition Law and Corporate Governance," (Cambridge University Press, 2019).

9 Canadian Competition Bureau, Corporate Compliance Programs (2015) available at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04297.html.

10 See Section 9.3, Indecopi draft Guidelines on Antitrust Compliance Programs, September 2019.

11 Riley and Sokol J. of Antitrust Enforcement 31 (2015), University of Florida Levin College of Law Research Paper No. 16-3, available at http://ssrn.com/abstract=2475959.

12 In fact, when it came to criminal enforcement, antitrust was (until the recent change of policy in the Antitrust Division) the only area in the entire DOJ that did not recognize the value of compliance programs.

The FCPA enforcers have indeed gone further than "merely" giving credit by way of a reduction in a fine or a reduced criminal sentence for credible compliance efforts. In April 2012, the DOJ for the first time declined to prosecute an FCPA violation by a corporation, while prosecuting an individual within that corporation. The declination related to Morgan Stanley, and was on the grounds that a Morgan Stanley employee had:

> [...] used a web of deceit to thwart Morgan Stanley's efforts to maintain adequate controls designed to prevent corruption. Despite years of training, he circumvented those controls for personal enrichment.[13]

The same policy objective (that a key goal of ABC enforcement is to achieve a compliance culture in practice) motivated the UK's Ministry of Justice to include a compliance defense of "*adequate [compliance] procedures*" in the UK Bribery Act[14] and to provide significant amounts of guidance on what compliance "adequate procedures" would entail.[15]

Recently a number of commentators have advocated that antitrust agencies should give more credit for genuine compliance efforts, since rewarding robust and genuine compliance programs in the context of an investigation can improve the effectiveness of corporate sanctions in providing ex ante incentives to companies to deter and detect illegal behavior internally.[16]

Certainly, these approaches of the authorities in giving compliance guidance and giving positive incentives for companies to invest in ABC/FCPA compliance (including the possibility of a complete defense for the corporation) have had a very dramatic impact on how much time, effort and (above all) resources that companies dedicate to this area of compliance. While it would be comforting to think that all companies will invest significant amounts of money and time in a compliance program from a sense of public spiritedness, that is perhaps a little naïve. The reality is that corporate resources – even in large companies – are limited, so that the in-house Legal and Compliance functions have to "compete" internally for precious resources (and the resource of employee and management time) that could otherwise be devoted to other matters – such as investing in the organic or inorganic growth of the business to increase profitability.

This does not mean that companies are not serious about antitrust compliance – generally they are, and most companies want to comply. But the reality is that they also want to invest in their business – so anything agencies can do to encourage and incentivize companies to devote sufficient and appropriate resources to the important area of antitrust compliance will support the policy objective of reducing antitrust violations.

Although there is little empirical evidence to support the following statement (as companies are understandably reluctant to discuss their compliance spend publicly), the author believes that the reluctance of antitrust agencies to engage actively in a dialogue with companies of the financial benefits to those companies of investing in a credible antitrust compliance program (in terms of mitigation of fines) has meant that antitrust might not be a top priority. The author believes that antitrust might be "left behind" in some companies (but not in all) when it comes to a decision whether to invest (for example) in ABC compliance (where the benefits of the investment are tangible) or in antitrust compliance, where the benefits of the resource allocation may not be immediately obvious to management, since mitigation of fines by antitrust agencies is rare.

IV. WHAT DRIVES NON-COMPLIANCE?

This article will not attempt to give any in-depth analysis of the behavioral psychology of non-compliance (although there are many excellent resources available),[17] but it is important (for companies in designing a compliance program and for antitrust agencies in assessing a program) to understand that human nature has a significant role to play in whether an individual within a company is likely to comply or not. Sometimes, whatever the efforts a company makes, and however many resources a company devotes to compliance, some people are just determined to break the law (or do not care whether they follow company policy or not).

13 DOJ Press Release https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required (April 24, 2012).

14 UK Bribery Act 2010, s7 (2).

15 https://www.gov.uk/government/publications/bribery-act-2010-guidance.

16 See F. Thepot at fn 8 *supra*.

17 See for example Kaptein, Muel, Why Do Good People Sometimes Do Bad Things? 52 Reflections on Ethics at Work (July 25, 2012). Available at https://ssrn.com/abstract=2117396 or http://dx.doi.org/10.2139/ssrn.2117396.

Enforcement agencies need to recognize that there is no such thing as zero risk – a company with even the best approach to compliance and with a good corporate culture may still have individuals within the organization who – despite a company's best efforts – decide to flout the law and ignore the company's own culture and policies.[18]

A "perfect" compliance program, while undoubtedly a laudable goal, may perhaps be an unrealistic goal, given that "humans are human." Ultimately it is not inanimate companies that decide to break the law – it is the human beings within those companies – and each person will have his / her own personal drivers – whether these are positive, such as the desire to behave ethically and with integrity, or negative such as ego, hubris, arrogance and greed.[19]

V. A WAY FORWARD IN TERMS OF RECOGNIZING ANTITRUST COMPLIANCE EFFORTS?

If the policy objective of antitrust enforcement is to "have no need to impose fines at all,"[20] the goal of antitrust enforcement agencies should be to take every step to encourage business integrity, and to support good corporate cultures and sincere compliance efforts.

If a company has made sincere and consistent efforts to comply, the antitrust agencies should understand that a company compliance program has not "failed" because one or more employee has circumvented company policy. Companies should rather be encouraged by the agencies to learn from any past compliance incidents and continuously improve their compliance efforts.

There is a credible argument (in terms of encouraging compliance in practice) for antitrust agencies to think more creatively about how corporate antitrust compliance programs could help enforcement,[21] for example by antitrust agencies:

- Giving credit for pre-existing genuine antitrust compliance efforts and a truly robust program, as the U.S. DOJ Antitrust Division has indicated it will now do;

- Actively and openly requiring the adoption of an antitrust compliance program in decisions and settlements, and in grants of immunity or leniency;[22] and /or

- Acknowledging genuine compliance efforts in looking at parental liability for acts of a wayward subsidiary, such as by not fining the parent company. This is considered further below as a possible avenue for DG COMP to explore.

Since much depends on the attitude of agencies in (positively) encouraging antitrust compliance, the remainder of this section considers the attitude of DG COMP, which has so far resisted calls to give credit for genuine compliance efforts.

To be clear, the author is not criticizing DG COMP for taking this position, and appreciates that the agency has moved from not wishing to discuss compliance efforts at all more than a decade ago, to issuing a booklet encouraging antitrust programs (without giving credit for them),[23] to its current (perhaps informal) position of actively encouraging discussion of antitrust compliance issues in the International Competition Network ("ICN").

18 T Banks and J Murphy "But it is also an inescapable fact of our human existence that people are fallible, and that in some cases people will ignore instructions and do things that they were expressly forbidden to do" *40 Denver Journal of International Law & Policy 368 (2012)* available at http://ssrn.com/abstract=2787970.

19 This view of human nature is not universally accepted by all commentators – see Wouter Wils*; "Because companies benefit from the antitrust infringements engaged in by their employees, companies would have an incentive to encourage violations. Companies would have an incentive to recruit those employees most likely to engage in antitrust infringements, and to give them the authority necessary to do so."* Journal of Antitrust Enforcement, Vol. 1, No. 1, April 2013, pp. 52-81 and available at http://ssrn.com/author=456087.

20 See Almunia at fn 2 *supra*.

21 Bloom and Riley A. Riley and M. Bloom, 'Antitrust Compliance Programmes – Can Companies and Antitrust Agencies Do More?' (2011) Journal of Competition Law 21.

22 An argument sometimes put forward by antitrust agencies is that they do not have the resources to monitor compliance on an ongoing basis, but that could be resolved in appropriate cases by appointing an independent antitrust compliance monitor– perhaps the appointment of an antitrust compliance monitor should be limited only to the more egregious cases such as in *United States v. Apple* Inc 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

23 "Compliance Matters" https://ec.europa.eu/competition/antitrust/compliance/index_en.html.

Given the U.S. DOJ Antitrust Division's recent policy change in relation to genuine antitrust compliance efforts, DG COMP may be inclined to move its position slightly closer to that of the DOJ (even if it is not minded yet to give credit for antitrust compliance programs).[24]

DG COMP could consider advising the EC to recognize genuine compliance efforts by acknowledging (and even crediting) the genuine compliance efforts of a parent company in cases of parental liability for the acts of miscreant subsidiaries and joint ventures. This would surely incentivize parent companies to increase their compliance efforts and their commitment to compliance and to take all reasonable steps (bearing in mind the legal principle of "corporate separateness") to ensure that its subsidiaries and joint ventures acted ethically in compliance with the law.

Of course, with joint ventures ("JVs"), all jointly controlling parents would need to demonstrate a corporate commitment to genuine compliance for each to receive credit, but there is no reason in principle why this could not be applied to alleviate the parental responsibility of one JV shareholder/owner[25] and not the other(s) if one could demonstrate a real compliance culture and the others did not.

Another area that DG COMP could consider giving recognition to credible antitrust compliance efforts in a parental liability case is in relation to the "recidivism multiplier" in the EC's Fining Guidelines.[26] Under Paragraph 28 of the EC's Fining Guidelines, the basic amount of a fine may be increased where the EC finds that there have been "aggravating circumstances," including where an undertaking continues or repeats the same or a similar violation. The so-called "recidivism multiplier" is punitive, since the increase can be up to 100 percent for each previous infringement established (up to the maximum of 10 percent of turnover under Regulation No. 1/2003).

These two steps (while not going as far as reducing the absolute level of a fine by giving credit for credible compliance to the company directly involved in the infringement) might be extremely effective in terms of incentivizing real compliance efforts at the group corporate level.

Certainly, the disapplication of the recidivism multiplier would be a huge incentive for a company which had had previous violations in the past, to ensure that they took all appropriate steps to ensure compliance for the future. Even just the existence of the possibility of the recidivism multiplier being disapplied would create this incentive.

VI. WHAT HAVE COMPANIES BEEN DOING TO ENCOURAGE ANTITRUST COMPLIANCE?

Compliance programs and codes of ethics have become a fundamental part – not merely of antitrust compliance but of compliance overall for companies.[27] While most major companies invest significant amounts of time, effort and resources in trying to ensure that they have a credible and robust antitrust compliance program, business organizations such as the ICC have been working tirelessly to advocate the of benefits of competition and the importance of antitrust compliance to all businesses, both large and small.

In 2013, the ICC launched the Antitrust Toolkit for companies.[28] The purpose of the Toolkit is to provide practical tools for companies wishing to build a robust antitrust compliance program. It seeks to complement materials produced by antitrust agencies and other sources of guidance,[29] by focusing on practical steps companies can take internally to embed a successful compliance culture. To ensure that the Toolkit can be easily accessed by business, it is (currently) available free of charge online, and has been translated into several languages, including several European languages, Chinese Mandarin and Russian. The main Toolkit was followed in 2015 by a very short and simple Toolkit specifically designed for SMEs.[30]

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24 The author, of course cannot speak for or influence DG COMP or the EC, so the following are merely suggestions of possible courses of action DG COMP may choose to consider.

25 The term JV "owner" is used because many JVs – particularly in the energy and infrastructure sectors - are unincorporated, in which case the JV is co-owned but there are no shareholders.

26 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5.

27 Sokol, D. Daniel, Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement (June 6, 2012). Antitrust Law Journal, Vol. 78, 2012. Available at https://ssrn.com/abstract=2079336.

28 See https://iccwbo.org/publication/icc-antitrust-compliance-toolkit.

29 See for example the publication by the Society of Corporate Compliance and Ethics ("SCCE"): "A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs" J. Murphy, SCCE, 2010, available at http://www.corporatecompliance.org/Portals/0/PDFs/Resources/ResourceOverview/CEProgramDollarADay-Murphy.pdf.

30 See https://iccwbo.org/publication/icc-sme-toolkit-complying-competition-law-good-business.

Since the publication of the Toolkits, the ICC has organized or presented at more than 100 workshops and conferences around the world, ranging from Canada in the north to Australia in the south, and also across the globe from east to west, to explain to businesses the benefits of competition, and to encourage agencies to give more guidance on their expectations of what a robust antitrust compliance program would entail. The advocacy work of the ICC continues, and the ICC is considering updating the main Toolkit (as an online-only version) in 2020, and is working on a Toolkit for Trade Associations, as well as a compliance story for children.

VII. CONCLUSIONS

There are many pressures facing businesses today – and many compliance challenges, both in relation to antitrust and in relation to the myriad of other laws they need to comply with. Research has shown that most businesses want to "do the right thing" – they want to act with integrity and protect their reputation – they just need to understand how to do that. Research by the UK Competition and Markets Authority demonstrates that the knowledge of the requirements of competition law among small and micro businesses (in particular, but also among some medium sized and even some larger companies) is deplorably low. Antitrust agencies as well as business organizations have a vital advocacy role in changing this.

Encouraging antitrust compliance is not just about programs and processes – although these are helpful – and perhaps even necessary to provide structure. Antitrust compliance is fundamentally about encouraging companies to do the right thing. It is about achieving and sustaining the right corporate culture.

An antitrust compliance program is not an "end in itself" – it is merely a tool to help businesses achieve a culture of ethics and integrity. Joseph (Joe) Murphy of the SCCE has said that "*one cannot get the right culture from applying magic fairy dust.*"[31] Mr. Murphy argues that the "*misty notion of culture*" can be another excuse for not doing the hard work required to establish a truly credible and robust compliance program. Mr. Murphy is of course absolutely correct. An aspiration to achieve an "ethical culture" will not on its own achieve real compliance – it requires the hard work envisaged by the U.S. Federal Sentencing Guidelines, the U.S. Antitrust Division compliance guidelines[32] and the Canadian Competition Bureau guidelines on compliance.[33] The program must be well designed, with procedures to follow up on breaches, and effective communication that does not merely give a forgettable and bland compliance message but that "gets inside someone's head."[34]

On the other hand, an antitrust compliance program on its own that is not underpinned and reinforced by a culture of compliance – involving "Tone at the Top," "Tone in the Middle," and "Tone all the way Down" the organization – will be unlikely to be effective. So, a robust antitrust compliance program needs appropriate policies and procedures that reflect and enforce the company's real commitment to conducting business ethically and in compliance with the law. If antitrust agencies continue (or start) to regard genuine compliance programs more positively and do more to encourage antitrust compliance efforts, those efforts, are likely to increase, and hopefully more compliant behavior will be the outcome. This can only benefit business, society and consumers generally.

31 See https://www.joemurphyccep.com/a-comment-on-ethics-trainings-are-even-dummer-than-you-think-so-is-magic-fairy-dust-the-answer-to-corporate-crime.

32 See fns 6 and 7 *supra*.

33 See fn 9 *supra*.

34 Hui Chen and Eugene Soltes: "Why Compliance Programs Fail and How to Fix them," Harvard Business Review March-April 2018 Issue, available at https://hbr.org/2018/03/why-compliance-programs-fail.

"IT DIDN'T WORK": ANTITRUST COMPLIANCE AND THE ROLE OF THE SENIOR EXECUTIVE

BY DONALD C. KLAWITER[1]

1 Donald C. Klawiter is the Principal at Klawiter PLLC in Washington, DC. Over 44 years, he has practiced antitrust law at the Antitrust Division of the U.S. Department of Justice and as a partner at three major international law firms. He served as Chair of the ABA Section of Antitrust Law in 2005-2006. He also served in leadership positions in the Section relating to cartel enforcement, damages, and competition policy in the United States and around the world. E-mail: don@klawiterpllc.com.

I. INTRODUCTION

When I entered private practice in 1986 after ten years at the Antitrust Division of the U.S. Department of Justice, I became involved in a debate with a senior Division official and good friend on whether the enforcement community or defense counsel were more effective in implementing and fostering compliance with the antitrust laws. I came out strongly for the great work of defense counsel in training corporate executives to act in conformity with the antitrust laws. My friend responded, simply, that every time a company was investigated or prosecuted by the Division, it meant defense counsel's efforts "didn't work." In the thirty-three years since that encounter, I heard time after time from Division staff that the company's compliance program "didn't work."

After hearing repeatedly that the Antitrust Division would not consider giving credit for compliance programs because "it didn't work," the antitrust bar was heartened by the July 11, 2019 announcement by Assistant Attorney General Makan Delrahim that the Division would now consider a company's compliance program both at the charging stage and at the penalty stage of a criminal prosecution. To be sure, this new program will be available only to a company that meets the very strict requirements laid out in the Division's guidance statement, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" (the "Division Guidance").[2]

This article will address the great benefits of the new Division Guidance and its major limitation – the role of senior executives in executing and promoting compliance programs if senior executives are aware of or involved in antitrust violations. At the same time, the article will remind the business community that the U.S. Corporate Leniency Policy is still the best outcome for a company that has uncovered serious antitrust violations and for its senior executives.[3] The shiny new compliance initiative should help the company get to leniency, but if leniency is not available, it offers another powerful incentive for company cooperation.

II. THE DIVISION GUIDANCE SETS OUT A COMPREHENSIVE EVALUATION OF THE ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

Even if nothing else develops from the Division Guidance, the Antitrust Division did a great service for the Antitrust Bar by setting up a comprehensive evaluation of the elements of an effective compliance program. It is much more than a checklist – it is a full-scale analysis of what it takes to build an effective compliance program and demonstrate the value of the company's compliance program. The nine elements of an effective compliance program that the Division presents – design and comprehensiveness, culture of compliance, responsibility, risk assessment, training and communication, periodic review, monitoring and auditing, reporting, incentives and discipline, and remediation and role in the discovery of the violation – are, indeed, one of the best and most comprehensive compliance analyses I have encountered.

I strongly encourage corporate counsel and their antitrust advisors to study the entire 14-page analysis of the elements, including the extremely helpful questions that are posed by the Division. The categories of questions focus the compliance program and build it block by block. Even if a company already has what it would consider an effective compliance program, I encourage the company to compare its current program to the nine elements and the questions flowing from them – and I further encourage the company to conduct that comparison and review every year. While the company does not need to have a program identical to the Division's elements, this is a situation where imitation is, most certainly, the sincerest form of flattery.

Since this new Division Guidance is only three months old, it still needs to be tested in practice. It is not completely clear how the Antitrust Division will evaluate the nine elements. Footnote 1 of the Division Guidance is a full-scale disclaimer, asserting that it has "no force or effect of law."[4] It goes on to say that nothing limits the discretion of the Department to "take . . . or not take action."[5] While this is a standard disclaimer, it does suggest that it will take some time for any pattern of activity to be identified. This places a burden on the Antitrust Division to keep this initiative in the Antitrust Bar's sights and market it broadly and enthusiastically. In the early days of the 1993 U.S. Corporate Leniency Policy, senior officials of the Division promoted the Policy externally to the bar and internally to Division staff, urging the staff to became true partners with the applicants by providing the resources and guidance to make it as easy as possible for the parties to be successful. The parties that seek to be included in the compliance initiative at the charging stage also need to aggressively pursue the Antitrust Division with proof of the effectiveness of its compliance program, and the evidence and cooperation it provides at the earliest stages of the investigation.

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2 U.S. Department of Justice, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, July 2019.

3 See Leniency Program Page, U.S. Dep't Justice, Antitrust Div., available at http://www.justice.gov/atr/leniency-program

4 *Supra* note 2 at 1.

