REWARDING POSITIVE BEHAVIOR: IMPROVING ANTITRUST COMPLIANCE IN DEVELOPING COUNTRIES

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CPI ANTITRUST CHRONICLE NOVEMBER 2019

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

Why Screening is a "Must Have" Tool for Effective Antitrust Compliance Programs
By Rosa M. Abrantes-Metz & Albert D. Metz

Antitrust Compliance – Reluctance to Embrace and Recognize Corporate Compliance Efforts
By Anne Riley

"It Didn't Work": Antitrust Compliance and the Role of the Senior Executive
By Donald C. Klawiter

Navigating Antitrust Compliance Under the DOJ's New Guidance
By Renata Hesse, Benjamin Walker & Christopher Viapiano

Create Your Own: Bespoke Antitrust Compliance Programs for Effective Compliance
By Leonor Davila, Gabrielle Kohlmeier, Anjali B. Patel & John Seward

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

Balancing Privacy Protections With Antitrust Compliance Efforts: Key Issues and Potential Solutions
By Fiona Schaeffer, Nathaniel Mattison & Jenna Weinblatt

Why isn't "Deterrence" Included in the Measurements of Antitrust "Enforcement"?
By Lawrence J. White

Enhancing the "Carrot": A Practical Perspective on DOJ Credit for Antitrust Compliance
By Robin D. Adelstein & Gerald A. Stein

Rewarding Positive Behavior: Improving Antitrust Compliance in Developing Countries
By Carlos Mena Labarthe & Édgar Martín Padilla

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.

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.

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.

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

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.

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.

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.

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]

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.

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.

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]

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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.

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/.

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.

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.

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

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]

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.

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.

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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