5 *Id.*

Companies will be well advised to devote the time and resources necessary to establish a comprehensive compliance program, obviously calibrated to the size and sophistication of the company. No company should say that it already has a compliance program and does not need anything further. This is especially relevant to companies headquartered outside of the U.S. that do not consider themselves subject to U.S. antitrust law. Earlier, there were many major companies in Europe and Asia that considered compliance programs to be an annoyance and an unnecessary expense. Many of these companies are now memorialized in the Antitrust Division's "$10 Million Club"— companies that have been fined between $10 million and $925 million in U.S. criminal antitrust cases. That list is maintained on the Antitrust Division's website.[6]

The task ahead is simple and direct: Establish an antitrust compliance program using the Division Guidance as a template. If the company already has an antitrust or corporate ethics program, revise that program consistent with the Division Guidance. Once created, administer the program aggressively by training, audits, conspiracy screens and the other tools that the Division Guidance identifies or recommends. As a company conducts the program, maintain a complete record of the actions taken so the company has direct evidence of the steps it has taken and can document the effectiveness of the compliance program. If the company does that, the odds are very good that it will not face criminal indictment because its compliance program did work. And, if it does face criminal charges, it will have detailed evidence of the steps it has taken to comply with the law. From that point, the Antitrust Division must make good on its initiatives at the charging stage or the penalty stage. Time will tell us how effective the initiative is.

III. THE MOST DIFFICULT ISSUE IN CONSIDERING THE IMPACT OF A COMPLIANCE PROGRAM AT BOTH THE CHARGING STAGE AND THE PENALTY STAGE IS EVALUATING THE CONDUCT OF SENIOR EXECUTIVES IN THE INVESTIGATION

The single most difficult issue in the Division Guidance is the role and conduct of senior executives. The Division Guidance has at least thirty primary references to the role and conduct of senior executives in determining responsibility for corporate criminal conduct, including one of the three preliminary questions about the efficacy of the company's compliance program: "To what extent was a company's senior management involved in the violation?"[7] The burden that the Division Guidance places on senior executives is indeed a heavy one. The top executives are responsible for organizing and orchestrating each step of the compliance program, overseeing the conduct of all employees in the marketplace and resisting the temptation of conspiring with competitors at all levels. In determining the breadth of the Division's preliminary question, it is necessary to explore three areas where the role of the executives may disqualify the company from obtaining any credit for its compliance program.

A. The Role of Senior Executives in Establishing and Supervising the Compliance Program

First, the Division Guidance deals with the role of corporate management in establishing and fostering the compliance program and the company's culture of compliance. The Division Guidance is very clear that if management "does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one."[8] This is essentially an "I know it when I see it" situation. How can the Division investigate and evaluate the participation and attitude of a senior executive in compliance training? If he reads from a prepared statement in a monotone, does that signal disinterest? Who would be called as witnesses by the Division to establish the degree of interest and enthusiasm of senior management? I have seen the monotone, but I have also seen very energetic activity by a CEO that would certainly meet the requirements of the new Division Guidance. This is a very difficult area to establish a true culture of compliance. I am sincerely concerned about the ability of the Division to give credit for a culture of compliance, except in very, very few situations.

B. The Role of Senior Executives in Monitoring and Tolerating the Conduct of Employees

Second, the Division Guidance raises concerns that senior management is aware of antitrust violations by other executives and turns a blind eye to the conduct. This also takes us to the culture of compliance. The key word in the Division Guidance is "tolerate."[9] The fact that senior executives will do such things as approve travel for sales executives to meet with competitors or read memos by sales personnel that strongly suggest that they received data directly from competitors or notice changes in pricing that are inconsistent with company practice should be reported to the compliance team or be reviewed by the audit or screening team. If, instead, the senior executive is confronted with these documents for the first time during the Division's investigation and responds with shock and surprise that these actions slipped through the compliance program, the

6 See https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

7 *Supra* note 2 at 3.

8 *Id.*

9 *Supra* note 2 at 5.

company's opportunity to receive compliance credit is greatly diminished. The quality of the compliance program overall will not matter. It didn't work.

C. The Role of Senior Executives in Participating Personally in Illegal Conduct

Third, as noted above, the Division Guidance addresses, as a threshold issue, the extent to which a company's senior management was involved in the violation of the antitrust laws. While the Division Guidance does not say it directly, if the executive responsible for establishing and supervising the compliance program and supervising key sales employees is the person meeting with competitors and agreeing to fix prices, rig bids and allocate markets, it would be virtually impossible for a company to receive compliance credit at either the charging or penalty stage.

Over the course of the past twenty-five years as international cartels have been investigated and prosecuted in many industries, the vast majority of those cartels have been personally operated by the very senior management of the company. The acts of those CEOs and international heads of sales have been imputed to the company, despite corporate policies to the contrary (i.e. compliance programs). Given the size and significance of these international agreements, they could only be approved and established by the international leadership of the companies. It would be a rare situation where such a company would – or should – qualify for compliance credit regardless of how good the compliance program appeared to be. This would certainly be the circumstance where the Division would be correct in announcing that "it didn't work."

IV. THE ANTITRUST DIVISION'S CORPORATE LENIENCY POLICY REMAINS THE ULTIMATE PRIZE IN ANTITRUST CRIMINAL ENFORCEMENT

While the Compliance Guidance is an admirable initiative to focus attention on compliance and bring new life to the sagging criminal enforcement program, the Antitrust Bar and Corporate Counsel should remember the Division's Corporate Leniency Policy is still the ultimate prize in criminal antitrust enforcement. Although there have been some bumps in the road to leniency in recent years, it remains the single most effective tool in the detection and prosecution of cartels ever devised by enforcers.[10] Those of us who grew up as defense counsel over the past 25 years can attest to the great value of leniency for clients and for the Antitrust Division as well. If leniency is executed well, it is a partnership between the company and the Division, each helping the other for their mutual benefit.

A comparison between leniency and the new compliance initiative demonstrates leniency's enormous advantages. First, only one company can receive leniency; it is still unclear how the compliance initiative will be carried out. Second, once a company meets the conditions and receives conditional leniency, the process is transparent – the company will not be prosecuted. With the compliance initiative, the company may need to wait until the end of the process before it knows what benefit it will receive, if any. Third, with leniency, the company (and usually its executives) will not be charged, prosecuted or fined; the best result under the compliance initiative is a deferred prosecution agreement (DPA) where the company will be fined and where the criminal charges are set out in writing. The largest criminal fines that the Division ever obtained were in DPA proceedings. Fourth, the leniency applicant could receive single damage treatment in civil damage actions under ACPERA, whereas a company under the compliance initiative would be subject to treble damages in any proceeding.

The final – and perhaps most important – comparison is the treatment of senior executives. Historically, the leniency policy provided that cooperating current employees of the leniency applicant would not be prosecuted, including the most senior – and culpable – executives. While the most recent amendments to the Division's Frequently Asked Questions ("FAQs") in 2017 have tightened up the policy, it has not excluded any current and cooperating executive from inclusion in the Policy. On the other hand, the new compliance initiative does not discuss the non-prosecution or sentencing of any individuals and focuses only on company prosecutions. That is an issue to keep in mind as this initiative moves ahead.

If a company can apply and obtain leniency, it should consider that opportunity seriously. The compliance initiative – although a very important move – is second best.

10 For a more detailed analysis of current issues and controversies with the Leniency Policy see Donald C. Klawiter, "The U.S. Corporate Leniency Policy: It Is Time for a Renaissance," *CPI Antitrust Chronicle*, January 2019, available at https://www.competitionpolicyinternational.com/the-u-s-corporate-leniency-policy-it-is-time-for-a-renaissance/.

V. A FINAL COMPLIANCE IDEA: MAKE AN EFFECTIVE COMPLIANCE PROGRAM A CONDITION OF LENIENCY

In today's enforcement environment, an effective compliance program is essential to obtaining compliance credit at the charging and the penalty stages of an antitrust criminal proceeding. How can it be then, that a company potentially can obtain corporate leniency – still the best result for a company – and not even have a compliance program? Until recently, no leniency regime in the world required a compliance program as a condition for obtaining leniency. In June 2018, the Hong Kong Competition Commission was the first to establish a compliance program requirement as a condition of receiving corporate leniency.

This amendment to the leniency policy would have the following advantages.[11] First, it would be another step in the movement to place compliance in its rightful place at the center of Antitrust Division enforcement policy. Second, a vibrant antitrust compliance policy makes corporate executives more aware of what cartel behavior looked like, and, third, it gives the Antitrust Division greater confidence that the corporate executives understood what cartel behavior entailed and, as a result, there would be few, if any, situations where the 2017 FAQs would be invoked to exclude corporate executives. This is beneficial to the company, the executives and the Antitrust Division.

Encouraging companies to establish comprehensive compliance programs that provide the opportunity for them to either obtain leniency or charging and sentencing credit is a major step forward for criminal antitrust enforcement. Hopefully, after thirty-three years, the positive aspects of the policy will drown out the chant of "It didn't work."

11 *Id.* The proposal to require a compliance program as a condition for obtaining leniency has been discussed with greater frequency over the last year.

NAVIGATING ANTITRUST COMPLIANCE UNDER THE DOJ'S NEW GUIDANCE

BY RENATA HESSE, BENJAMIN WALKER & CHRISTOPHER VIAPIANO[1]



1 Sullivan & Cromwell LLP. The authors wish to acknowledge the assistance of Nicholas Menillo and Karl Bock in the preparation of this article.

I. INTRODUCTION

The Antitrust Division of the U.S. Department of Justice ("DOJ") has for many years insisted on guilty pleas for companies involved in criminal violations of the antitrust laws that do not otherwise qualify for leniency under the Antitrust Division's Corporate Leniency Policy. On July 11, 2019, Assistant Attorney General Makan Delrahim announced that the Antitrust Division was reversing this policy.[2] The Antitrust Division also announced new guidance (the "Guidance") for evaluating antitrust compliance programs.[3] This represents a significant shift that has opened a new path to a potential deferred prosecution agreement ("DPA") for companies with "effective" antitrust compliance programs, as measured under the Guidance.

Companies should review the Guidance carefully to understand the Antitrust Division's expectations regarding antitrust compliance. This article provides a primer on the Guidance and suggestions for companies thinking through how to navigate antitrust compliance issues under the new regime.

II. BACKGROUND

For more than 25 years, the Antitrust Division has relied on its Corporate Leniency Policy to incentivize companies to establish effective compliance programs. Pursuant to that policy, leniency is granted to the first company that self-reports a violation of the antitrust laws (and meets the Corporate Leniency Policy's other requirements). The benefits of leniency include immunity from criminal charges and penalties, non-prosecution protections for certain cooperating employees, and reduced damages and other benefits in related civil actions under the Antitrust Criminal Penalty Enhancement & Reform Act.

For companies that do not win the "race for leniency" but self-report early, the Antitrust Division has historically insisted upon a guilty plea,[4] regardless of the effectiveness of the company's compliance program.[5] Specifically, the DOJ's Justice Manual stated:

> [T]he Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government."[6] It further explained that "the nature of some crimes, e.g. antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.[7]

Under this prior policy, non-prosecution agreements ("NPAs") and DPAs were typically unavailable to such companies, and their only opportunity to receive any credit for their compliance programs, self-reporting, cooperation, or remediation was at the sentencing stage.

III. DISCUSSION

Pursuant to new Antitrust Division policy announced on July 11, 2019, Antitrust Division prosecutors will now consider the company's compliance program at the charging stage in criminal antitrust matters. The DOJ has removed from the Justice Manual the language reflecting the Antitrust Division's former policy. According to Delrahim, this shift in approach recognizes "the progress that has been made over the years in antitrust awareness and increased compliance" and a desire to "encourage companies to further invest in compliance efforts."[8] The change in policy creates the potential for companies that have robust compliance programs, but do not win the "race for leniency," to obtain a DPA (although not an NPA) instead of a guilty plea.

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2 Makan Delrahim, Asst. Att'y Gen., U.S. Dep't Justice, Antitrust Div., Remarks at New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0; see also *CPI Talks with Makan Delrahim*, CPI Antitrust Chronicle, Summer 2019, at 11-12.

3 U.S. Dep't of Justice, Antitrust Division, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

4 There have been instances in which the Antitrust Division has entered into a DPA with a company, but they have been exceedingly rare.

5 Delrahim Remarks, *supra* note 2.

6 Justice Manual § 9-28.400 cmt.

7 Justice Manual § 9-28.800.

8 Delrahim Remarks, *supra* note 2.

In the charging phase, Antitrust Division prosecutors must now consider the Principles of Federal Prosecution of Business Organizations (collectively, the "Principles") that apply to all federal prosecutors considering criminal charges against companies. The Principles set forth ten factors, including four that Delrahim has noted relate to "good corporate citizenship"[9]: (i) "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision"; (ii) "timely and voluntary disclosure of wrongdoing"; (iii) "willingness to cooperate"; and (iv) "remedial actions."[10]

To assist its attorneys in evaluating compliance programs, and to respond to a "desire for greater clarity and transparency on the considerations weighed by the Antitrust Division when evaluating compliance programs," the Antitrust Division published the Guidance.[11]

The Guidance has two sections. The first section sets forth a comprehensive set of factors that prosecutors are to consider in evaluating an antitrust compliance program at the charging stage. The second section clarifies the Antitrust Division's policy regarding how prosecutors should evaluate the effectiveness of a compliance program at the sentencing stage.

A. Evaluating an Antitrust Compliance Program at the Charging Stage

Preliminary Questions. The Guidance begins with preliminary questions intended to "focus the analysis":

- "*Does the company's compliance program address and prohibit criminal antitrust violations?*"
- "*Did the antitrust compliance program detect and facilitate prompt reporting of the violation?*"
- "*To what extent was a company's senior management involved in the violation?*"

Elements of an Effective Compliance Program. The Guidance explains that there is no "checklist or formula" for an effective antitrust compliance program, but sets forth nine factors to consider. For each factor, the Guidance lists questions that the prosecutors should consider.

"Design and Comprehensiveness." The Guidance states that "*key considerations*" in evaluating the design and comprehensiveness of a compliance program include its "*integration*" into the company's business and the accessibility of antitrust compliance resources to employees. The Guidance then provides a list of questions focusing on how the program is implemented, and to whom it is communicated.

"Culture of Compliance." The Guidance states that prosecutors should examine the extent to which the company's management "has clearly articulated – and conducted themselves in accordance with – the company's commitment to good corporate citizenship." It then provides a list of questions relating to senior leaders' conduct, their role in promoting compliance, and the extent of their involvement (if any) in the antitrust violations at issue.

"Responsibility for the Compliance Program." The Guidance states that for an antitrust compliance program to be "*effective*," those with operational responsibility for the program must have sufficient autonomy, authority, and seniority, and there must be adequate resources for training, monitoring, auditing, and periodic evaluation of the program. The Guidance lists questions relating to the organization of the compliance function; how it compares with other functions in the company in terms of stature, compensation, seniority, resources, etc.; antitrust experience of compliance personnel; and resources dedicated to education and training.

"Risk Assessment." The Guidance states that a "*well-designed*" compliance program is tailored to account for antitrust risk where it might arise in light of the company's lines of business, and lists questions relating to that subject. Additional questions focus on antitrust risk detection methods implemented by the company, and how the company manages new antitrust risks associated with any changes to the company's business. The questions highlight the need for the company to provide specialized antitrust compliance training for human resources personnel and executives responsible for overseeing recruitment and hiring, building on prior Antitrust Division guidance in the area of human resources.[12]

9 *CPI Talks with Makan Delrahim*, available at https://www.competitionpolicyinternational.com/cpi-talks-14/.

10 Justice Manual § 9-28.300.

11 Delrahim Remarks, *supra* note 2.

12 U.S. Dep't Justice & Fed. Trade Comm'n, "Antitrust Guidance for Human Resource Professionals," (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

"Training and Communication." The Guidance directs prosecutors to examine the company's antitrust policies and training and lists questions that focus on the extent to which the company's policies have been disseminated, and whether the manner of communication "promotes and ensures employees' understanding." Prosecutors are directed to consider who receives antitrust-specific training, as well as the timing, frequency, form, and content of that training (such as whether it is tailored to the employees' duties, whether it uses examples that could arise in the relevant business, and whether it addresses lessons learned from prior incidents).

"Periodic Review, Monitoring and Auditing." The Guidance stresses the importance of periodically assessing antitrust compliance. It directs prosecutors to consider how the company evaluates the effectiveness of its program and how it audits/updates the program.

"Reporting." The Guidance states that reporting mechanisms should allow employees to report violations anonymously or confidentially without fear of retaliation. It then lists questions relating to how the reporting mechanisms function, the incentives or disincentives for reporting antitrust violations, and the extent to which the company periodically analyzes its business for patterns or other red flags of an antitrust violation.

"Incentives and Discipline." The Guidance instructs prosecutors to consider the extent to which the company incentivizes antitrust compliance. It lists questions relating to the company's compensation structure and disciplinary policies. Prosecutors are directed to consider past examples of discipline, including for senior executives, for antitrust or other compliance failures.

"Remediation and Role of the Compliance Program in the Discovery of the Violation." The Guidance provides that a company's remedial efforts are relevant to the effectiveness of the compliance program both at the time of the antitrust violation and at the time of the charging decision or sentencing recommendation. The Guidance lists questions relating to how the antitrust violation at issue was identified, how the company has since revised its compliance program, whether outside counsel was involved in assisting the company in that regard, and how the changes have been conveyed to employees.

B. Sentencing Considerations

The second section clarifies the Antitrust Division's guidance for evaluating a company's compliance program when making sentencing recommendations. At the sentencing phase, an entity may receive credit for its compliance program in three ways. First, U.S. Sentencing Guidelines § 8C2.5(f) provides for a three-point reduction in a corporate defendant's culpability score if the company had an effective compliance program (absent unreasonable delay in reporting the offense to appropriate governmental authorities).[13] Second, the existence and effectiveness of a compliance program may be relevant to determining whether a company should be sentenced to probation.[14] Third, the effectiveness of a compliance program, including post-violation remedial efforts, may be relevant to determining the appropriate corporate fine to recommend within the guideline range, or whether to recommend a fine below that range.[15]

IV. PRACTICAL IMPLICATIONS

Assistant Attorney General Delrahim's speech, and the new policies he announced, highlight the Antitrust Division's focus on the need for companies to establish and maintain effective antitrust compliance programs. To be clear, compliance is not a panacea. As noted above, the Justice Manual instructs prosecutors to consider all of the Principles when making charging decisions. As Delrahim explained, "[g]ood corporate citizens not only implement robust compliance programs, but if misconduct occurs, they promptly self-report, cooperate, and take remedial action," and "prosecutors will not credit compliance programs when the other hallmarks of good corporate citizenship are absent."[16]

That said, although an effective compliance program should "not be misconstrued as an automatic pass for corporate misconduct,"[17] it could mean the difference between a DPA and a criminal conviction under the new regime. Compliance and self-reporting are intertwined. An effective compliance program is one that helps to promptly identify misconduct. The effectiveness of a compliance program and the promptness

13 When an organization is convicted of a federal crime, the court will consider the U.S. Sentencing Guidelines in determining the appropriate sentence, including any fine the organization may be required to pay. Likewise, prosecutors typically consider the U.S. Sentencing Guidelines when negotiating the resolution of a criminal matter. The organization's culpability score under the Sentencing Guidelines (which depends on six factors) is used to calculate the recommended fine range. See U.S. Sentencing Guidelines §§ 8C2.6, 8C2.7.

14 U.S. Sentencing Guidelines § 8D1.1.

15 U.S. Sentencing Guidelines § 8C2.8; 18 U.S.C. § 3572.

16 *CPI Talks with Makan Delrahim*, *supra* note 2, at 12.

17 Delrahim Remarks, *supra* note 2.

of self-reporting are two of the factors that prosecutors are directed to consider in making charging decisions. Moreover, having a robust compliance program remains the best way to maximize the chances of being the first to self-report a violation and potentially obtain the benefits of non-prosecution under the DOJ's Corporate Leniency Policy.

What follows below is a practical approach to understanding the Guidance in the context of your own company's compliance program. We provide suggestions for companies looking to be proactive in assessing and, if appropriate, enhancing their antitrust compliance programs in light of the Guidance.

Risk Assessment. Risk assessment is the fourth "*element*" of an effective compliance program listed in the Guidance, but it is where any company should start. There is no one-size-fits-all antitrust compliance program; the Guidance emphasizes that an effective compliance program should be tailored to the particular risks presented by the company's activities. Companies re-evaluating compliance in light of the Guidance should thus conduct a review across their business to develop an understanding of the particular risks presented by their operations. The approach to the other "*elements*" under the Guidance — training, guidance, reporting, etc. — should flow from that risk assessment.

Companies should consider retaining external antitrust experts to assist with the risk assessment and to make recommendations for specific enhancements, which should make it more likely that all antitrust risks are identified, including those that may be less obvious. Pricing and bidding are familiar areas of antitrust risk. Recent developments have made clear, however, that the Antitrust Division intends to prosecute other forms of antitrust violations that may seem less apparent.

For example, in recent years, the Antitrust Division has shined a spotlight on the antitrust implications of HR-related activities. In October 2016, the Antitrust Division announced that it intended to "proceed criminally against naked wage-fixing or no-poaching agreements" (i.e. agreements unconnected to a legitimate collaboration between employers) because "these types of agreements eliminate competition in the same irredeemable way as agreements to fix the prices of goods or allocate customers."[18] Simultaneously, the Antitrust Division and the Federal Trade Commission ("FTC") jointly issued guidance making clear that naked no-poaching and wage-fixing agreements are illegal and that sharing information with competitors about terms and conditions of employment also could run afoul of the antitrust laws.[19] In April 2018, the Antitrust Division announced a settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp, two of the world's largest rail equipment suppliers, relating to no-poach agreements among the companies.[20] Clearly, HR-related antitrust issues have become a significant focus for the Antitrust Division.

Notwithstanding the publicity concerning this issue, the individuals involved may not have appreciated that their activities carried antitrust risk, particularly in the context of no-poach agreements and the sharing of commercially sensitive HR information (such as salary data). Engaging an antitrust expert to assist with assessing and enhancing a compliance program can help identify antitrust risks before they become the Antitrust Division's next enforcement focus.

In conducting the risk assessment, companies should take care to survey all touchpoints with competitors. Risk for cartel conduct and price fixing can be most acute at relatively high levels within the organization, as that is often where the authority to enter into agreements that bind the company resides. But antitrust risk can and does arise in low levels of an organization as well. All areas in which employees have direct or indirect communications with competitors should be considered. Companies should inventory all industry groups in which employees participate, as these could be a mechanism for potentially improper information exchanges. Even if participation in industry groups is widespread and frequent, there should be adequate controls to manage the antitrust risk. The risk assessment should look at relationships with vendors, especially if those vendors work with or provide information about competitors. The risk assessment should include any areas in which contracts are frequently entered into (e.g. corporate finance, mergers and acquisitions) to understand the practice in the industry with respect to non-solicitation or no-poach provisions. The assessment should cover not only the company's lines of business, but also support functions (such as HR).

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18 U.S. Dep't of Justice, "Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation," (October 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

19 *Id.*

20 U.S. Dep't Justice, *Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees* (Apr. 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

A risk assessment should be the first step for companies wishing to be proactive about the Antitrust Division's new Guidance. As the Guidance contemplates, however, antitrust risks are not static. Companies should periodically refresh their risk assessments to take into account changes in the industry, law, technology, and the company's lines of business. An accurate risk assessment can help tailor your compliance program to the risks actually presented by the business and promptly responds to changes.

Antitrust Policy, Training and Guidance. Antitrust policies, training and guidance materials are critical elements of an effective compliance program under the Guidance. Companies can assess and enhance these materials on the basis of a thoughtful risk assessment.

First, the risk assessment should identify which groups of employees need training and guidance. As noted above, this could extend to senior employees, even in large organizations. It may be appropriate to train senior executives and members of the Board of Directors. As an added benefit, appropriate training for senior employees can help to promote a culture of compliance throughout the organization. Beyond that, training and guidance should be tailored to the particular groups of employees that engage in activities that carry antitrust risk. It may be true for many organizations that all employees need some level of antitrust training. At some companies, it may even include contractors and agents.

Second, the training and guidance for each different group of employees should be designed to address the particular antitrust risks faced by that group, as identified during the risk assessment. Depending on the size and scope of the organization, it may be appropriate to have multiple sets of training materials, and subject-specific antitrust guidance, tailored to different groups within the company. For example, at a large institution, an effective program may have one set of materials for employees in the sales and trading businesses, another for employees in the corporate finance function, and another for HR and Legal. Consider also whether there are cultural or linguistic variations across the company that require adapting the training and guidance.

Training and guidance should cover the scope of the company's competitors, which may not always be obvious. Drawing once again from the HR context, a technology company's competitors for talent might include not only other technology companies but also any other company with a technology department. With respect to certain positions in HR, competitors for talent may even include external headhunters that work with the company. The risk assessment should identify these nuances so that they inform the design of the company's training and guidance materials.

Under the Guidance, companies should give their training and guidance materials real-world applicability. To illustrate the concepts, materials should use examples that the employees who are receiving them are most likely to experience. It would not be useful, for example, for an HR employee to receive training using example scenarios in which salespeople share pricing models. Potential sources for real-world examples include the company's past experiences with competition issues (including those identified during the risk assessment, if any), examples from the news, and specific public enforcement actions against other companies. The goal should be to make training and guidance materials easily digestible and useful for the employees receiving them.

Companies can also institute a procedure to provide antitrust training to new hires and employees who have changed job functions, and repeat that antitrust training periodically. Likewise, companies can provide their antitrust policies and guidance materials to new hires upon joining the company and periodically thereafter. The risk assessment, again, should govern the frequency with which this occurs. Employees who have regular contact with competitors may need training that is more frequent. Likewise, it may be appropriate to provide one-off refresher training to particular employees before they attend industry group meetings with competitors.

In addition to updating training and guidance materials in light of a thorough risk assessment, companies that wish to be proactive can take a few easy steps right now:

- Companies can establish a procedure for reviewing and updating their antitrust policies, training and guidance materials on a periodic basis to account for changes in the industry, technology, law, and the business.

- Companies can institute systems for tracking participation in trainings and appropriate consequences for employees who do not complete required trainings.

- It may be appropriate to involve senior individuals in training sessions (e.g. in an introductory role or, if appropriate, to deliver the training) to emphasize the importance of antitrust compliance and to promote further a culture of compliance.

- Companies can make their antitrust policy and guidance materials available in a centralized location that is easily accessible to employees, such as a company-wide intranet.

- Companies can institute a procedure requiring employees to certify in writing that they received, reviewed, and understand the antitrust compliance policy.

Other Considerations. On the basis of a thoughtful risk assessment, proactive companies can begin to address other factors assessed under the Guidance.

The Guidance emphasizes the mechanisms for monitoring antitrust compliance and reporting potential violations. Depending on the circumstances, it may be appropriate to institute a whistleblower hotline, where employees can anonymously report suspected violations, or an antitrust helpdesk, where employees can seek approval or specific legal guidance for proposed activities. For some companies, periodic, unannounced audits may be the most appropriate way to monitor compliance. For others, the risk assessment may indicate that real-time employee surveillance tools are warranted. In any case, the employees charged with monitoring antitrust compliance and handling reports of suspected violations should be trained to spot potential antitrust issues.

The Guidance also states that companies should assess the ways in which they incentivize antitrust compliance. It may be appropriate for companies to incorporate compliance metrics into their key performance indicators for calculating bonuses. Companies should also consider how antitrust violations are disciplined.

Finally, the risk assessment should inform how the company thinks about the organization and governance of its compliance function. The nature and frequency of antitrust risks encountered in the ordinary course of the company's business may have implications for the size of the compliance team, the seniority of its leaders, and the amount of time and effort budgeted specifically for antitrust compliance issues.

V. CONCLUSION

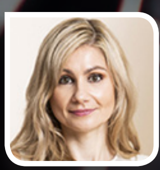
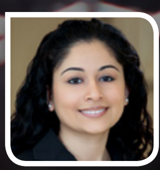
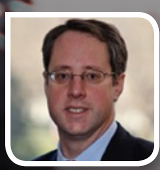
While this shift in approach at the Antitrust Division creates a new path to a DPA, it does not obviate the importance of the Corporate Leniency Policy. Leniency remains the only way to achieve immunity.[21] But the best way to maximize the chances of winning the "race to leniency"—and the prospect of avoiding prosecution if not—is to implement an effective compliance program that encourages and facilitates prompt reporting of misconduct. The Guidance should assist companies in achieving that goal.

Companies should carefully review the Guidance, particularly with respect to the new detail provided by the DOJ regarding its areas of interest in assessing compliance programs, and should consider the Guidance a useful resource for understanding the Antitrust Division's expectations for both the design and implementation of antitrust compliance programs.

21 Delrahim Remarks, *supra* note 2.

CREATE YOUR OWN: BESPOKE ANTITRUST COMPLIANCE PROGRAMS FOR EFFECTIVE COMPLIANCE

BY LEONOR DAVILA, GABRIELLE KOHLMEIER, ANJALI B. PATEL & JOHN SEWARD[1]

1 Leonor V. Davila is Senior Counsel, Antitrust Compliance at Intel Corporation. She joined Intel from the Federal Trade Commission, where she held roles in the Bureau of Competition and the Office of International Affairs. Gabrielle Kohlmeier is Associate General Counsel, Antitrust & Strategic Projects at Verizon, and leads Verizon's competition policy strategy. Externally, she chairs the Tech Compliance Working Group of the ABA Antitrust Ethics and Compliance Committee, among other leadership roles. She also leads numerous diversity & inclusion initiatives in and outside of Verizon, having learned that brilliant ideas and coworkers, like compliance programs, come in many different forms. Anjali B. Patel is Counsel, Antitrust & Strategic Projects at Verizon. She joined Verizon after 10 years in private practice, where she counseled clients across a variety of industries on the antitrust aspects of mergers and acquisitions, litigation, investigations and compliance. John Seward is the Associate Director of Antitrust Compliance at Intel Corporation. He joined Intel after 18 years in private practice counseling clients on the antitrust aspects of litigation, mergers and acquisitions, dominant firm practices, joint ventures and other competitor collaborations, and intellectual property licensing.

Corporate antitrust compliance programs, much like our preferred morning beverages, come in all shapes and sizes – there is no one size or flavor that fits all. And yet, just like one person's large matcha green tea oat milk latte wakes him up as effectively as the next person's small foamy cold brew with half-and-half does her, the compliance programs best suited to promote genuine antitrust compliance may vary greatly based on the particular companies they serve. The Department of Justice Antitrust Division (Division) astutely recognizes this. Announcing their new approach to corporate compliance on July 11, 2019, the Division noted in public statements and subsequent public commentary[2] that there is no standard or singular approach to effective corporate antitrust compliance programs. In fact, companies rely on their corporate compliance programs, including antitrust compliance, in different ways. And various factors may affect and shape what best promotes competition and antitrust compliance for any given company.

This article raises some of the many differences between companies that may lead to different flavors of compliance. It provides a sample, non-exhaustive menu of options from which different companies may choose to create the type of robust, dynamic, and current program that may warrant credit from the Division.

I. ANTITRUST COMPLIANCE GETS ITS DUE

Historically, antitrust compliance programs received little credit from the Division. The Division did not take pre-existing antitrust compliance programs meaningfully into account when assessing and investigating potential criminal matters.

Prior to July 2019, a party facing allegations of criminal antitrust behavior had limited recourse, especially a party that was not the "first one in," in terms of eligibility for leniency. For second- and later-comers unable to pursue leniency, the best hope of avoiding liability was to convince the Division to decline to prosecute given lack of evidence. One way to do so was through Deferred Prosecution Agreements ("DPAs"), which "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation,"[3] and are probation-like arrangements under which the Division files criminal charges but agrees not to pursue prosecution against the company subject to the company abiding by certain compliance conditions. Division use of DPAs was exceedingly rare, at best.[4]

The Division set a high bar for corporate antitrust compliance programs seeking credit during the sentencing phase of a criminal investigation. Under the U.S. Sentencing Guidelines ("Sentencing Guidelines"), companies with corporate compliance programs are eligible for a three-point reduction in their culpability score.[5] Unlike other branches of the Department of Justice, the Division, as Assistant Attorney General ("AAG") Makan Delrahim acknowledged, "has yet to recommend credit for a defendant's 'pre-existing' antitrust compliance program under the Guidelines' three-point reduction provision."[6] In rare instances, the Division credited "forward-looking" compliance programs that demonstrated "extraordinary efforts" that began at the time the violation was uncovered.[7] For example, in November 2015, Kayaba Industry Co. Ltd., pled guilty to its role in a conspiracy to fix prices, rig bids, and allocate markets in the shock absorbers industry.[8] The Division recommended a reduced fine for Kayaba's cooperation with the government and for "the substantial improvements" to its "compliance and remediation program to prevent recurrence of the charged offense."[9]

2 See, e.g. Department of Justice, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, p. 2 (July 2019) ("This document addresses these questions in the criminal antitrust context by identifying elements of an effective antitrust compliance program. Although Division prosecutors should consider these factors when evaluating antitrust compliance programs, the factors are not a checklist or formula. Indeed, not all factors will be relevant in every case, and some factors in the Division's analysis are relevant to more than one question.").

3 Department of Justice, Division Manual at § 9-28.200, available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

4 Examples include a 2013 agreement with the Royal Bank of Scotland (https://www.justice.gov/atr/case-document/file/509081/download), a 2015 agreement with Deutsche Bank. (https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/2014-04-23-deutsche-bank-deferred-prosecution-agreement.pdf), and most recently, an agreement with Heritage Pharmaceuticals in June 2019, https://www.justice.gov/opa/press-release/file/1174111/download.

5 United States Sentencing Commission, Sentencing Guidelines at §8C2.5(f)(1).

6 Assistant Attorney General Makan Delrahim, Department of Justice – Antitrust Division, "Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs," available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

7 Brent Snyder, Dep. Ass't Att'y Gen., Antitrust Div., Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

8 Sentencing Memorandum, *United States v. Kayaba Industry Co., Ltd.*, (S.D. Oh. Oct. 5, 2015).

9 *Id.* at 9. See also Plea Agreement, *United States v. Barclays PLC.*, (D.C. Ct. May 19, 2015) at 16, https://www.justice.gov/file/440481/download (Division cited the "substantial improvements" Barclays had made to its "compliance and remediation program to prevent recurrence of the charged offence" as a factor in its sentence recommendation.

Between the expense and burden of implementing a comprehensive antitrust compliance program and the relatively non-existent payoff of having an existing antitrust compliance program in the event of a potential antitrust criminal investigation, proponents faced an uphill struggle convincing companies to invest significantly in antitrust compliance. Forward-thinking companies with antitrust compliance programs nonetheless risked a determination that all their hard work was insufficient. After all, the Division's historical position has been that even if you had a program, it didn't work because wrongdoing allegedly occurred. In the summer of 2019, the landscape shifted.

On July 11, 2019, AAG Delrahim made history when he announced that the Division would: (1) begin giving companies accused of antitrust crimes credit for existing antitrust compliance at the charging stage; (2) provide more clarity on how the effectiveness of an antitrust compliance program is assessed at the sentencing stage; and (3) for the first time in the Division's history, publish guidance for Division prosecutors to use in their evaluation of antitrust compliance programs.

The Division's announcement further underscored what compliance-credit proponents have been saying for years – a robust and dynamic antitrust compliance program is critical to a company's culture of good corporate citizenship. Further, compliance programs could point to additional value for these efforts, while outside counsel quickly penned client alerts touting their services. Before long attorneys were explaining their compliance programs to internal governing bodies and boards and assessing whether updates and additional investments in those programs were warranted. On the former, counsel could now point to not only the cost savings of avoiding antitrust litigation by preventing antitrust violations in the first place through robust compliance, but also the upside of being able to get relief in case of a crack in antitrust: being able to demonstrate to DOJ a robust, dynamic and continuously evolving antitrust program sincerely supported by leadership could translate into millions of dollars in savings in case an antitrust violation takes place – likely far outweighing the cost of any such program.

And the change is likely to stick. The Division announced that it is not merely changing its practices; the change is to be incorporated into the Department of Justice Manual, which formerly had a specific carve out for antitrust in the provisions giving credit for compliance programs.[10] Unlikely to be a change that is taken lightly, what does this mean for companies, and in-house antitrust counsel in particular, going forward?

II. HOW TO IMPLEMENT A SUCCESSFUL COMPLIANCE PROGRAM

A deep dive into specific compliance programs is beyond the scope of this short article, but, as you'll see, one message rings loud and clear. Different companies have different needs, and there is no "one-size-fits-all" approach to antitrust compliance. That matcha green tea oat milk latte might be just what works for some companies, but others might need something different. In the interest of providing examples of how antitrust compliance may vary, much like our morning beverages, we provide a brief overview of factors that companies may take into consideration when designing an antitrust compliance program, including size, scope and industry, as well as some ideas on how to structure compliance programs.

The Sentencing Guidelines provide a useful framework for the development of a successful compliance program.[11] The elements of a successful compliance program are policies and procedures, oversight by a governing authority or tone from the top, exclusion of anyone from substantial authority who the company knew (or should have known) engaged in illegal activities, training programs and communications, monitoring and auditing and reporting mechanisms, enforcement of policies and procedures, and periodic risk assessments.

While these elements provide a useful framework for the design of a program, each company should take the time to assess its business and risk in order to create a program that's the right fit for the company. There are a number of factors a company should consider as part of its assessment, including the size of the company, geographic scope, and the business and legal model. For example, some companies may put their products into the market through distribution channels and/or direct through hundreds of employees all over the world, so a robust training program with on line options may be appropriate. Whether to translate antitrust policies and trainings into a variety of languages is another consideration for a company with a significant global presence, taking into account factors such as that country's relative antitrust risk and any guidance from the local antitrust agencies on effective compliance programs. The size of the in-house legal team should also inform the design of the program. A company with a large in-house legal team that includes country-specific lawyers, sales lawyers, and business lawyers can extend the reach of its compliance program by training the legal team to identify and report red flags to the compliance team, provide in person training, and contribute to risk assessments.

10 Department of Justice, Division Manual at §§ 9-28.400 & 9-28.800, available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

11 U.S. Sentencing Guidelines. An antitrust compliance program should also be in line with the DOJ's new guidance, which draws from the Sentencing Guidelines.

Regular risk assessments ensure the program is successfully preventing and detecting violations of antitrust laws. Risk assessments may be accomplished through audits, outside counsel reviews, teams of in-house lawyers, or a combination of lawyers and business people. External and business changes that are not obvious to the compliance team may be captured through these assessments, and should result in enhancements to policies and training programs.

A company's past experience with enforcement agencies and private litigation may also inform the design of a compliance program. Companies that are part of a settlement agreement or order should incorporate the obligations of those instruments into their program.

The level of regulation a company faces in its ordinary course of business may also be an important consideration in designing an antitrust compliance program. Companies in regulated industries, or industries subject to control by governmental rules, face unique challenges with regard to corporate compliance, and risk assessment and management. Such challenges can include evolving regulatory landscapes, significant data and reporting obligations and strict compliance requirements. Creating and maintaining a culture of compliance is thus rarely an afterthought, but something that, to be most effective should be built into the ethos and organization fundamentals. Having a dedicated in-house legal team involved in developing a robust and dynamic compliance program is one way to build this in, though outside counsel or cognizant generalists can also have the necessary impact. Whatever the mode, the need is particularly acute with regard to antitrust, where the risks of non-compliance are substantial and extensive.

III. IDEAS TO STRUCTURE AN "EFFECTIVE" COMPLIANCE PROGRAM

An "effective" antitrust compliance program can look one of a number of ways, but below we outline some components to consider including in a program/policy:

A. Create a Culture of Compliance

As the well-known adage goes, "culture eats strategy for lunch." So what does it mean to have a "culture of compliance" and how can in-house counsel help instill compliance values within an organization? Again, there is no one-size-fits-all approach, but there are some common characteristics of robust compliance programs.

A culture of compliance starts at the top with buy-in from senior management. Senior management can set a strong "tone from the top" about the importance of antitrust compliance to the company and ensure that the compliance program is given the necessary budget and other resources. Onboarding training for new hires and newly acquired businesses is another key component of instilling a culture of compliance. As new hires are being introduced to a company and learning the corporate culture, onboarding training provides an effective and efficient way to emphasize the importance of an antitrust compliance program. Compliance training can be embedded in any orientation and training programs new hires are given. For new senior managers the training may include a conversation about the value of "tone from the top" and how to role model a culture of compliance. As part of that tone from the top there should also be oversight from high level personnel, whether the CEO, the GC, the Board of Directors, or an appropriate Board committee. That oversight is important because it gives a sense of value and importance to the compliance program.

B. Documented Policies and Procedures

A documented antitrust policy is a critical element of a successful antitrust compliance program. A policy facilitates enforcement of expectations regarding antitrust laws by informing employees about those expectations and putting them on notice about the consequences of a violation. It is also an important step towards program documentation, in case it becomes necessary to demonstrate the program features to an enforcer. Similar to an antitrust compliance program, the policy should reflect the unique aspects of the company. Multinational companies may benefit from a global antitrust policy that sets coherent expectations around antitrust compliance. For some companies, however, it may be more important to tailor the policy to address the expectations of certain local enforcers.

The policy should be simple, and easy to understand, primarily focused on standards of conduct rather than antitrust principles. Certain companies may also benefit from supplemental procedures or subject matter guidelines to ensure compliance, such as guidance on hiring or automated procedures that track certain sales activities. For companies with a significant mobile workforce or global presence, translations may be useful as well as placing the policy on a variety of platforms, including cell phone apps. Once the policy is finalized, companies should develop a training and communications plan to ensure effective roll out of the policy. The policy and supporting guidelines are not static, they should be periodically reviewed and refreshed to reflect changes to the antitrust laws and the business. The need for modifications may be identified through periodic program effectiveness reviews.

The importance of compliance, including antitrust compliance, can also be emphasized through a company's code of conduct, or best practices guide/handbook. These foundational materials often set the very groundwork from which all employees proceed. It is often one of the first documents new hires are shown. It is one of the few documents that is available to every single person in an organization. And having an antitrust policy referenced in such key materials helps demonstrate just how important such a policy is to senior leadership.

C. Detailed Training Programs

Antitrust can be complex and, as many antitrust practitioners know, intensely fact-driven. Introducing employees to antitrust and sensitizing employees to potential issues is therefore critical. No one expects any individual employee to become an antitrust expert; that is why companies have in-house counsel. They are there to advise on questions that may arise.

However, you don't know what you don't know. Counsel can only address questions that are brought to them. If employees are given broad, substantive and high-level training on a variety of topics, they are better equipped to spot potential issues in their day-to-day business and come to counsel with questions, thus protecting themselves and the company. One way to accomplish this broad reach is through a series of online training programs. A company can create a high-level "Antitrust 101" program that can be made available to all employees and new hires. An online training suite also allows for targeted training programs on particular topics that might be of relevance or import to a business.

D. Reporting System

Employee reporting of suspicious conduct is central to a culture of compliance and is one of the most important ways of detecting wrongful conduct. An effective compliance program empowers employees to serve as the compliance team's eyes and ears on the ground who can flag anticompetitive conduct early on. To help create a strong reporting culture, in-house attorneys should make themselves visible to employees by attending management meetings and visiting their company's facilities to educate employees on how to report a problem and who to ask questions about compliance. It is also critical that employees feel confident that information they report will remain confidential and that they will not be retaliated against for raising complaints in good faith.

To facilitate honest and open reporting, it is also important to establish easily accessible reporting channels that allow employees to remain anonymous if they so choose. Toll-free hotlines and online reporting tools are two of the more common solutions companies use. When using these tools, it is imperative that a member of the compliance team be assigned ownership of monitoring the hotline and/or online submissions and keeping them operational. In evaluating compliance programs, the DOJ has been known to call reporting hotlines. On more than one occasion, it found the hotline disconnected. Employees should also be made to feel comfortable reporting concerns to a member of the in-house legal team.

E. Auditing and Monitoring

In addition to employee reporting, companies can establish an audit program to monitor and detect anticompetitive conduct. While all audit programs should include some degree of employee interviewing and document review, the scope of an audit program can vary based on company size, compliance team resources, industry, a company's antitrust history, and risks facing the company. For some companies, it may be prudent to have an audit program that includes multiple formal audits per year examining emails and other communications, as well as a regular cadence of interviews with key employees in sales and marketing and other competitive decision-making roles. For other companies, less formal, but regular, check-ins with key employees combined with a targeted review of communications may be appropriate. With today's mobile workforce, companies should also consider auditing texts and messaging programs if these tools are regularly used for work-related communications. Whatever form a company's audit program takes, it is important that it be directed by counsel in a manner that will preserve the attorney-client privilege.

F. Enforcement and Remediation

An effective compliance program also requires counsel to enforce the antitrust policy when violations occur and apply learnings from audits and investigations through appropriate remedial action. Enforcement of an antitrust policy against employees who have engaged in inappropriate conduct can include remedial actions such as rigorous training, employee counseling or discipline for more egregious conduct.

In addition, learnings from audits and investigations can be applied more broadly. For example, learnings can be used to identify areas where additional employee training is needed or policies require clarification. There is no limit to the types of remedial actions a compliance team can take; what is important is that the compliance team implement and espouse a culture of continuous learning and program improvement.

G. Routine Risk Assessment

The U.S. Sentencing Guidelines provide that "an organization shall take reasonable steps . . . to evaluate periodically the effectiveness of the organization's compliance and ethics program."[12] What constitutes "reasonable steps" can vary from company to company. Some companies may want to employ a formal review process with reporting to senior management that takes place on a regular (perhaps annual) basis. Other companies may find a less formal assessment works better.

Regardless of the formality of the process, the risk assessment should examine changes to both the legal and business landscape. An assessment of changes in the legal landscape includes staying abreast of enforcement priorities of the antitrust agencies in the jurisdictions where a company operates and changes in statutory and case law. On the business side, counsel should assess whether changes in company strategy, new business initiatives, or the addition of new lines of business (either organically or through acquisition) warrant updates to the antitrust compliance program.

The compliance team may also want to conduct a self-assessment to ensure it is effectively promoting a culture of compliance. Items to assess include the effectiveness of training programs and whether the material has become stale or outdated, as well as the clarity of antitrust policies and guidelines. Finally, all assessment activities should be documented in a non-privileged document that can be shared with DOJ or other enforcement agencies if needed to demonstrate the effectiveness of the company's antitrust compliance program.

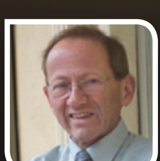
IV. CONCLUSION

As we note, different things work for different companies, and may work differently for the same company at different points in time. The key is that an antitrust compliance program should be a living, dynamic part of any company's culture. As a company evolves, it should evolve; as it moves in a different direction, an antitrust compliance program should be reassessed to see if any changes are required. This requires antitrust counsel that is engaged and present. Pick up your beverage of choice, and stay vigilant.

12 U.S. Sentencing Guideline Manual § 8B2.1(b)(5) (2018), available at https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8#NaN.

RECRUITING COMPANIES IN THE FIGHT AGAINST ANTITRUST VIOLATIONS: GOVERNMENT COULD DO BETTER!

BY JOE MURPHY[1]



1 Joseph E. Murphy, CCEP, Director, Public Policy, Society of Corporate Compliance and Ethics, http://www.joemurphyccep.com/.

I. UNDERMINING COMPANY PROGRAMS

It would be reasonable to assume that governments and legal systems would promote company compliance efforts and avoid steps that undermine these socially beneficial efforts. The reality is that this is not always so; sometimes the legal system has substantially undercut and even punished compliance efforts.

In the U.S., there is a tendency to elevate the importance of litigation above other values. So while corporate self-policing serves an important social value, litigants are nevertheless allowed to use these efforts against companies in ways that discourage compliance work. For example, in a notorious case involving alleged discrimination by Lucky Stores,[2] the plaintiffs were allowed to use against the company notes taken in compliance training. The court even cited those notes as a basis for imposing punitive damages. Predictably, the message to compliance people was not to risk using the types of innovative techniques that had been used in that training (having attendees articulate biased statements they had heard in the workplace) and not to have students take notes (terrible advice, from a training perspective.) When it comes to dealing with litigation, keeping compliance training safe became more important than making it effective.

These flawed approaches can also be seen in the European Union. The European Commission in its competition law activities has shown views bordering on contempt for compliance efforts. The Commission helped establish a legal principle that allowed it to increase punishment for any corporate parent that attempts to promote compliance programs in subsidiaries and then has a violation, using this compliance effort as a basis for holding the parent responsible for a subsidiary's violation. It has steadfastly refused to consider compliance programs as an ameliorating factor. It has severely undercut the role of a principal source of support for compliance programs, corporate inside counsel. The Commission has adamantly opposed any protection for inside counsel's advice and work product, preferring instead to use counsel as a tool for gaining litigation advantage, and thereby discouraging employees from seeking advice from their company lawyers.[3]

There is also a record of privacy bureaucracies misusing privacy laws to undercut company compliance efforts, focusing particularly on company speak-up systems. For example, the French authority, CNIL, attacked companies for implementing helpline systems, mistakenly assuming this was a new concept tied only to the U.S. Sarbanes-Oxley Act. While the agency quickly backtracked on some of its more severe reactions, it nevertheless generated substantial waste in compliance programs in meeting new regulatory requirements. It also triggered other EU privacy agencies to mimic the approach; in some cases these agencies even purported to have the power to prohibit employees from being able to report their bosses' misconduct without revealing their identities and exposing themselves to retaliation.

The stakes have been raised substantially by the new European mandate, the General Data Protection Regulation ("GDPR"). The GDPR grants European privacy enforcers enormous powers to impose fines, enables mass civil actions, and creates significant ambiguity about the requirements of the law. Compliance functions may be attacked by privacy enforcers, because the law failed to take into account the important role of voluntary compliance efforts. As a result, vital compliance steps like conducting due diligence on potential business partners, may be severely curtailed.[4]

These ill-informed approaches inhibit organizations in their efforts to promote compliance and ethics.[5] In addition, they push companies to rely on lawyers and legalize the program, instead of using effective, management-oriented techniques.

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2 *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 330 (N.D. Cal. 1992); Compliance Trainers Beware, 1 Corp. Conduct Q. 11 (Fall. 1991).

3 *Akzo Nobel Chemicals and Akros Chemicals v. EC.* (European Court of Justice, Sept. 14, 2010) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0550:EN:HTML.

4 See, e.g. Conflicts between GDPR and corporate anti-bribery compliance: OECD Working Group invites comments, available at http://www.fcpablog.com/blog/2019/5/2/conflicts-between-gdpr-and-corporate-anti-bribery-compliance.html.

5 This hostility to compliance efforts is explored in more detail in Murphy, "Policies in conflict: Undermining corporate self-policing," 69 Rutgers U.L. Rev. 421 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827324.

II. IGNORING PROGRAMS

Some enforcers simply ignore company compliance programs, viewing companies as singular actors – inscrutable black boxes acting as units. No credit is given for internal efforts to prevent wrongdoing. Those who willfully flout the law, and those who diligently try to prevent violations are treated identically. Agency personnel ignore government's real role, to ensure the law is followed, and focus instead on harvesting fines.

In this context, enforcers consider a program a failure because even one violation has occurred, notwithstanding that the company may have tens of thousands of employees and may have made prodigious efforts to ensure compliance.

Perhaps government lawyers, untrained in compliance and ethics, are unwilling to try something new. Partnering with in-house compliance professionals may be untried terrain for them, and not something commended by their law professors when they were in school.

III. MANDATING PROGRAM DETAILS

Some in government believe in the potential of compliance programs, but seek a short cut. Instead of doing the difficult work of actually learning about the field, and working on the most effective means to incent organizations to conduct internal policing, they look for the quick fix of mandating the specifics of compliance programs.

One of the most prominent examples was California's approach to harassment. The state did not explore with compliance and ethics professionals the broader field of compliance and ethics; it simply jumped on traditional training as the cure, and required exactly two hours of training every two years. California overlooked human nature; as soon as the state dictates a minimum, it tends instead to create a maximum. The message is that companies no longer need to struggle with this; all they need do is meet California's minimum. Thus, if behavioral experts teach us that two hours of training is less effective than regular, brief messages, California does not accept that. If there are new, more effective means to motivate employees, mandates like California's push companies to ignore reality and simply "follow the law." Mandates can limit innovation. Why try anything new if what you are doing meets the legal standard (even if it does not actually work)?

Governments should not rely on mandates instead of doing the difficult job of encouraging innovation. Mandating programs in effect encourages companies to do minimum, check-box compliance. Process becomes more important than effectiveness.

IV. FOCUSING ON PAPER AND PREACHING

Those working in the compliance field know that effective programs call for a broad range of management tools. While in the past some might have imagined that a mere code of conduct could magically transform human conduct, realists today know better. Nor do lectures by lawyers ensure compliance. Government agents who focus only on policies and lawyer presentations will not be encouraging effective programs.

There was a recent example in the Czech Republic of this dynamic. Czech law had been revised to allow diligent efforts to prevent violations as a defense to criminal cases against organizations. A lower court gave a company a complete pass because it had a code of conduct. The appellate court wisely reversed this ruling, noting that a code of conduct alone does not meet this standard.[6]

Issuing policies or providing training is not a compliance program. The U.S. Sentencing Guidelines'[7] excellent *minimum* list of steps, spells out what needs to be included. Anyone assessing programs needs to use a list with this degree of comprehensiveness. The Department of Justice ("DOJ") Antitrust Division's list of questions for evaluating programs[8] provides a good example of the types of questions enforcers should ask of compliance programs.

6 See "Czech Republic: Which compliance programme can exculpate your company from criminal liability?," available at https://www.schoenherr.eu/publications/publication-detail/czech-republic-which-compliance-programme-can-exculpate-your-company-from-criminal-liability/.

7 U.S.S.G. §8B2.1 Effective Compliance and Ethics Program, available at http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf.

8 See https://www.justice.gov/atr/page/file/1182001/download.

V. NOT PROVIDING EXAMPLES OR DISCUSSING CASES

There are leaders in government who understand their mission to take effective steps to prevent violations. They endorse compliance and ethics programs and give them credit in assessing organizational wrongdoing.

But they sometimes miss an important opportunity to strengthen the field by not providing examples and lessons learned from their cases. Discussing the cases where they have considered compliance programs and sharing with the community what elements were impressive and what steps were done wrong provides an important chance to learn. For compliance and ethics professionals one of the best ways to get the attention of company lawyers and managers is to have actual cases from the government that illustrate important points.

Why is there this reluctance by enforcers? In some cases it may be that they did not know of the need. While it is helpful to have positive statements from government encouraging programs, these lack the power, persuasiveness and utility of actual examples.

Enforcers may fear setting a binding precedent – a concern that spelling out examples may allow a company to assert that any time a company has done x, y, and z it should get a free pass because the government gave credit for those things in a prior case. But this fear has only a superficial basis.

Government can state publicly that each case is individual, and determined by the facts in that case; case determinations are not binding precedent. So in a relatively minor offense involving no executives, less may be expected for a compliance program. But in a severe case with executive involvement, the government may place a higher burden on a company. Given that the government is exercising discretion and is not legally bound by prior determinations, the fear of setting a binding precedent seems unfounded.

VI. NOT HAVING COMPLIANCE AND ETHICS EXPERTISE

Compliance and ethics is a relatively new field. So it is understandable that some are slow to recognize what is involved in doing this work. Those in related fields may mistakenly assume that expertise in their field, such as law, is the same as expertise in compliance and ethics.

Enforcement people may attempt to deal with this field as if it were nothing more than the practice of law. They may focus greatly on documents and box-ticking. But the field is multidisciplinary, requiring knowledge and skill in a number of areas. It draws from many fields, but is not a subset of any of them.

In assessing compliance and ethics programs those who have not been trained in this field may be impressed by things that look good on the surface, but do not really work. But when enforcement people know what questions to ask, what records to review, and whom to interview, assessing programs is no more difficult than any other area that requires expertise.

In the author's past experience, DOJ people have done little to develop such expertise. My consistent experience as a faculty member at various training programs, including those for SCCE and the Practising Law Institute, is that Department personnel only show up if they are speaking, stay long enough to deliver their addresses, and leave immediately thereafter.

The Canadian Competition Bureau provides a model of what to do. The Bureau designated specific Bureau personnel who were available as resources for other enforcement personnel. The Bureau made sure their people knew the area by having them attend the Society of Corporate Compliance & Ethics' ("SCCE") academy and then qualify for certification as Certified Compliance & Ethics Professionals.[9]

Another practical example involved the Securities and Exchange Commission's creation of an FCPA task force. As part of its increased focus on FCPA enforcement, the Commission held a boot camp of SEC, DOJ and FBI personnel and invited people with background in compliance, including the author, to teach. The author gave a presentation called "*Don't get conned*," advising on how to avoid being misled by a company's compliance program presentation.

9 See "Meet Terence Stechysin, CCEP-I," Compliance and Ethics Professional 37 (July 2018).

VII. TAKING A PASS/FAIL APPROACH

Any agency that gives companies credit for having a compliance and ethics program is certainly worthy of praise. But even those who do give credit need to consider how best to do this.

Some may take a pass/fail approach to programs, with no room for nuance. In this all or nothing context, programs are neatly divided between good and ineffective. For example, this was the original model of the U.S. Sentencing Guidelines. The problem with pass/fail is that the goal is only to pass, which can lead companies to shoot for the minimum. When there is no "A+" grade to reach for, "pass" becomes the definition of success. There is no inspiration for companies to strive to do better. This can lead to box ticking, to meet the minimum.

While this was the original model of the Sentencing Guidelines, the "secret" of the U.S. system is that while the Sentencing Guidelines drew people's attention, it is the discretionary approach of the DOJ that actually counts in real life. The DOJ, in its Justice Manual,[10] applies a range of factors and allows for a range of responses. In that context, anyone working on compliance programs certainly wants to meet the Sentencing Guidelines minimums, but must also be sure whatever they do will impress the government in an actual case. This keeps programs dynamic and focused on real results.

VIII. TYING THEIR OWN HANDS

One of the abiding mysteries in this area is why any agency would voluntarily impose restrictions on itself. Agencies should be free to make appropriate determinations of how culpable an organization is. One company may show contempt for the law, taking steps to cover up wrongdoing, and having senior management directly involved in the offenses. But another company may have done all the management steps it could to prevent misconduct, but be victimized by an employee actively concealing the violations. One of these companies deserves severe treatment, while the other had no real moral culpability. While they both must repair any damage they caused, no purpose is served by beating with a stick the one that already did what was appropriate and was itself the victim of a transgressing employee.

The DOJ's Justice Manual appropriately empowers enforcement personnel to consider these factors before making any of the enforcement decisions in a given case. But in competition law elsewhere an inexplicable approach has been adopted. Enforcement personnel, using no research and no empirical support, have pulled a number from the ether to limit what consideration they can give to a company's compliance efforts. Instead of having the freedom to examine all the circumstances and determine what makes sense in any given case, they place a numerical chain on their own hands, limiting what percentage fine reduction a company can get. This make-believe percentage ranges arbitrarily from 10 to 15 percent, but it just as easily could have been 3.8 percent or 7.3 percent. There is no basis for the number, or for limiting agency freedom simply to dealing with fines and applying some small number reduction.

It is difficult to understand why in antitrust anyone believes that these small percentages are a significant incentive. Ironically, competition law enforcers had learned from experience that half-baked incentives were worthless. In years past there had been an anemic incentive program operated by the DOJ's Antitrust Division for violators to self-disclose violations. Almost no one ever used it because there were no assurances that companies would really benefit, or get anything more than unpredictable fine reductions. But when the Justice Department stepped up and guaranteed the first in to receive full immunity in cartel cases, the program took off and has been copied around the world.

If simply inventing a tiny number were enough, then offering an arbitrary 11.3 percent or 7.2 percent reduction in fines should have been enough to encourage voluntary disclosures; no immunity would be needed. In the real world this circumscribed benefit did not work for self-disclosure, and it is certainly the case that imposing artificial restraints on enforcement people in dealing with company self-policing efforts does little to promote socially useful compliance efforts.

10 See http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

IX. REWARDING COMPANIES FOR NOT HAVING PROGRAMS

Another approach in competition law that defies explanation is rewarding companies for delaying any compliance effort until *after* a violation occurs. In other words, to gain the most favor with enforcers, companies could rationally defer any effort to prevent violations until they are caught in a violation, and only then implement a compliance program.

This approach was embraced by the French competition authority in dealing with cartels, and had been tried by the U.S. Antitrust Division. The government was not interested in what a company did to prevent a violation. But once a crime had occurred, then efforts to prevent a recurrence were rewarded.

As wrong-headed as this policy would be in any enforcement area, it is astonishing in antitrust, where economics is supposed to be a key factor. Consider the impact of incentives in two different compliance areas. A rational company acting on a purely economic basis would see that in a different compliance area – corruption – compliance programs implemented before violations do, in fact, count if a violation occurs. The stronger the preventive program, the better the government will treat the company.

If the same company looks at antitrust following the French model, such a preventive program was useless and merited no attention. But if there is nothing done beforehand, then anything done afterward converts into money saved. Only steps taken *after* the crime occurs received any reward. Where would companies rationally focus resources? Fighting corruption, where preventive steps are rewarded, or antitrust where the benefit only occurs when the actions are taken after the violation has been caught? Notably, according to at least one Justice official, they saw much stronger anticorruption programs than antitrust ones.[11] When it comes to competition law compliance, if the company never spends money on a compliance program and never commits a violation (or is never caught), it has saved money. And if it is caught, there is then time to put some money into the program and reap a reward. How can this make sense? Wisely the Antitrust Division now follows the path set by the anti-corruption enforcers and will credit prior programs. The French, on the other hand, now do nothing.

X. DOING ASSESSMENTS THE WRONG WAY

Wise agencies will see the value of recognizing and encouraging company compliance programs. They will ensure they have expertise to assess compliance programs. They will not hamstring their own freedom to assess programs, and they will not deliberately send the wrong message. But when it comes to doing the actual work, it is important to do this in a smart way. So a brief review of *wrong* ways can help ensure agencies do this effectively.

One of the easiest mistakes to make is only listening to a company's outside counsel. Unless counsel is from one of the few law firms that has its own rigorous compliance program or includes practitioners who have had on-the-ground in-house experience implementing programs, they likely start from a thin base themselves. They may want to give the government a ton of paper and policies and act like they are presenting a case to a judge. The government enforcers need to talk to the real players. They can start with company in-house counsel, but they need to talk with the actual managers who operate the compliance program on a daily basis to get the full story.

If a company's compliance program is effective then it is part of the company's culture. It is either part of how the company really works or it is not. Enforcers should start exploring this from the first day of the investigation. As the Antitrust Division has noted:

> Division prosecutors should evaluate compliance programs throughout the course of their investigation, including asking relevant compliance-related questions of witnesses, and should not wait for companies to offer a compliance presentation before beginning their evaluation of a company's antitrust compliance program.[12]

But if instead the government waits for the company to propose to visit and "present their compliance program" the enforcers are not fully doing their job. Lawyers in suits using PowerPoints will not give the necessary depth. A compliance program is not a pile of papers in a folder. It is in the daily lives of the company's people.

No review should be limited to simply reading documents. Companies may offer to "send over their compliance program," but that makes no sense. Documents do not tell the full story about an organization and its culture. Documents are not a compliance program, they are merely the shell.

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11 Murphy, "Gee, I wonder why antitrust compliance programs aren't better?," COMPLIANCE AND ETHICS PROFESSIONAL 68 (Feb. 2018).

12 See https://www.justice.gov/atr/page/file/1182001/download pp 2-3.

In the same way that documents do not tell the full story, merely talking with selected witnesses within the company may give only a limited view. It helps to talk with others involved in the matter being investigated. So if there are customers, suppliers, or other business partners involved, include the company's compliance program and its apparent commitment to doing the right thing in discussions with everyone who is part of the investigation. If there is a real program and a deep culture of integrity, those who deal with the company will know.

XI. HOW CAN THESE MISTAKES BE FIXED?

How do we make changes in this area and help government do a more effective job in achieving organizational compliance? The first step is accepting that this is a problem. Policymakers need to see that simply beating organizations with sticks has limits as a matter of policy. First, it always comes after the harm has been done. And second, organizations are not just big individuals. Relying on punishment of groups has severe limitations in effectiveness. All in, it makes much more sense to prevent violations.

For agencies looking at this issue, it is essential to have someone with responsibility for it – designating an appropriately-positioned leader in the organization with responsibility for developing and implementing an effective approach.

Those in government also need to accept that compliance and ethics is a field that requires study. Government people need to study this field and be part of it.

There also needs to be change in the laws, rules and policies that undermine compliance and ethics programs. There should be provisions that recognize and encourage organizations to adopt strong programs. Organizational self-policing should be recognized, promoted and protected, at a policy level, as a step that makes a positive contribution to society.

Governments should engage with compliance and ethics professionals. For example those devising the GDPR in Europe should have consulted directly with major compliance professional organizations like SCCE, and talked with some of the individual professionals who spend their days working to prevent organizational crime and misconduct.

Compliance and ethics professionals share with government the mission of preventing illegal conduct by organizations. We all want to prevent this harm. If Government continues to undercut our work we all lose. But if we work together we can make a real difference.

BALANCING PRIVACY PROTECTIONS WITH ANTITRUST COMPLIANCE EFFORTS: KEY ISSUES AND POTENTIAL SOLUTIONS

BY FIONA SCHAEFFER, NATHANIEL MATTISON & JENNA WEINBLATT[1]



1 Fiona Schaeffer is a partner at Milbank LLP. Nathaniel Mattison and Jenna Weinblatt are associates at Milbank LLP.

I. INTRODUCTION

Public interest in strengthening privacy protections and in pursuing more vigorous antitrust enforcement have increased in recent years, as certain economic sectors have been perceived to have become too consolidated and certain companies too powerful. Privacy and antitrust have the potential to be strong complements, in that they share the goal of protecting consumers from unfair economic exploitation – privacy law by promoting transparency in personal data collection and limiting the uses to which it may be put, antitrust law by promoting full and fair competition between providers of goods and services. Yet as legislatures move to strengthen privacy protections, broadly written statutes threaten to undercut effective antitrust compliance. Specifically, broad privacy protections may chill implementation of robust voluntary antitrust compliance programs if they limit employers' latitude to collect and analyze employee data necessary to carry out effective internal monitoring and timely report wrongdoing to enforcement authorities. Privacy is an important value, but legislators should take other policy goals into account when crafting new privacy protections: antitrust enforcers' increasing incentives for robust antitrust compliance programs also serve worthy social and economic purposes. Legislators, businesses, and the legal community should work together to ensure that privacy protections do not raise the risk of anticompetitive conduct going undetected, to consumers' detriment.

II. THE INCREASING PROMINENCE OF COMPLIANCE IN ANTITRUST ENFORCEMENT

A. The U.S. Department of Justice's Changing Approach to Compliance

For many years, antitrust enforcers in the United States treated corporate compliance programs with "disdain," as one commentator has put it.[2] Under the Corporate Leniency Program, only the first company to confess to participation in an antitrust crime and fully cooperate with the Department of Justice's Antitrust Division ("DOJ") could receive full recognition for its efforts — namely, immunity from prosecution. Companies that did not win the "race" for leniency had to plead guilty to criminal charges before having the opportunity to earn a reduction in the applicable penalties. A company's antitrust compliance program was only considered — if at all — as part of this sentencing reduction.[3] The DOJ took this stark approach to compliance and reporting because it was a tool to promote the Leniency Policy.[4]

Experience, however, seems to have taught the DOJ that a more sensitive — and sensible — approach to encouraging the development of compliance programs is required. Thus, in July 2019, Assistant Attorney General Makan Delrahim announced that the DOJ will begin considering whether to provide credit for businesses' compliance programs at the *charging* stage of criminal antitrust investigations,[5] and the DOJ has released public guidance for prosecutors — and companies — to assess companies' antitrust compliance efforts.[6] While the DOJ continues to disfavor non-prosecution agreements, except for those first-reporting companies that qualify under the Leniency Program, second- or third-to-report companies may now qualify for deferred prosecution agreements with federal prosecutors.[7] In this way, the DOJ is seeking to better leverage existing resources — and encouraging the new deployment of private ones — to eliminate anticompetitive behavior.

2 Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 69 Rutgers U.L. Rev. 421, 461 (2017).

3 Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the N.Y.U. School of Law Program on Corporate Compliance and Enforcement 2 (July 11, 2019), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0 ("Wind of Change").

4 *Id.* at 3.

5 *Id.* at 3, 6-9.

6 Antitrust Div., U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), available at https://www.justice.gov/atr/page/file/1182001/download ("Evaluation of Corporate Compliance Programs").

7 Delrahim, Wind of Change, *supra* note 3, at 8.

B. The Department of Justice's Guidance on Effective Compliance

To identify worthy compliance efforts, DOJ prosecutors now are to consider three core questions:

1. Is the corporation's compliance program well designed?

2. Is the program being applied earnestly and in good faith?

3. Does the corporation's compliance program work?[8]

The DOJ explicitly recognizes that "no compliance program can ever prevent all criminal activity by a corporation's employees,"[9] but companies nonetheless should strive to answer these questions satisfactorily, to mitigate the risks of criminal anticompetitive activity occurring and to earn credit with prosecutors as they weigh criminal charges. To make these broad questions more tangible, the DOJ helpfully has identified nine elements that commonly characterize effective antitrust compliance programs, which prosecutors are to consider when evaluating potential criminal charges:

1. Program comprehensiveness,

2. A corporate culture of compliance,

3. Senior management responsibility for compliance,

4. Risk assessment and appropriate program tailoring to a company's business,

5. Adequate training and communication,

6. Periodic reviews, monitoring and auditing,

7. Reporting mechanisms,

8. Incentives and discipline, and

9. Ongoing program improvement.[10]

While certain aspects of the DOJ's new approach will take time to work out — for example, establishing what might be sufficiently "prompt" reporting of wrongdoing for a company to merit a favorable charging decision — the DOJ's guidance is a clear signal to companies that antitrust compliance programs matter. Furthermore, while the guidance states that the nine markers of effective compliance are "not a checklist or formula,"[11] those markers provide a detailed and fairly straightforward roadmap for companies on how to establish promising compliance programs, and how to improve existing ones. Although the success of compliance programs can only be proven through experience, companies would be well served to invest in them: not only might they provide protection in the event of an investigation, they also point towards a better way of doing business.

8 DOJ, Evaluation of Corporate Compliance Programs, *supra* note 6, at 2.

9 *Id.* at 3.

10 *Id.* at 3-14.

11 *Id.* at 2.

III. STRENGTHENED PRIVACY LAWS: POTENTIAL BRAKES ON EFFECTIVE COMPLIANCE PROGRAMS

The DOJ's changed stance towards compliance programs, and specific guidance regarding the hallmarks of corporate good citizenship, are welcome developments for companies, practitioners, and consumers. Robust and widespread corporate self-policing is key to safeguarding the benefits of full and fair competition in markets. Trends towards strengthening privacy laws, however, may prevent companies and the DOJ from realizing the full potential of this changed approach, or seeing it copied by other jurisdictions.

A. The Traditional Rules of Privacy in the Workplace: Few Obstacles to Implementing Effective Compliance Programs

Historically, U.S. law has been favorable to employers' monitoring employees' use of company resources, such as workplace email, notwithstanding the potential presence of information employees might subjectively view as "private." Federal statutes regarding the interception of electronic communications, as well as the accessing of stored communications, contain exceptions for employers that allow them to review communications made using the employers' systems.[12] More generally, U.S. courts have applied a rule of an employee's reasonable expectations of privacy when deciding whether an employer's accessing an employee's data in the workplace — including on work-provided devices — is lawful.[13] Thus even information that an employee might argue is subject to his or her individual legal privilege may be accessed and used by an employer, if the employee objectively had no basis to believe that the information was not accessible or subject to monitoring or review.[14]

Friction around employer monitoring of employees has been building, however, as the boundaries between work and non-work time and space have become increasingly blurred, abetted by changes in technology and social norms.[15] In recent years, employers' access to or monitoring of employees' personal email or social media accounts, even if employees have accessed such accounts using firm-provided computers and browsers, has been condemned, or employers' use of the information gleaned has been limited.[16] Businesses also have faced difficulties due to their "bring your own device" policies, among other employer efforts to leverage employees' own resources for business purposes.[17]

While egregious employer behavior with respect to employee personal data rightfully may be condemned, from a compliance perspective the blurring line between work and non-work spheres mean that risk monitoring and management might be justified in expanding to some degree. For example, where a company's employees use social media accounts as part of their work, it is difficult to argue that the company should not have the ability to monitor those same accounts — even if they are "personal" ones — if the business is to effectively monitor employees'

12 18 U.S.C. § 2511(2)(a)(1) (providing that it is not unlawful for "a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service . . . ."); 18 U.S.C. § 2701(c)(1) (providing that "the person or entity providing a wire or electronic communications service" may " intentionally access[ ] without authorization a facility through which an electronic communication service is provided" or "intentionally exceed[ ] an authorization to access that facility"). An employer's monitoring of communications may also be lawful because it does not fall within the Electronic Communications Privacy Act's definition of "interception." See *Fraser v. Nationwide Mutual Ins. Co.*, 352 F.3d 107 (3d Cir. 2003) (holding, in relevant part, that employer's accessing former employee's emails was not an unlawful "interception" of the emails, because the access did not occur "contemporaneously" with the emails' being sent or received).

13 See Restatement of Employment Law § 7.03. E.g. *City of Ontario v. Quon*, 560 U.S. 746 (2010) (holding that even if a police officer had a reasonable expectation of privacy with respect to personal text messages sent and received on his employer-issued pager, the public employer's review of those messages was lawful under the Fourth Amendment "[b]ecause the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope"); *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183 (S.D. Cal 2008) (granting, in relevant part, defendant's motion for summary judgment against counterdefendant's counterclaim for invasion of privacy, because the computer accessed by defendant was defendant's property, and defendant "did not look at the computer for the purpose of rooting out personal information about [counterdefendant], but, rather, was motivated by a desire to protect its confidential information and to ensure that [counterdefendant] was not engaged in unauthorized activity that would harm [defendant].").

14 E.g. *Bingham v. Baycare Health Sys.*, Case No: 8:14-cv-73-T-23JSS, 2016 WL 3917513 (M.D. Fla. July 20, 2016) (determining that emails between plaintiff and plaintiff's attorneys produced by plaintiff's employer to defendant in response to a discovery request were not privileged, where plaintiff's employer's computer usage policy vitiated any reasonable expectation of confidentiality in the emails).

15 See Lisa M. Durham Taylor, *The Times They Are A-Changin': Shifting Norms and Employee Privacy in the Technological Era*, 15 Minn. J. L. Sci. & Tech. 949 (2014).

16 E.g. *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 759 F.Supp.2d 417 (S.D.N.Y. 2010) (holding that former employer's accessing former employee's Gmail, Hotmail, and Warrior Fitness Boot Camp email accounts using login information left on the former employer's computer violated the Stored Communications Act); *Stengart v. Loving Care Agency*, 201 N.J. 300, 990 A.2d 650 (2010) (holding that former employee "could reasonably expect that e-mail communications with her lawyer through her personal [web-based email] account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them," and that the former employer's counsel breached the New Jersey Rules of Professional Conduct by reading the emails and failing to notify the former employee).

17 See generally Lindsey Blair, *Contextualizing Bring Your Own Device Policies*, 44 J. Corp. L. 151 (2018).

competitive conduct.[18] Not only would a failure to monitor those accounts increase the risk of unlawful conduct going undetected — harming consumers — but it also would increase the risk that prosecutors would consider antitrust compliance efforts by the business insufficient, because those efforts might not be seen as appropriately tailored to the operations of the business or appropriately thorough in sampling risky activity.[19]

B. The California Consumer Privacy Act: New Protections for Privacy in the Workplace, New Problems for Effective Compliance?

Although difficult to generalize, and applied in an *ex post* fashion, the reasonable expectations rule allows for a balancing of employer and employee interests, and flexibility in achieving compliance goals — flexibility that is presumed by the DOJ's new crediting policy and guidelines. Advocates of increased privacy protection, however, have sought to increase, *ex ante*, limits on data collection and usage, and legislatures have begun to respond to their concerns. The recently-enacted California Consumer Privacy Act ("CCPA") represents this more aggressive approach to protecting individuals' personal information, and it raises important concerns for implementing the Department of Justice's guidance.

Beginning January 2020, "consumers" within the meaning of the CCPA will be able to ask a company what "personal information" the company has collected about them, and furthermore will have the right to force the company to delete the information or to prohibit the company from selling the information to third parties.[20] The CCPA has a broad jurisdictional reach, applying to companies doing business in California that either: (1) have more than $25 million in gross revenue; (2) have data on more than 50,000 "consumers," households, or devices; or (3) make over half of their revenue selling "consumer's" personal information.[21] The CCPA defines "personal information" as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[22] Most critically, the law defines a "consumer" as any "natural person who is a California resident."[23]

While protecting consumer information, in general, is a worthy policy goal, the law's effective reach evidently goes beyond shielding the privacy of businesses' customers. The law's definition of a "consumer" applies to individuals beyond the ordinary meaning of the term, such as employees and job applicants – individuals who arguably should have been beyond the scope of the CCPA given the different nature of their relationships with covered business entities. Recognizing this apparent overreach, the California recently enacted Assembly Bill 25 ("AB-25").[24] AB-25 exempts information collected by a business about a natural person "acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business" from many of the CCPA's provisions, including consumers' statutory data deletion right.[25]

While AB-25 will improve the CCPA's approach to employers' compliance efforts, it nevertheless has important limitations. Chief among these is that AB-25's exemption for employee information will only last until January 1, 2021.[26] This means that, over the long term, companies subject to the CCPA still may have to defend whether personal information they have collected from their employees should not be subject to deletion,[27] and to defend whether the use of that information either is not limited by the law or is consistent with it.[28] These aspects of the laws pose short- to medium-term investigation and enforcement risks for businesses that they may weigh more heavily than the long-term benefits

18 *Cf.* Office of Public Affairs, U.S. Dep't of Justice, President of E-Commerce Company Pleads Guilty to Price Fixing (April 11, 2019), available at https://www.justice.gov/opa/pr/president-e-commerce-company-pleads-guilty-price-fixing (announcing guilty plea of an e-commerce company president, who had engaged in a conspiracy to fix the prices of customized promotional products that was carried out through Facebook, as well as Skype and WhatsApp).

19 DOJ, Evaluation of Corporate Compliance Programs, *supra* note 6, at 7-8, 10-11.

20 See Cal. Civ. Code § 1798.100 *et seq.* (effective Jan. 1, 2020).

21 Cal. Civ. Code § 1798.140(c).

22 Cal. Civ. Code § 1798.140(o)

23 Cal. Civ. Code § 1798.140(g).

24 A.B. 25, 2019-2020 Leg., Reg. Sess., 2019 Cal. Stat. ch. 763.

25 A.B. 25 § 2 (amending Cal. Civ. Code. §1798.145(g)); see also A.B. 25 § 2.1 (amending Cal. Civ. Code. §1798.145(h)), § 2.2 (amending Cal. Civ. Code. §1798.145(g)), and § 2.3 (amending Cal. Civ. Code. §1798.145(h)).

26 A.B. 25 § 2.

27 Cal. Civ. Code § 1798.105(d) (stating that a business is exempt from complying with a "consumer's" request to delete information, if the information is "necessary" to achieve certain specified purposes).

28 See Cal. Civ. Code § 1798.145(a) (providing that the CCPA does not restrict a business's ability to comply with applicable law, or a civil, criminal, or regulatory, inquiry, or cooperate with law enforcement agencies concerning conduct that the business believes may violate the law).

of implementing robust compliance, and thus businesses may not invest in the latter despite the DOJ's new emphasis on compliance and the protections compliance generally can offer.

In addition, even during AB-25's brief exemption period, the law does *not* relieve companies of their obligation to inform employees and job applicants "at or before the point of collection" of the kinds of personal information that will be collected and the uses to which that information may be put.[29] This seems to mean that companies must affirmatively disclose what information will be collected from employees via employer provided technology, including phones and laptops, and set forth the uses to which it may be put. This requirement effectively asks companies to predetermine what information will be relevant to compliance monitoring and auditing, without those companies knowing what personal information employees may actually put on their work devices — the kind of untailored compliance program design disfavored by the DOJ. Because of the CCPA's further requirement that companies looking to collect and use new types of personal information must re-notify "consumers" of the changes, businesses may be inclined not to modify their initial decisions, again undercutting the DOJ's policy by limiting the experience-based adjustments the DOJ has said are a hallmark of effective compliance.

C. The GDPR and Repercussions for Compliance Programs, Generally

The CCPA's forceful approach to privacy is reminiscent of the General Data Protection Regulation ("GDPR") enacted by the European Union in 2016.[30] Like the CCPA, the GDPR creates strong protections for a wide array of EU residents' personal information, including limits on such information's collection and use. Also, like the CCPA, the GDPR seems to have been designed solely with privacy in mind, creating barriers for the effective enforcement of other legal regimes through voluntary self-policing.

The GDPR's implications for compliance have been most extensively examined in the context of anticorruption efforts. TRACE International, a globally recognized anti-bribery business association, has concluded that "many GDPR provisions do not facilitate – and are even in direct conflict with – the essential elements of anti-bribery compliance programs such as due diligence of third parties and compliance procedures for monitoring, internal investigations and reporting."[31] For example, the GDPR's prohibition of the processing of personal data relating to criminal offenses inhibits data collection and analysis that is central to effective anti-bribery compliance – namely, determining whether counterparties have bribery or economic crimes convictions that make them risky transaction partners.[32] In addition, the GDPR limits the lawful bases for processing personal data, and subjects data collection to purpose and time limitations, which have not been part of anti-bribery compliance best practices.[33] These restrictions imposed by the GDPR thus present businesses with a quandary when they seek to engage in anticorruption due diligence: to the extent that they depart from compliance best practices, businesses raise their risk of exposure to corruption, but to the extent that they try to collect and use personal information to carry out effective due diligence, they raise their risk of a privacy enforcement action, or even a private lawsuit for a putative privacy violation.[34]

The GDPR's implications for anticorruption compliance likely are not dissimilar to their potential effect on antitrust compliance. The GDPR's provisions either prevent outright the collection and analysis of information appropriately considered as part of competition crime prevention, or discourage the collection and analysis of information that could aid detection and mitigation efforts. For companies engaged in business in both the United States and the European Union, this raises the risk of not being able to fully implement the DOJ's hallmarks of effective compliance across the board, and thus the risks of anticompetitive conduct occurring undetected and of adverse prosecutorial decisions. In addition, the GDPR presents a significant hurdle to any effort to export an American-style approach to antitrust compliance to the EU, as the GDPR provides relatively limited circumstances for modifications of its protections on a national level.[35] As a result, businesses and enforcers are disadvantaged in their efforts to protect consumers from anticompetitive actions in the market.

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29 A.B. 25 § 2.

30 Council Regulation 2016/679, 2016 O.J. (L. 119) 1.

31 TRACE International, Inc., Submission to OECD Working Group on Bribery 81-82, *in* OECD Working Group on Bribery, Public Comments: Review of the 2009 Anti-Bribery Recommendation (2019), available at http://www.oecd.org/corruption/anti-bribery/Public-Comments-Review-OECD-Anti-Bribery-Recommendation.pdf.

32 *Id.* at 84. See Council Regulation 2016/679 art. 10, 2016 O.J. (L. 119) 39.

33 TRACE International, Inc., Submission to OECD Working Group on Bribery 85, 87. See Council Regulation 2016/679 arts. 5-6, 2016 O.J. (L. 119) 35-37.

34 See Council Regulation 2016/679 ch. VIII, 2016 O.J. (L. 119) 80-83 (providing rights for data subjects to lodge complaints against companies with supervisory authorities, and to effective judicial remedies).

35 See Council Regulation 2016/679 art. 23, 2016 O.J. (L. 119) 46-47.

IV. NAVIGATING THE CROSSCURRENTS OF PRIVACY PROTECTION AND EFFECTIVE COMPLIANCE

Privacy is an important value, but to date it largely has overridden others as legislatures have considered and enacted laws to strengthen protections for personal information, thereby threatening to undercut antitrust enforcers' new efforts to incentivize and reward effective compliance programs. Governments seeking to increase privacy protections should recognize the importance of voluntary corporate self-policing when enacting or amending privacy legislation: effective antitrust compliance programs are vital to achieving government policy priorities and protecting consumers and businesses from harmful market conduct. As the implementors of both antitrust compliance programs and many privacy protections, members of the legal community and businesses have a key role to play in raising legislators' awareness of the potential privacy and antitrust law conflict, and in helping to develop solutions that harmonize the fields. Lawyers, compliance experts, and businesses can speak directly to the ways in which increased privacy protections, without tailoring, can raise the risk of anticompetitive conduct going undetected, causing harm to consumers and creating legal risks for the enterprises. They also can explain the strain on resources that can occur in trying to satisfactorily carry out competing privacy and antitrust mandates, producing suboptimal privacy and antitrust outcomes.

One way legislators could work to advance antitrust compliance, while still increasing privacy protections in general, would be to provide by law that data collection by employers from their employees for compliance purposes is a valid exception to otherwise applicable restrictions on personal information monitoring and analysis. In the United States, this could in effect maintain the reasonableness rule that has been applied to date. Legislators also could provide that government entities to which privacy regulation and enforcement are delegated must consult with other agencies, including antitrust enforcers, so that those agencies are able to ensure privacy regulators take account of their policy interests.

To the extent that these and other solutions are not implemented, however, businesses should resist the temptation to avoid instituting as many effective compliance measures as possible. New privacy regulations may make antitrust compliance more difficult, but such difficulty would not be a satisfactory justification for inaction if antitrust enforcers consider filing charges against a business. TRACE's Illya Antonenko has offered similar advice regarding anticorruption due diligence in the wake of the GDPR.[36] As Antonenko has suggested for anticorruption efforts, companies should attempt to reconcile their antitrust compliance policies and procedures with the privacy law's requirements: companies should commit time and resources to understanding their privacy law obligations, and use those requirements to frame their antitrust compliance efforts.[37] In so doing, businesses have the opportunity to protect against downside risks under both the privacy and the antitrust laws.

36 Ilya Antonenko, *Reconciling Personal Data Protection and Business Transparency Compliance*, CEP Magazine, Oct. 2019, at 23, 25, available at https://assets.corporatecompliance.org/Portals/1/PDF/ComplianceEthicsQuiz/CEU-articles/2019/cep-2019-10-CEU-antonenko.pdf.

37<<<< *Id.* at 23-24.

WHY ISN'T "DETERRENCE" INCLUDED IN THE MEASUREMENTS OF ANTITRUST "ENFORCEMENT"?

BY LAWRENCE J. WHITE[1]

1 Stern School of Business, New York University, Lwhite@stern.nyu.edu. Thanks are due to Shagun Varma, whose research assistance was valuable in shaping the ideas that are expressed in this paper.

If asked about how to measure the government's enforcement of the antitrust laws, many antitrust attorneys – especially those at the U.S. antitrust enforcement agencies and in the antitrust plaintiff's bar – are likely to answer with some version of: "Look at the annual number of government cases that are brought; a larger number means more enforcement." This view is often found in law review articles and in reports that include summaries of the annual numbers of cases that have been brought by the enforcement agencies, with the implication – or sometimes an explicit statement – that a reduced number of cases that have been brought within a given year must mean that less effort has been made to detect and prosecute violations.[2]

One possible assumption that underlies this position is that the antitrust violators are constantly "at work," committing their violations. If more resources are devoted to detecting them, more violators will be caught – hence, the greater number of cases that are brought are an indicator of enforcement.

But that position ignores the role of deterrence: If potential (and actual) violators make rational decisions, then more efforts at detection (and harsher penalties for convicted violators) ought to lead to *fewer* violations. More enforcement effort could thus be associated with *fewer* cases that are brought.

Let's illustrate this point by considering a non-antitrust form of law violation: street muggings of individuals. And let's consider the relationship between enforcement efforts – as measured by the number of police officers on the streets of a town – and the number of arrests. At one extreme, suppose that there are no police officers on the streets; then, although muggings might be rampant, there will be few (if any) arrests. At the other extreme, suppose that there is a police officer on every street corner, around the clock; then few will be the muggers who would dare try to mug anyone, and again, there will be few arrests. And in between these two extremes, there are some police on some street corners at some times – and there are some muggings, and there are some arrests.

This simple example is represented in a stylized form in Figure 1: On the horizontal axis is the number of police officers on the streets; on the vertical axis is the number of arrests per time period (say, per week). At the left-hand side, there are zero officers on the streets and zero arrests; on the right-hand side there are police officers on every corner, and there are zero arrests (because there are zero muggings). And in between there are a positive number of arrests. The relationship between the number of police on the streets and the number of arrests is thus an inverted parabola – a "Laffer Curve" of arrests and enforcement efforts.[3]

Figure 1: The "Laffer Curve" of Arrests and Police Presence

2 See, for example, Michael Kades, "The State of U.S. Federal Antitrust Enforcement," Washington Center for Equitable Growth, September 19, 2019; accessible at: https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true. See also the cites that are contained in that report.

3 A similar diagram, supported by a more formal and elaborate model, appears in Lawrence J. White, "Litigation and Economic Incentives," in Richard O. Zerbe, ed., Research in Law and Economics, Vol. 11. Greenwich, Conn.: JAI Press, 1988, pp. 73-90.

In this example: More enforcement efforts do result in fewer violations. But the numbers of arrests may well be a poor proxy for enforcement efforts: Yes, on the left-hand side of the parabola, there is a positive relationship between arrests and enforcement efforts (and a negative relationship between the underlying violations and enforcement efforts). But to the right of the peak there is a *negative* relationship between arrests and enforcement efforts. Accordingly, an increase in the number of arrests from one year to the next might be an indication of more enforcement effort (on the left-hand side of the parabola); but it could also be an indication of less enforcement effort (on the right-hand side of the parabola). Conversely, fewer arrests from one year to the next might be indicative of less enforcement effort – or it could be an indication of fewer violations *because of more enforcement effort*.

Equivalently: When a police officer walks the streets but doesn't arrest anyone – *because there are no crimes being committed* – he/she is still *enforcing* the law. To identify "enforcement" solely with arrests is mis-leading at best and is likely to focus too much attention on arrests and not enough on crime prevention through other means.

What is true for street muggings, arrests, and police enforcement should hold as well for antitrust violations, cases brought, and enforcement by the antitrust agencies.

Let us now expand the consideration of antitrust enforcement to encompass merger reviews. Again, there are frequently asserted associations between "antitrust enforcement" and the number of merger challenges that are brought by the antitrust agencies.

But suppose that the legal standards as to the types of mergers that will be challenged as threats to competition and the types of mergers that are considered to be competitively benign are clear "bright lines," with no ambiguity – and that these challenge standards are sure to be upheld by the courts – and all of the antitrust bar know the location of and understand these "lines." Then, if we assume that the counsel to potentially merging parties accurately advise their clients and that the clients always heed their advice, only benign mergers will be proposed – since non-benign mergers will always be challenged and the challenges will always be upheld. Thus, there will be zero merger challenges – because of the effectiveness of enforcement and not because of the lack of enforcement.

Note that this zero-challenge-result could hold regardless of where the challenge "line" is located. If, for example, the enforcement agencies believe that entry conditions are always such that merged firms are unlikely to achieve any lasting market power, or if instead the agencies believe that entry is a weak disciplining force such that many mergers are likely to achieve lasting market power – so long as the "lines" that result from these views are clearly conveyed to the antitrust bar and are supported by the courts, few (if any) merger challenges will be observed.

Thus, the observation that there are varying numbers of merger challenges from year to year says much more about the difficulties of conveying where those "lines" are for various industries under various circumstances.[4]

In the context of imperfect knowledge or vagueness about where the "lines" are, and thus of the consequent positive numbers of merger challenges: Suppose that a new presidential administration changes the location of the enforcement "line" but hasn't conveyed that change with adequate clarity or precision. Then a change to greater leniency as to what is considered anti-competitive would likely be accompanied initially by a reduced number of challenges; and a change to greater stringency would initially be accompanied by a greater number of challenges.[5] But after the initial change in the number of challenges, the merger-advising bar ought to gain a better (though still imperfect) idea of where the new "line" is, and the numbers of merger challenges should return to roughly their previous levels.

Let's now return to the Laffer Curve of Figure 1. Since the left-hand side of the curve does show a positive relationship between cases that are brought and enforcement efforts, it is possible that someone could believe in deterrence but also believe that even when deterrence is taken into account, the actual state of enforcement efforts is always sufficiently sparse that all observations occur along the left-hand side of the curve. But then the next question should be about the basis for this latter belief.

4 This is similar to Priest and Klein's analysis of why some cases proceed to trial rather than being settled: See George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation," Journal of Legal Studies, 13, January 1984, pp. 1-55.

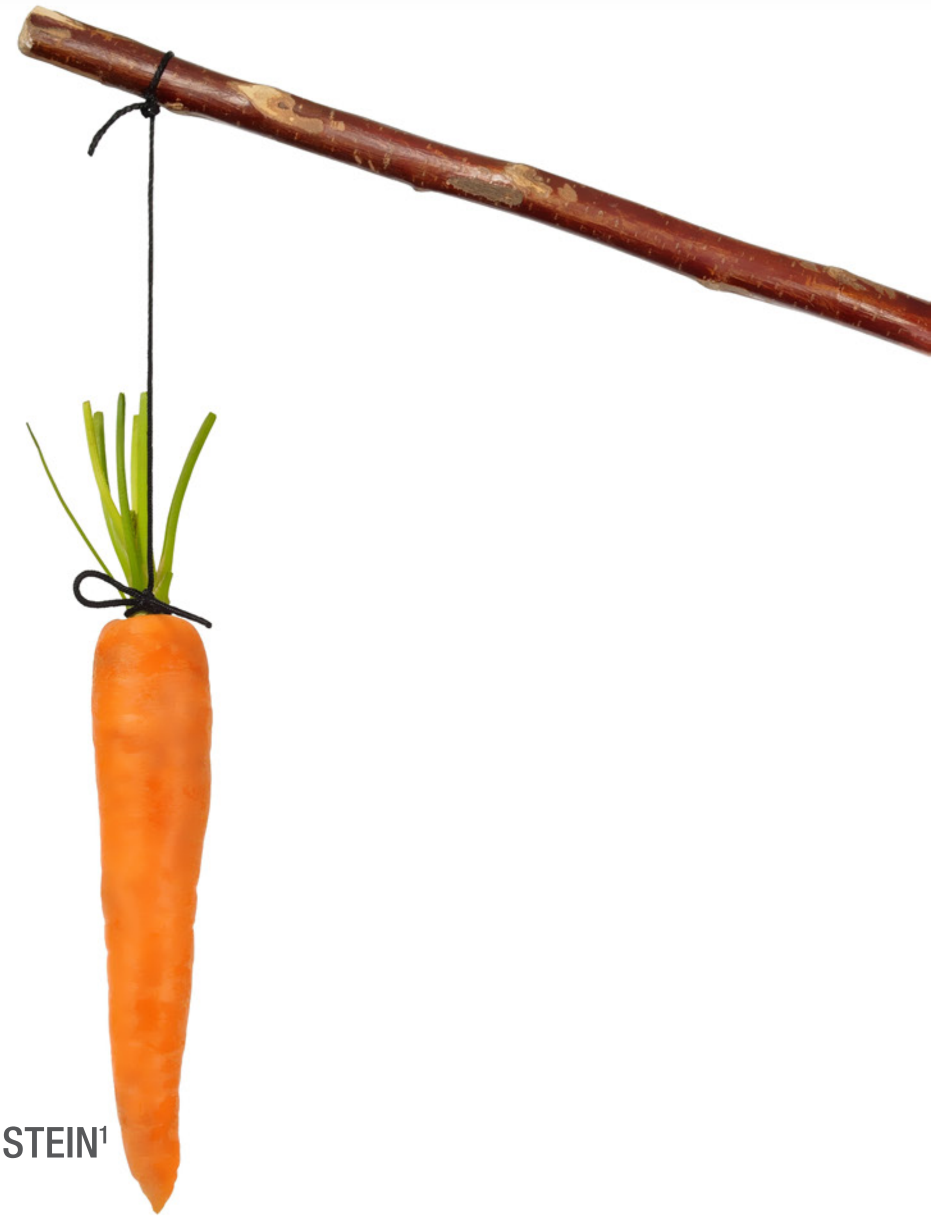
5 But it is also possible that the merger-advising bar mis-reads the former change and believes that the enforcement "line" has become even more lenient than the new administration intends, so that there could even be more merger challenges initially; similarly, the move toward greater stringency could be mis-read, with the consequence of fewer mergers' being challenged initially.

There is a final implication from this consideration of the effects of deterrence: Conclusions about the effectiveness of an antitrust regime – or of any legal enforcement regime – should not be based on observations of the number of cases that are brought during any time period. Instead, those judgments should be made on the basis of where the enforcement "line" appears to be drawn and whether that "line" embodies excessive leniency or excessive stringency.

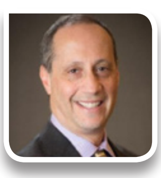
These kinds of judgments are more easily made when the actions in question are readily observed: for example, the mergers that are permitted versus those that are challenged;[6] or the vertical restraints that are permitted versus those that are challenged. The judgments are harder when the actions involved are surreptitious, such as price-fixing/bid-rigging/cartel activity. But it is nevertheless the right way to think about the issue.

6 Kwoka, for example, follows this approach and argues that recent merger policy has been too lenient: See John E. Kwoka, Jr., "Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes," Antitrust Law Journal, 78(3), 2013, pp. 619-650; and John E. Kwoka, Jr., Mergers, Merger Control, and Remedies: A Retrospective of U.S. Policy. Cambridge, MA: MIT Press, 2015.

ENHANCING THE "CARROT": A PRACTICAL PERSPECTIVE ON DOJ CREDIT FOR ANTITRUST COMPLIANCE



BY ROBIN D. ADELSTEIN & GERALD A. STEIN[1]



1 Robin D. Adelstein is the U.S. Head of Antitrust and Competition at global law firm Norton Rose Fulbright US LLP. Robin's pragmatic approach to the practice of law is informed by her experience, having served as in-house antitrust and litigation counsel at Swiss healthcare company Novartis and UK alcohol beverage leader Diageo, before becoming North American General Counsel of Sandoz, the generics and biosimilars division of Novartis. Gerald A. Stein is a Senior Counsel in the New York Office of Norton Rose Fulbright US LLP and a member of the firm's Antitrust and Competition Group. A former attorney at the Bureau of Competition (Northeast Region) of the Federal Trade Commission, Gerald counsels and represents clients before the U.S. antitrust enforcement agencies and in all aspects of private antitrust litigation. The authors were assisted in writing this article by law clerk Emily Woolbank, who works under the direct supervision of Ms. Adelstein.

I. INTRODUCTION

In July 2019, the U.S. Department of Justice Antitrust Division (the "Division") announced a new policy to encourage the implementation of robust and effective antitrust compliance programs by companies that operate in the United States. Division prosecutors will now consider providing credit at the charging and sentencing stages of an antitrust criminal investigation to a company that maintains an antitrust compliance program that meets certain specified requirements.

As part of the policy announcement, the Division published guidance entitled "Evaluation of Corporate Compliance Programs" ("Guidance"),[2] which sets forth the nine factors that Division prosecutors will evaluate in considering whether a compliance program is sufficient to support a reduction of criminal charges and sentences. Applying only to criminal antitrust violations (such as price fixing, bid rigging and market allocation), the Division's new policy provides credit at both the charging and sentencing stages of criminal prosecutions if a company can establish that such violations took place during a time in which it maintained an "effective compliance program" as defined in the Guidance. The Guidance also provides transparency and useful instruction to the business community and practitioners regarding what the Division considers best practice in antitrust compliance.

While the Guidance sets out the nine key elements of an effective compliance program, both the Guidance and comments from the Division front office made during a panel discussion at NYU School of Law immediately following the Division's announcement of the policy change, strongly underscore that credit will be given only if a company "promptly self-reports" a potential cartel violation after it is detected through its internal compliance measures. A failure to promptly self-report – despite a company maintaining a best practice compliance program – likely will result in no credit given.

II. "EVALUATION OF CORPORATE COMPLIANCE PROGRAMS"

The Division has now departed from its hardline approach of refusing to grant credit during charging or sentencing for companies that had pre-existing antitrust compliance programs, which was based on the theory that the occurrence of an antitrust violation meant that such a program was ineffective. According to Assistant Attorney General Makan Delrahim, this position reflected "an outdated view of the real world."

The Guidance explains in considerable detail the elements of a robust and effective antitrust program and is intended to be read in conjunction with other prosecutorial guidance materials, including the "Principles of Federal Prosecution of Business Organizations" and the United States Sentencing Guidelines.[3]

The Division acknowledges that while it has "no formulaic requirements regarding the evaluation of a compliance program," prosecutors should ask three preliminary questions about a company's compliance efforts to focus their analysis on a case-by-case basis:

1. "Does the company's compliance program address and prohibit criminal antitrust violations?

2. Did the antitrust compliance program detect and facilitate prompt reporting of the violation?

3. To what extent was a company's senior management involved in the violation?"[4]

The change brings the Division in alignment with the position taken by the U.S. Department of Justice in non-antitrust matters, namely that "no compliance program can ever prevent all criminal activity by a corporation's employees."[5] In doing so, the Guidance identifies *nine factors* that the Division should consider when evaluating a compliance program's effectiveness at the *charging stage*:

2 U.S. Department of Justice Antitrust Division, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations," July 2019. Available at: https://www.justice.gov/atr/page/file/1182001/download.

3 U.S. Department of Justice, Justice Manual § 9-28.300, "Principles of Federal Prosecution of Business Organizations." Available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.800. United States Sentencing Guidelines, Chapter 8. Available at https://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8.

4 See Guidance, p. 3.

5 U.S. Department of Justice, Justice Manual § 9-28.800.

1. **Design and Comprehensiveness:** Division prosecutors will consider "the design, format and, comprehensiveness" of the program, including its integration into a company's business, the accessibility/type of resources for employees, and whether it existed prior to the investigation. Focus will also be on how often it is reviewed or updated.

2. **Culture of Compliance:** Emphasis is placed on whether "management has clearly articulated – and conducted themselves in accordance with – the company's commitment to good corporate citizenship." This includes consideration of the actions of senior management, their response to violations, and personal accountability for prior failures.

3. **Responsibility for the Compliance Program:** A chief compliance officer or executive should be given "operational responsibility for the program," including "autonomy, authority, and seniority within the company's governance structure." He or she should also be given adequate resources for training, monitoring, auditing and evaluating the program.

4. **Risk Assessment:** A compliance program must be tailored to the company's industry and internal business lines, including common types of misconduct. Antitrust policies should be implemented accordingly, utilizing information or metrics to help detect violations and reviewed to keep abreast of legal or technological advances and lessons learned.

5. **Training and Communication:** The Guidance directs prosecutors to consider whether a program's training and communications allow employees to understand their antitrust obligations. Communication issues include the nature of the communication and method of distribution, whether antitrust policies are included in a Code of Conduct, and whether employees must certify that they have read the policy. Training considerations include who receives training, whether that training is tailored to business lines and seniority, the type, timing and format of training and whether training is updated to reflect developments.

6. **Review, Monitoring and Auditing:** Regular review and audits should be undertaken to ensure the program continues to address relevant antitrust risks, to reinforce a company's commitment to compliance and to identify violations quickly. The Division will consider the method used to evaluate or audit the program and the frequency of review.

7. **Reporting:** The program should utilize anonymous or confidential reporting methods that employees can use without fear of retaliation. Relevant factors include the type of mechanism, whether the reporting system is publicized internally, whether employees have a duty to report, and whether reports are periodically reviewed.

8. **Incentives and Discipline:** The Division will consider the incentive and discipline features of the program, including the nature of any incentives for compliance (e.g., bonus clawbacks or denial of promotions) and the type of discipline inflicted for prior violations, such as management turnover, termination or ongoing supervision.

9. **Remediation and Role of the Compliance Program in the Discovery of the Violation:** The Guidance emphasizes the importance of early detection and self-policing, as well as any remedial efforts, which should enable a company to be the first applicant for leniency. Considerations here include the role of the program in uncovering the violation, individual knowledge prior to detection, the role of senior leadership in addressing the violation and whether the program assisted the company to promptly self-report.

With respect to credit at the *sentencing stage*, prosecutors will follow the United States Sentencing Guidelines, which enable a three-point reduction in a company's culpability score if the company has an "effective" compliance program.[6] First, like at the charging stage, what is considered effective will be assessed on a case-by-case basis. Most importantly, sentencing credit will not be available, and a compliance program will be deemed ineffective, if (i) the company failed to promptly report a violation to the Division, or (ii) members of the senior management were involved in the violation. Second, as AAG Delrahim explained, when determining the appropriate corporate fine under the Sentencing Guidelines, Division prosecutors may take into account the existence of a compliance program. Third, the existence of an effective compliance program is relevant to a probation recommendation or the recommendation of an external monitor.[7]

6 See Guidance, p. 14.

7 "Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs," speech by AAG Makan Delrahim, July 11, 2019.

III. IMPLICATIONS FOR IN-HOUSE COUNSEL

The Division's Guidance is a positive step towards assisting companies and their antitrust counsel in drafting and implementing an antitrust compliance program. Although the Guidance applies only to criminal cartel conduct, the Division's about-face in compliance program policy marks a significant and important shift that applies to companies of all sizes and will assist in-house counsel to craft and implement a comprehensive antitrust compliance program. The Guidance is a helpful reminder of the importance of compliance and will incentivize companies to review, update and modify their programs. It will also assist to frame the discussion as to the type of antitrust compliance program to implement, including the content and format of antitrust policies, the type of training to be implemented, employees to be targeted by the program, the regularity with which a policy or program is reviewed and revised, and the effectiveness of an internal whistleblower mechanism. The clear articulation of what is considered "robust and effective" can only be considered a positive in compliance circles.

Antitrust compliance should already be very familiar to in-house counsel, given that companies must ensure their employees understand their antitrust obligations, with non-compliance potentially resulting in civil penalties of hundreds of millions of dollars. Issues such as resale price maintenance, civil cartel conduct, group boycotts, tying and bundling, predatory pricing and gun jumping are issues that already should be addressed by corporate compliance programs. Furthermore, many of the elements of a robust and effective compliance program, as detailed in the Guidance, will likely be familiar to in-house counsel or compliance officers that are already tasked with ensuring compliance with other regulatory regimes, including FCPA, anti-bribery and anti-corruption laws, money laundering, and obstruction of justice.

Yet, the myriad of regulatory regimes presents another issue for compliance – corporate compliance is already a crowded space, where antitrust counsel is required to compete to obtain "airtime" to ensure their company meets its antitrust compliance obligations. In this respect, the possibility of obtaining credit at the charging and sentencing stages may be critical to achieving the buy-in required from company senior management to implement a robust and effective compliance program, and is a welcome development for in-house counsel. The Division's Guidance will also be helpful in informing the development of compliance programs outside the antitrust space.

The best practice compliance program envisioned by the Guidance may not be obtainable by all companies. While compliance programs will need to be tailored to company size, industry type and risk level posed, it may be difficult for small to medium sized businesses to meet the requirements of the Guidance. There is uncertainty as to whether any credit will be given to a compliance program implemented by a smaller company that meets many, but not all of the Guidance's nine steps, but is adequately and appropriately tailored to the specific needs and size of a small to medium sized company. While the Division states that it will address each compliance program on a case-by-case basis, this may be an impossibly high standard for certain companies to achieve, particularly if the Division will only grant credit on a very narrow basis (that is, if all nine steps are met).

IV. SELF-REPORTING

Significant questions remain regarding the extent to which the opportunity for compliance credit will incentivize companies to self-report criminal antitrust violations, particularly given the enormous risk of follow-on civil litigation (both within the U.S. and abroad) and how the Guidance interacts with the Division's Leniency Program.

The Division has taken a positive step towards recognizing that a company can have an effective compliance program even in the face of a violation. In such instance, a company may still receive credit at both the charging and sentencing stages if its compliance program bears the hallmarks of a program that is robust and effective as described in the Division's Guidance.

However, it is critical to note that simply maintaining a best-practice compliance program will only go so far in reducing or eliminating a company's exposure and culpability under the antitrust laws. In his speech announcing the Division's Guidance, AAG Delrahim emphasized that, to benefit under the policy, a company must be a "good corporate citizen," which requires both an effective compliance program, as well as prompt self-reporting, cooperation with the Division's investigation and remedial action.[8]

The Division has indicated that what amounts to "prompt" self-reporting will be assessed on a case-by-case basis, but there remains considerable uncertainty as to how the self-reporting requirement will play out in practice. It is not clear whether "prompt" self-reporting requires reporting to the Division immediately upon discovery of the potential violation, or whether credit still will be given for a robust and effective compliance program that uncovered misconduct but where the company chose not to report until after it had conducted an internal investigation and carried out any appropriate remedial action.

8 "Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs," speech by AAG Makan Delrahim, July 11, 2019.

While credit for compliance may certainly increase the "carrot" for companies to pursue effective compliance programs, that incentive may be outweighed by other company considerations. Consider a situation where a company with a best practice compliance program detects a violation. In that scenario, the company may have a Code of Conduct which every employee must sign, a written antitrust compliance policy and training program that includes in-person and online training with real life examples of issues relevant to the company completed on a yearly basis. The program is regularly audited by antitrust in-house counsel, with a whistleblower hotline, and regular communication between the antitrust in-house counsel or compliance officer and senior company management. This program would meet the requirements of the Division's Guidance.

Yet, even if the in-house counsel uncovered the price fixing, conducted an internal investigation, identified that the price fixing was carried out by a rogue employee, took steps to terminate the contravening employee, and then reviewed and revised its compliance program policies, all of its compliance efforts may go unrecognized by the Division if it decided not to self-report and the Division later uncovers the violation. Even if the company does choose to self-report, but does so at a later point in time (for example, after an internal investigation), it also may not receive any credit.

But, there are many reasons why a company may choose not to self-report. The most significant reason is that even if leniency is obtained under the Division's Leniency Program, notifying the Division could result in potentially ruinous follow-on civil litigation by private plaintiffs, state Attorneys General and other global antitrust litigation or government regulators. AAG Delrahim made clear that there is no intention to have de-trebling and other benefits of the Antitrust Criminal Penalty Enhancement & Reform Act ("ACPERA")[9] apply in the absence of leniency. Any benefits of prompt self-reporting, while perhaps providing credit at the charging and sentencing stages at the U.S. federal level, must therefore be weighed against the potential for additional civil and criminal liability. This will significantly inform both the financial and time investment made by antitrust counsel in their company's compliance program.

Another factor for in-house counsel to consider is the interaction between credit for robust and effective compliance programs and non-prosecution decisions by the Division. It appears that maintaining an effective compliance program will not result in non-prosecution of a company for cartel conduct, nor will it result in shifting the dial from criminal prosecution to civil action. However, the Division has indicated that it may consider a deferred prosecution agreement ("DPA") where appropriate.[10] A DPA involves the Division filing criminal charges but deferring prosecution subject to compliance with certain conditions for a period of time. A decision to proceed by way of DPA depends not only on the effectiveness of a compliance program, but also many other discretionary factors that the Division is required to apply.[11] It remains to be seen whether we will see a rise in the use of DPAs, and whether the availability of a DPA will encourage a company to invest in a best-practice compliance program.

V. CONCLUSION

The compliance program policy is an encouraging step towards greater transparency for businesses in determining their level of investment in internal antitrust compliance. This should provide in-house counsel and compliance officers with the support they need to encourage senior management to invest in a company's antitrust compliance efforts. It is clear, however, that a company's management will face tough decisions in determining whether the "carrot" – credit at the charging and sentencing stages – is worth the risks that flow from prompt self-reporting. There are many competing factors at play and, in some instances, the availability of such credit may be outweighed by other interests. Despite the Division's efforts, it appears that its Leniency Program continues to remain the ultimate incentive for early detection of antitrust violations, as the only way for a company and its executives to obtain amnesty from criminal enforcement action.

Despite these uncertainties, the issuance of these Guidelines is a strong step in the direction of recognizing the efforts companies take toward encouraging antitrust compliance and serves as a useful reminder of the importance of having a robust and effective antitrust compliance policy.

9 The Antitrust Criminal Penalty Enhancement & Reform Act of 2004; Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004).

10 *Id.*

11 U.S. Department of Justice, Justice Manual § 9-28.300.

REWARDING POSITIVE BEHAVIOR: IMPROVING ANTITRUST COMPLIANCE IN DEVELOPING COUNTRIES

CARLOS MENA LABARTHE & ÉDGAR MARTÍN PADILLA[1]


1 *Carlos Mena Labarthe* is a partner of Creel, García-Cuéllar, Aiza y Enríquez, in the Mexico City Office. His practice focuses on Antitrust and Competition and is a member of the firm´s Investigations and Compliance practice group. *Édgar Martín Padilla* is a senior associate of Creel, García-Cuéllar, Aiza y Enríquez, in the Mexico City Office. His practice focuses on Antitrust and Competition.

I. INTRODUCTION

Self-regulation is an enormous ally for antitrust policy. Antitrust compliance programs in companies are designed to manage the risk of violations by raising awareness, detecting infringements and, in the worst case, putting the company in the "strongest possible position in the race for leniency."[2] Antitrust authorities have successfully developed a smart enforcement approach through mechanisms that reward cooperation of the targeted economic agents. In most countries, such cooperation mainly unfolds in the way of leniency programs, but in some cases such as Brazil, the United States, or France, the authority has also leveraged soft enforcement by providing incentives for effective compliance programs. Such strategies aim for complementarity between compliance with the law, and rewards for information gathering in investigations.

Companies have successfully deterred employees from deviating from the law through the implementation of compliance systems. Allocating resources to the internal monitoring and enforcement of the law has proved effective to solve the divergence between employers´ and employees´ incentives for a large amount of companies. Moreover, some companies have found it useful to have internal compliance officers ("CCOs") the main function of which is to manage risk, monitor hazardous behaviors and design effective strategies to avoid unintended breaches to the law.[3]

But, of course, not all compliance programs are effective. For example, Gotz, Herold, & Johannes (2016) found that compliance measures are often targeted at low-level or middle managers, although literature often finds that collusive conduct is initiated at all hierarchical levels.[4] Many companies consider compliance efforts as an "*expensive luxury*" and many others use compliance programs as an ornamental measure to keep stakeholders happy. Furthermore, as shown in De Bournonville & Brankin (2009) even the most effective program cannot protect an organization from a rogue employee or director.[5]

Nonetheless, this is not an argument to discard compliance. Effective compliance programs are often silent in nature, particularly when functioning well, and thus, enforcers would have a hard time trying to calculate the benefits of extending self-regulation in their countries. Indeed, it is possible that antitrust infringements rise as a result of the implementation of compliance, as it is also ultimately a detection mechanism. Therefore, we believe that the questions posed by the OECD a few years ago when reflecting on the topic are still applicable, namely: "What factors other than fines and prison might motivate compliance with competition law? What factors undermine it? How can competition authorities promote better compliance? What strategies have not been tried yet that are worth considering?"[6]

In the following sections, we explain why in developing countries antitrust agencies will benefit even more from using cooperative approaches to the enforcement of antitrust law. Section II explores the challenge of having weaker rule of law and its impact on compliance. Section III discusses the relatively low awareness of competition matters in developing countries. Finally, Section IV briefly touches upon the complex relationship between legal and *de facto* powers that is faced by agencies in developing countries. We use the example of Mexico to analyze if in the presence of such challenges, it makes even more sense for developing countries to apply smart frameworks of cooperation with the regulated agencies to improve compliance with the law and a culture of competition. Mexico has successfully pioneered cooperation approaches such as the leniency program,[7] and it seems to be a good moment to take further steps in soft enforcement, by incentivizing corporate compliance and whistleblower programs.

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2 De Bournonville, D., & Brankin, S.-P. (2009), *European briefings: a special supplement to ACC Docket.* Washington, page 2. Available at https://www.crowell.com/documents/Building-an-Effective-Antitrust-Compliance-Program-in-Europe.pdf.

3 Requena, C., & Cárdenas, S. (2016), *Compliance Legal de la Empresa.* Ciudad de México: Dofiscal Editores, 137-128.

4 Gotz, G., Herold, D., & Johannes, P. (2016), Results of a survey in Germany, Austria, and Switzerland on How to Prevent Violations of Competition Laws. En J. Paha, *Competition Law Compliance Programmes*, p..53. Giessen: Springer.

5 De Bournonville, D., & Brankin, S.-P. (2009), European briefings: a special supplement to ACC Docket. Washington, page 2. Available at https://www.crowell.com/documents/Building-an-Effective-Antitrust-Compliance-Program-in-Europe.pdf.

6 OECD (2011), Policy roundtables,Promoting compliance with competition law. Available at http://www.oecd.org/daf/competition/Promotingcompliancewithcompetition-law2011.pdf.

7 García Santos Coy, L. G., & Serralde Rodríguez, M. (2015), Mexico. In C. A. Varney, *The Cartels and Leniency Review* (págs. 258-269). London: Law Business Research Ltd. Retrieved from https://www.creel.mx/wp-content/uploads/2016/08/Mexico.pdf. And García Santos Coy, L. G., Serralde Rodríguez, M & Mena Labarthe, C. (2019), Mexico. Inmunity, sanctions & settlements. Retrieved from https://globalcompetitionreview.com/jurisdiction/1005848/mexico.

II. WEAKER RULE OF LAW

Perfect compliance with the law, particularly in sophisticated areas like antitrust, is costly and difficult to achieve.[8] Compliance programs have been designed as a mechanism to cope with this burden by tackling the divergence between the corporate interest in abiding with the legal framework and the incentives of employees to get a bigger personal reward by deviating from internal policies.[9]

Literature often analyzes the economics of compliance assuming homogeneity among the institutional contexts of the countries where such programs are implemented. For example, Blair & Knight (2013) modeled the compliance decision of an expected maximizing utility by comparing the *expected utility of noncompliance* to the level of utility offered by complying with corporate policy.[10] The utility of complying with corporate policy decreases if detection is low or in the absence of credible punishment. Therefore, an internal compliance program aims to increase effective monitoring and apply significant sanctions.[11] Before that, Beckenstein & Gable's (1986) work also addressed the role of regulatory agencies on the economics of antitrust compliance. In their view, enforcement agencies influence the probability of corporate violations not only directly through investigations and sanctions, but indirectly, by affecting the strategies by which corporations try to comply with the antitrust law.[12]

Economic models of compliance tend to take the existence of a strong rule of law for granted. But if the intention is to apply such models to developing countries, one should also consider the enormous institutional challenges. The framework should neither be limited to the relation between employers and employees at a firm level, nor to only look at the relation among economic agents and regulatory agencies. Not all agencies are created equal, but also not all of them operate in the same social and institutional contexts. Decisions and risk preferences are also influenced by the institutional framework and the perception of the rule of law that is present in the country where such firms and agencies are located.

In countries in which the rule of law is weaker, the decisions of companies and employees to abide with the law tend to be different. Traditional economic models of crime and compliance consider the size of the applicable sanctions and the likelihood of them being detected. But for developing countries there are institutional challenges to account for in such equation, such as low budgets for regulatory agencies, less availability of human capital and/or deficient judiciary systems. In such regulatory environments the perception of companies on the importance of self-enforcing antitrust provisions is affected. It would appear as rational for them in some cases to consider a compliance program to be a luxury or simply, an irrelevant expense.

Paradoxically, the divergence between the corporate policies and employees' conducts is usually bigger in the presence of a weaker enforcement context. Due to the perception of less than optimal enforcement, employees' calculations on the likelihood of infringement detection is likely to affect their risk and reward expectations, deviating them more – on average – from corporate compliance. Employees' may conclude that the impact of deviations of corporate compliance policies would be negligible outside the firm, "*in the real world*," resulting in neglecting to fulfil their duties or even intentional actions to break the law. In such situations, corporations become the primary enforcers of the law, as they are in the best position to correct any such perception.

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8 Beckenstein & Gable (1986) identify four problems on corporate compliance objectives: (1) imperfect information; (2) costly communication; (3) perverse incentives and impacted information; and (4) bounded rationality. See Beckenstein, Alan & Gabel, Landis (1986), *The Economics of antitrust compliance*, Southern Economic Journal. Vol. 52, No. 3, pp. 673-692.

9 "The firm is not a black box responding only to rules and opportunities, rather, the firm consists of actors who are, first of all humans acting rationally but no perfectly so." (Kotzian, Stober, & Weibenberger, 2016, pág. 60)

10 "The potential divergence between employers´ and employees´ incentives leads to a need for monitoring and enforcement within the corporation. The economic approach to resolving this problem is to make a non-compliance "unprofitable" for the firm´s employees. Corporations can, with some limitations, allocate resources to altering employees´ incentives regarding compliance." (Blair & Knight, 2013, p. 529).

11 "Although the policy makers' cost-benefit calculus with respect to the desired deterrence of violations appears self-evident, real firms are not single entities but rather a collection of individuals driven by their personal objective functions." See Frubing, S., & Huschelrath, K. (2016), Competition Law Compliance Programmes: A Law and Economic Perspective. En J. Paha, Competition Law Compliance Programmes (pp.. 9-36), GieBen: Springer, at p. 10.

12 In this line, (Paha, J, 2016) also explores how companies react to the enforcement of regulatory agencies, explaining that "improved detections, rising fines, a greater relevance of private damages claims (especially in Europe), and longer prison sentences (for example in USA) have raised the necessity for firms to implement measures that prevent their managers and other employees from violating competitions laws" See Paha, J. (2016), *Competition Law Compliance Programmes*. Pages 3-9. GieBen: Springer.

Authorities should acknowledge this, and leverage smart methods to circumvent the institutional challenges of developing countries. For example, in Mexico, cooperative approaches on antitrust leniency have resulted in increased detection and higher-quality investigations[13] as in most countries that have adopted such policies. As will be further explained below, it has also helped the Mexican enforcement agencies to navigate the pressure of regulating the most powerful companies and associations in the country, effectively changing the competition landscape in relatively few years.

For a large group of developing countries, in the absence of sophisticated methods to prosecute a massive amount of infringements, it makes more sense to forego the capacity of sanctioning each and every individual, in exchange for gaining access to sufficient information to dismantle cartel activity. Likewise, for such authorities it would make sense to apply a smaller fraction of potential sanctions in exchange for achieving increased awareness and extended compliance of the law. Futher, failing to use the whole toolset available for enhancing compliance with the antitrust law, is further a bad idea for regulatory agencies in challenging institutional contexts such as in developing countries.[14]

III. LOW AWARENESS

Moreover, it is important to bear in mind that awareness of antitrust law is significantly lower in developing countries. In said countries, ineffectiveness to comply with the antitrust law is often caused by minimal awareness of many businesses on what behaviors may constitute an antitrust infringement. In particular, family businesses or small and medium enterprises are sometimes genuinely unaware of the existence of an antitrust law, or even of its most basic principles.

In the case of Mexico, although the Competition Law entered into force in 1993, it remained largely unknown to the general public. Only after the implementation of important reforms in 2013, a new competition law enacted in 2014 and high-profile sanctions in the coming years, the Federal Economic Competition Commission of Mexico ("COFECE") increased its presence and became more important for many companies in their compliance efforts.[15] Still, a recent report prepared by McKinsey and Company considers that there is not sufficient knowledge of the competition law in Mexico except for specialized attorneys.[16]

But even more awareness can be achieved, if targeted to the most important addressees of the law. One of the mandates of the Mexican Competition Law is to "*promote free market access and economic competition.*"[17] Indeed, a strong internal division of the Mexican regulatory agency has made tremendous efforts to raise awareness in the benefits of a competition culture in the country. In our view, this goal would be furthered by targeting companies as the primary addressees of the antitrust legislation, promoting their internal efforts to comply with the law. To provide strong incentives to companies is also a way to expand enforcers' influence through self-regulated compliance programs.

Regulatory agencies around the world use a *carrot-and-stick* approach, through both sanctions and mechanisms that positively make more profitable to abide with the antitrust law. After all, corporate compliance policies are "*profit-motivated responses to government regulations.*"[18] For instance, the U.S. Department of Justice's ("DOJ's") recent efforts in rewarding corporate compliance are remarkable in this regard. The DOJ established that "effective antitrust compliance programs not only prevent, detect, and address antitrust violations, they also further remedial efforts and help foster corporate and individual accountability by facilitating a corporation's prompt self-reporting and timely and thorough cooperation in the Antitrust Division's investigations."[19] In July 2019, based on the Division's experience and expertise, a guidance document named "*Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*" was published. This guidance document focuses on the evaluation of compliance programs in the context of criminal violations of the Sherman Act.

13 García Santos Coy, L. G., Serralde Rodríguez, M & Kargl Pavía, J (2015), Mexico. In M. Dolmans, *The Dominance and monopolies review.* London: Law Business Research Ltd. Retrieved from https://www.creel.mx/wp-content/uploads/2016/08/The-Dominance-and-Monopolies-Review%E2%80%99-publicado-por-Law-Business-Research-Ltd.-June-2015.pdf.

14 See Beckenstein, Alan & Gabel, Landis (1986), The Economics of antitrust compliance. Southern Economic Journal. Vol. 52, No. 3, pp. 673-692.

15 Statistics from several of the largest OECD economies do show dramatic growth in the fines imposed for corporate and (in some jurisdictions) individual cartel activity over the past twenty years. During the same time, prison sentences for cartel participants became more frequent and severe in the US, while leniency programs and the criminalization of cartel violations spread to more countries. Yet cartels remain a substantial problem, as do recidivists. See OECD (2011), Policy roundtables, *Promoting compliance with competition law*. Available at http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.

16 Mckinsey&Company, "Estudio y análisis de la percepción sobre temas de competencia económica y la labor de la COFECE," COFECE. Available athttps://www.cofece.mx/wp-content/uploads/2018/01/Estudio-labor-COFECE-17.pdf.

17 Mexican Federal Law of Economic Competition, articles 2 and 12, XXI.

18 See Beckenstein, Alan & Gabel, Landis (1986), The Economics of antitrust compliance. Southern Economic Journal. Vol. 52, No. 3, pp. 673-692.

19 U.S. Department of Justice (2019), *"Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations." Page 1*. Available at https://www.justice.gov/atr/page/file/1182001/download.

According to the DOJ's guidance, compliance programs provide the companies, who follow it correctly,[20] not only an opportunity to prevent and detect misconduct but also, in the scenario where an offense was committed, the possibility for the prosecutor to take into consideration the company´s compliance program when: (i) formulating "charging decisions"; (ii) formulating recommendations and fines; and (iii) deciding if it is necessary to impose an external compliance monitor.[21] It expressly states that: "the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. See U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11)."[22]

Furthermore, the DOJ has also advocated for legislation protecting individuals who disclose antitrust violations to the authority.[23] Whistleblower programs are being discussed in the US, Europe, Canada and others have slowly discussed legislation in this regard. In countries were awareness of antitrust law is smaller and workers have significantly fewer labor protections, it is also worth to discuss the applicability for a whistleblower program.

More recently, the Peruvian antitrust authority ("INDECOPI") also released for public consultation, its guidelines on antitrust compliance. In recent years, the inspection capabilities of the Technical Secretariat in Peru have increased, initiating more procedures and imposing greater sanctions. Based on the Brazilian and U.S. legislation,[24] INDECOPI prepared a draft guide for competition compliance, offers recommendations for building a good compliance program and includes benefits for those companies having an effective compliance program. Such benefits can include a reduction of the fine in the event of a violation of the competition law.[25]

As for Mexico, COFECE is conscious of the importance of promoting compliance efforts in corporations. In August 2019, COFECE released its "*Recommendations to comply with the Federal Economic Competition Law*" ("COFECE Recommendations"). The COFECE Recommendations urge companies to have a solid compliance program, preferably prepared by people with sufficient technical capacity, and to explain to employees the consequences of violating the competition law.[26] Some of the suggestions include recommendations to: (i) prevent and not only react; (ii) avoid risk and sanctions; (iii) protect employees; (iv) protect the company´s reputation; (v) generate security and certainty; (vi) protect commercial interests.

Although the COFECE Recommendations are a very useful document, it seems that the Mexican regulatory agency could push further to promote corporate antitrust compliance. The COFECE Recommendations might benefit from including express incentives to put in place a compliance program as, unlike other jurisdictions, in Mexico the incentives are limited to the avoidance of reputational damages, additional expenses, job losses, administrative and criminal sanctions. In our view, and to expand awareness of the competition law, it seems efficient to provide incentives to the companies to implement effective compliance programs.

20 The "failure to prevent or detect the instant offense does not mean that the program is not generally effective in preventing and deterring misconduct. The Department is aware that it is impossible to prevent al criminal activities, what the Departments is searching for is that the company took actions in order to reduce this risk." See US Department of Justice, Criminal Division (2019), "Evaluation of Corporate Compliance Programs." Available at https://www.justice.gov/criminal-fraud/page/file/937501/download.

21 Nassikasm J., Tan, J., & Carson, L. (2019), "*New DOJ Compliance Program Guidance.*" Available at https://corpgov.law.harvard.edu/2019/06/10/new-doj-compliance-program-guidance/.

22 U.S. Department of Justice, Criminal Division (2019), "*Evaluation of Corporate Compliance Programs," p. 1.* Available at https://www.justice.gov/criminal-fraud/page/file/937501/download.

23 See Himes, Jay L. & Perez, Matthew (2019), "*Blowing the whistle on the lack of antitrust whistleblower protection.*" CPI Antitrust Chronicle, Summer 2019, Volume 2, Number 1.

24 Brazil's CADE guidelines are available at http://en.cade.gov.br/topics/publications/guidelines/compliance-guidelines-final-version.pdf.

25 INDECOPI's guidelines are available at: https://www.indecopi.gob.pe/documents/51771/2962929/Guía+de+Programa+de+Cumplimiento/.

26 The Recommendations are available at: https://www.cofece.mx/wp-content/uploads/2019/08/Recomendaciones_web.pdf.

IV. COMPLEX POLITICAL ECONOMY

On top of the above, the political economy of regulation is much more complex in developing countries than in developed nations. Antitrust enforcers regulate the most important economic agents in each country, who are usually closer to the source of power and have influence in the economic and political arena. It has proved to be challenging – even for autonomous agencies, such as COFECE – to create and maintain an optimal equilibrium and to be perceived as a strong but fair referee.

In recent years, antitrust agencies both in the "global north" and the "global south" are facing unprecedent political pressure. In developed countries, pressures on the regulatory agencies are often associated with demands to adopt a broader policy scope than just *competition* (*i.e.*, industrial policy objectives, labor considerations, competing with Asian companies, etc.). Also, recent discussions on digital markets suggest that antitrust could be perceived as the best tool to address concerns with big tech, no matter how implausible that could be in some cases.

In developing countries, pressures are different. Even when regulatory bodies are regarded as sophisticated government offices, regulation is often criticized by some sectors for being "too technical" and very little concerned about the multiple struggles of the country. When intervening in heavily regulated markets with a previous history of natural monopolies or state-owned companies, regulators may face political pressure and claims of being sensitive to policy objectives that are different from economic competition. Moreover, antitrust enforcement agencies in developing countries frequently have to regulate either bigger economic agents or pressure groups, which increases political exposure. Economic power often translates into political power, and sometimes even legislative changes or regulatory capture.

In such an environment, regulators must build support to have the necessary leverage and independence to perform their duties. One of the mechanisms of authorities in developing countries to enforce the law while coping with the complex political economy, is the introduction of leniency programs. As said before, cooperative approaches such as in leniency programs can certainly help in navigating the political dashboard of regulating the most powerful agents in the country by reducing pressure, offering alternatives and ultimately achieving the main goal of ending historical cartels.

In Mexico, in part thanks to its cooperative approach with economic agents, the leadership of COFECE has been widely acclaimed. In recent years, COFECE has proved to have a strong and strategic direction, clear goals and to have picked its battles wisely. Antitrust authorities in the country have been able to resist changes in government in the last decade, adapting to different approaches, priorities and agendas. They are also recognized by many economic agents as transparent and serious government agencies.

A way to keep building strong support and a *win-win* equilibrium is to expand the promotion of self-regulation to as many companies as possible. The leverage of regulators with other stakeholders in developing countries may grow by using its influence and soft power in the decisions of more companies that are willing to set a strategy to self-implement compliance with the antitrust law. Giving credit to effective compliance programs, reducing sanctions and rewarding whistleblower efforts, constitutes a good strategy to achieve an expanding presence for the authority and increasing competition culture among companies.

But not all compliance programs should be considered by antitrust enforcers. As correctly pointed out in the Peruvian guidelines, an effective compliance program should be able to "demonstrate that the infringements constitute an isolated event and evidence that the situation was acted upon in a quick and timely manner."[27] No rewards should be granted by enforcement agencies to compliance programs that are mere "shams," usually prepared by non-experts and without any measure of effectiveness. As a general guidance, the DOJ also establishes those factors to consider when evaluating a compliance program: (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.[28]

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27 INDECOPI (2019), "*Guía de Programas de Cumplimiento de las Normas de Libre Competencia.*" Available at https://www.indecopi.gob.pe/documents/51771/2962929/Guía+de+Programa+de+Cumplimiento/.

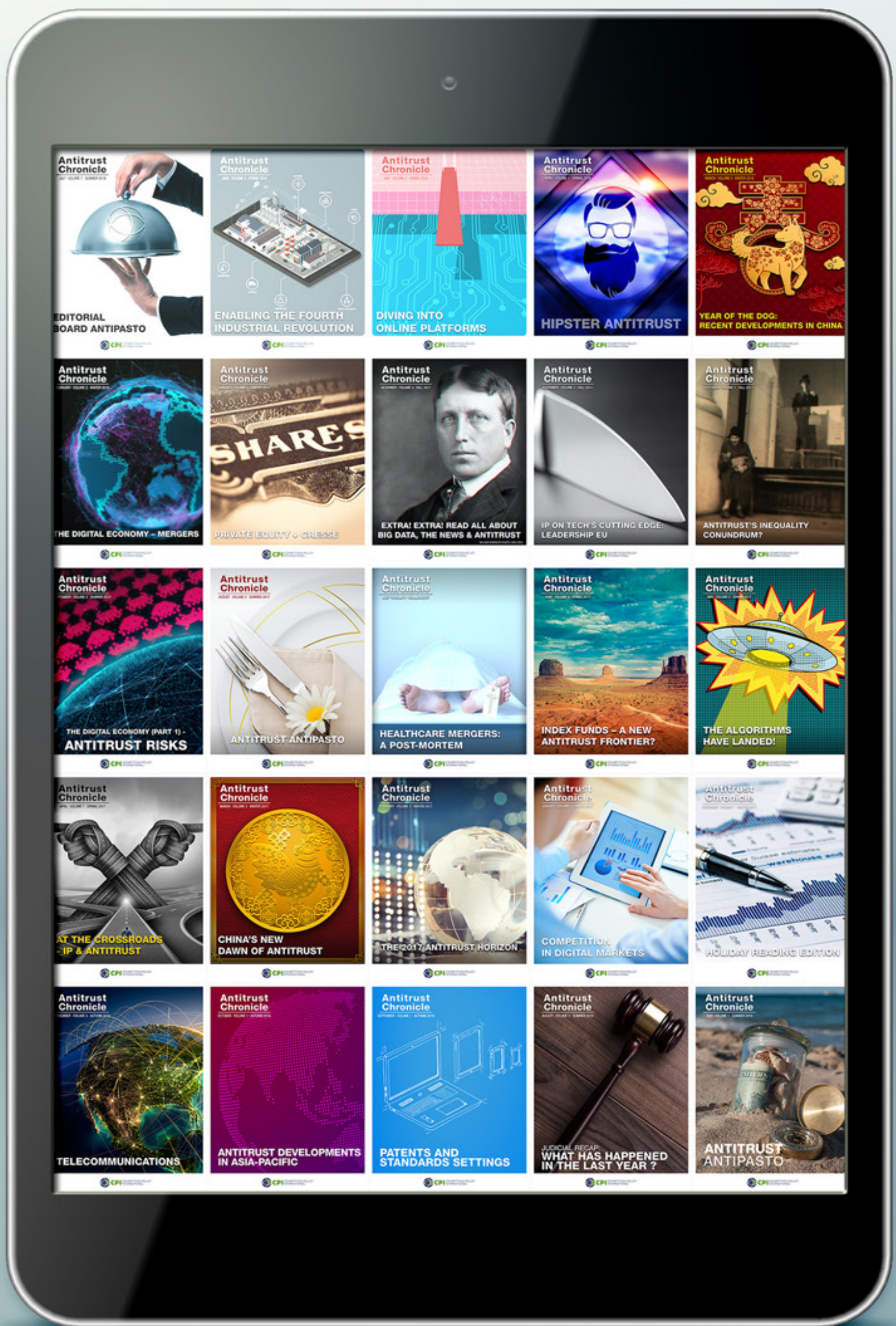
28 U.S. Department of Justice, Antitrust Division (2019), "*Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations,"* page 3, available at https://www.justice.gov/atr/page/file/1182001/download.

V. FINAL THOUGHTS

Advanced jurisdictions with experienced regulators have been increasingly interested in providing more incentives for compliance as they see value in having companies regulating themselves. Unfortunately, and despite the incentives, we find that in most emerging jurisdictions, less attention is paid by authorities to promoting effective compliance programs.

Antitrust authorities in developing countries should promote the design and implementation of mechanisms that strategically enhance the moral commitment of companies to comply with the law.[29] Agencies can take advantage of the antitrust law awareness raised in both developed and developing countries to expand the culture of compliance among all companies. In particular, the existence of compliance programs is of critical help in developing countries. Challenges in our countries are significant and the authorities should use all the available tools for strengthening antitrust awareness, compliance and the rule of law.

29 "Looking at academic research and evidence from practice, one finds that for the effectiveness of both, codes and compliance training, the empirical record is spotty as well as contradictory. In most cases, empirical analyses of the usage and effectiveness of both codes and/or compliance training refer to little more than the mere (non-)existence of a code or compliance training, thus ignoring practical design elements. For example, how is the code presented, what regulations does it contains, or how is compliance training organized? This leads to the supposition that the impact of varying design elements on codes' and/or compliance training have an impact on their effectiveness." See Kotzian, P., Stober, T., & Weibenberger, B. (2016), Reducing antitrust violations: do codes of conduct and compliance training make a difference? In J. Paha, Competition law compliance programmes (pp. 59-86). Giessen: Springer, at p. 61.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